

Hungary: Hungarian court upholds NCA decision in IT procurement case (“University cartel”), reduces fine

January 2014

The background of the case

In 2004, the Hungarian Competition Office (HCO) launched proceedings against International System House Kft. (ISH), SAP Hungary Kft. (SAP) and International Business Machines Magyarország Kft. (IBM) for bid-rigging in public procurement. The tenders in question aimed to provide five Hungarian universities with enterprise resource planning (ERP) systems and clinical systems software for the three universities with medical faculties. Four universities opted for two-stage public procurement proceedings, inviting only a limited number of bidders to the second stage. ISH made the shortlist in every instance, IBM four times. In each case, they named each other, as well as SAP as their subcontractors involved in more than 10% of the works. They won all tenders, but the results of one were subsequently invalidated by the authorities.

The HCO’s decision

A Teaming Agreement provided the framework for cooperation between the undertakings and during the course of the proceedings, the parties argued that the agreement was concluded with the intention of developing new software, which would combine ISH’s clinical system with SAP’s widely used ERP software. The HCO rejected this argument on the basis that the joint development was proposed months after the conclusion of the Teaming Agreement and even then, IBM’s and SAP’s experts were still unfamiliar with ISH’s model. It was also noted that although some development did take place, the number of workdays dedicated to this activity was very low.

The HCO also maintained that the relationship between the undertakings was horizontal. Although they all had different strengths (SAP was the market leader in ERP systems, IBM had the greatest SAP-tailoring expertise and the highest number of references in the public sector, and ISH, with its SAP-based software, was the market-leader in medical solutions), the teaming was, to the HCO, not a necessity and served only to increase the undertakings’ chances of winning. This seemed particularly apparent in the case of universities without medical faculties, since all three undertakings had developed their own SAP-based ERP systems. The HCO also asserted that the sharing of information (including price information) between the parties went above and beyond what would have been necessary between prime and subcontractor (especially considering that the parties involved supposedly competed for the position of prime contractor).

In the end, though, the HCO left open the question of whether the agreement could potentially be exempted as a cluster, reasoning that the behaviours “surrounding” the agreement sufficed to conclude that the parties restricted competition via agreements and concerted practices. This was allegedly done by (i) submitting parallel bids for the sole purpose of excluding competitors from the shortlist, (ii) jointly influencing the terms of the tender invitations and (iii) carrying on anti-competitive negotiations with another undertaking, Synergon Rt. This conduct was held to be anti-competitive by object. The HCO supported most of its claims with e-mail messages seized during down-raids.

The HCO defined the relevant product market as the product subject to the tender and the actors on the relevant market as those undertakings that were invited to submit a bid in the second stage.

One interesting aspect of the case was that cooperation between the undertakings appears to have been initiated by an official of the Ministry of Education responsible for overseeing the technological modernisation of universities. This official may even have helped the undertakings influence the terms laid down in the procurement notices. However, the HCO ruled that this did not exempt the undertakings from responsibility.

The proceedings before the HCO ended with about 482500 Euro fine against ISH and about 2.5 million Euro fine against SAP and IBM.

Court proceedings

The undertakings involved initiated the judicial review of the HCO's decision, denying any kind of anti-competitive conduct, but succeeding only in having point (iii) above struck out due to insufficient evidence. Upon appeal, the judgment was annulled and the case referred back to first instance. This time, the HCO's decision was upheld completely, but this decision was also annulled on appeal. When the parties initiated extra-ordinary judicial review before the Curia (Supreme Court), the second instance's judgment was annulled and the case remanded back to the Metropolitan Court of Appeal, which proceeded to refer the case back to first instance. There, point (iii) was struck out again and the fine reduced by 10%. This decision was affirmed by the Metropolitan Court of Appeal, court of second instance, in its judgment no. 2. Kf.27.195/2012/6 in 2012.

Judgement of the Metropolitan Court of Appeal of 10 October 2012

Evidentiary issues

On the issue of burden of proof, the court of second instance noted that the provision of the Civil Code laying down the *ei incumbit probatio qui dicit, non qui negat* principle generally applied to the judicial review of HCO decisions, and so, it was up to the claimants to refute the defendant's (i.e. the HCO's) decision, or at least raise doubts about the correctness of the facts contained therein. Since the claimants, to the court of appeal, did not dispute the facts but merely the conclusions drawn from them, this was insufficient to reverse the burden of proof.

Regarding standard of proof, the court of second instance emphasised that civil and administrative proceedings are both based on freedom of proof. Due to the difficulties inherent in proving cartels, even pieces of circumstantial evidence can be significant. Two parties' correspondence can potentially be used to prove the participation of a third in a cartel. The fact that a party did not participate at a certain meeting is irrelevant if it received a forwarded message informing it of the results of the meeting and did not object or express surprise. In other words, with regard to e-mail correspondence the court of second instance adopted a position somewhat similar to that of distancing oneself from a cartel during a meeting.

The claimants asserted that the court of first instance ignored the evidence they submitted. However, the court of appeal reasoned that the claimants' evidence related mostly to market definition and was thus incapable of contradicting or "reinterpreting" the evidence supporting collusion (comprised mostly of incriminating e-mail correspondence).

Market definition

On the issue of relevant market, the court of appeal confirmed that, in accordance with the court of first instance's judgment, all five public procurement proceedings constituted a separate relevant market (one previous, annulled judgment had identified two markets). The court of appeal reasoned that regardless of how many complex software existed on the market, the universities had specified in their procurement notices exactly what sort of product they were ready to purchase. Logically, this product could not be replaced with other, similar products on the market which did not fulfil the criteria set out in the notices. The Court also stated

that only undertakings invited to the shortlist could compete with the parties. However, it was also noted that the exact definition of the relevant market is not a priority in this case, due to the hardcore nature of the restriction.

Fine

Regarding the amount of the fine, the Court held that judicial review is aimed at ensuring the legality of administrative proceedings and not overruling the administration's discretionary decisions, as long as these confirm to the law, particularly the provisions regarding reasoning. The HCO's fining notice is not a law and thus the Court is not bound by it, only the legal provisions contained in the Competition Act and the Code of Civil Procedure. In the end, the Court affirmed the court of first instance's judgment with regard to the amount of the fine, as well.

Source: *Eszter Ritter, Orsolya Staniszewski*, The Hungarian Court of Appeal upholds NCA's decision and reduces fines in IT procurement case (University cartel), 10 octobre 2012, Bulletin e-Competitions October 2012, Art. N° 61084, www.concurrences.com

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