



Hungary: The Hungarian Metropolitan Court dismisses a claim for damages on the basis of bid-rigging established by the Hungarian Competition Office

The Metropolitan Court dismissed the claim for damages lodged by the Traffic Development Coordination Centre against Strabag Építő Zrt. and Debreceni Magas, Mély és Útépitő Zrt for their participation in a construction bid-rigging cartel. The court established that the plaintiff did not suffer the damage alleged in its statement of claim. The judgement was adopted in one of the first private enforcement litigation cases in Hungary, and it indicates the factors that are deemed to be relevant by courts in such matters.

On 24 October 2012, the Metropolitan Court (the “**Court**”) dismissed the claim for damages lodged by the Traffic Development Coordination Centre (in Hungarian: “**Közlekedésfejlesztési Koordinációs Központ**”, the “**Plaintiff**”) made against Strabag Építő Zrt. (“**Strabag**”) and Debreceni Magas, Mély és Útépitő Zrt. (“**Debmút**”) (together the “**Defendants**”) on the grounds of non-contractual liability for causing damage by engaging in cartel activity (i.e. bid-rigging) in relation to the construction of the by-pass section of Road no. 3 around the town of Garadna in Hungary. The judgment is not final; an appeal is pending before the Metropolitan Court of Appeal.

Background

The Plaintiff is an entity owned by the Hungarian Ministry of Transport, Telecommunication and Energy that manages road sector funds and the coordination of transport and road construction. In 2002 the legal predecessor of the Plaintiff published several notices of open, pre-qualification public procurement proceedings, including the construction of the road subject to the litigation. A consortium formed by the Defendants won the tender by offering the lowest price, and the construction contract was concluded in the same year.

In 2004, the Hungarian Competition Office (the “**HCO**”) launched a cartel investigation against several undertakings (including Debmút and the legal predecessor of Strabag) in relation to bid-rigging during several tenders, including the by-pass section of Road no. 3. In its resolution no. Vj-56/2004/190 dated 22 September 2005, the HCO found the investigated companies guilty of bid-rigging during several tenders, including the tender for the by-pass section of Road no. 3. During a subsequent judicial review, the HCO decision was upheld by the Hungarian courts in all instances.

The legal basis of the Plaintiff’s claim

In 2007 the Plaintiff filed a claim before the Court against the Defendants requesting the court to declare null and void the construction contract of 2002 relating to the by-pass section of Road no. 3 on the grounds that it breached the law (i.e. the provisions of the Hungarian Competition Act prohibiting cartel activity). The Plaintiff’s first claim was based on sections 200(2) and 237 (2) of the Hungarian Civil Code, as the Plaintiff stated that the construction contract was null and void due to its breach of) and Section 11 of the Hungarian Competition Act prohibiting cartel activity.

As a remedy of the nullity, the Plaintiff claimed in integrum restitutio the repayment of any extra profit that the Defendants incorporated into the contractual contractor’s fee as a result of the bid-rigging. In its second, “back-up” claim (filed in order to cover the possibility that the court might fail to declare the contract null and void), the Plaintiff asked the Court to order the Defendants (as joint and several debtors) to pay to the Plaintiff damages on the grounds of non-contractual liability (in line with Section 339 of the Civil Code) for damage caused by bid-rigging to the Plaintiff’s legal predecessor.



Although during the proceedings the Court appointed an expert to investigate whether the contract price contained any unfair extra profits, ultimately the expert opinion was not decisive for the judgement.

The Court found the Plaintiff's claims to be unsupported

The Court referred to consistent judicial practice and ruled that the fact that the integrity of a public procurement tender was distorted through the violation of Section 11 (2) e) of the Hungarian Competition Act (i.e. that an infringement occurred in the course of selecting the contracting party in a public procurement procedure) did not result in the nullity of the contract concluded as a result of the tender. The Court confirmed that Section 11 (2) e) of the Hungarian Competition Act established the nullity of the cartel agreement only. Therefore, the validity of the construction agreement subject to the litigation had to be evaluated under the civil law rules and not under competition law. In the current case, there was no reason to establish the invalidity of the construction agreement on the basis of the legal grounds referred to in the petition, and the Court dismissed the Plaintiff's first claim.

As regards the Plaintiff's second claim, the Court found that the Plaintiff had not suffered damage as a result of the Defendants' unlawful conduct. The Court took into account the following:

The road construction was not paid for by the Plaintiff or from the Plaintiff's own resources

The Court ruled that the works specified in the construction agreement were financed from the budgetary appropriation allocated to road maintenance and development ultimately managed by the Minister of Transport, and not from the road fund budgetary appropriation managed by the Plaintiff's legal predecessor (as stated by the Plaintiff). At the time of the payment of the contractor's fee, the Plaintiff was only responsible for the operation of the road maintenance and development budget funds; it had no ownership title or management rights. Therefore, the contract price for the construction works in question was not paid from the Plaintiff's own resources, but from the central budget (i.e. the road maintenance and development budget funds).

Given that the Plaintiff did not finance the road construction from its own funds, paying a contract price that was unduly increased by any alleged extra profits (as stated by the Plaintiff) could not have resulted in the reduction of the Plaintiff's assets. Consequently, the Plaintiff (as a sovereign legal entity) did not suffer the damage claimed in connection with the Defendants' unlawful conduct.

The Plaintiff could not demonstrate that the Defendants' anti-competitive practices had a price-increasing effect or that the bid prices contained extra profits

The Plaintiff alleged in its statement of claim that the Defendants' anti-competitive practices had a price-increasing effect, as prior to submitting their bid, the Defendants had agreed on the bid prices containing extra profit. The Plaintiff alleged that the bid price significantly exceeded the prices generally accepted on the market. The Plaintiff stated that such market prices equalled the so called "theoretical engineer price", which was calculated by the Plaintiff on the basis of the PUBLISHED average unit prices applicable in Hungary in the 2002 reference period.

The expert appointed by the Court noted in his opinion that the bid price of the Defendants significantly exceeded the theoretical engineer price. However, the Court ruled that the theoretical engineer price elaborated by the Plaintiff could not be deemed to be equal to the actual engineer price determined by the Plaintiff's legal predecessor before the conclusion of the construction agreement in 2002. The Plaintiff was not able to prove the extent of the actual engineer price during the proceedings. The Court found that it was not realistic to assume that the actual engineer price was as low as the theoretical engineer literary price presented by the Plaintiff, since no bid exceeding the actual engineer price could have won the tender. Therefore, the actual engineer price must have been significantly higher than such theoretical engineer price.



Further, the Court found that the average margin of construction companies calculated on top of such companies' own costs was 5.2 per cent in 2002, and the Plaintiff had stated (in accordance with the HCO) that it would accept as fair profits even twice this amount (i.e. 10 per cent). However, on the basis of the expert opinion, the Court established that the Defendants' actual profit was below 1 per cent and declared that this could be considered as low compared to the average road construction profit rate applicable during that period.

On the basis of the above, the court could clearly establish that the Plaintiff did not suffer the damage alleged in its statement of claim.

Conclusion

The above judgement was adopted in one of the first private enforcement litigation cases in Hungary, and it indicates the factors that are deemed to be relevant by courts in such matters. However, it is important to note that since 2007 (when the above litigation was commenced), the private enforcement rules in Hungary have changed. In private enforcement lawsuits filed after 2009 a statutory presumption set out in Section 88/C of the Hungarian Competition Act will be applicable. Accordingly, in the event of an anti-competitive agreement concerned price fixing, market partitioning or setting of sales or production quotas between competitors, it will be presumed that the anti-competitive agreement caused a 10 per cent increase in the sales price applied by the undertakings participating in such cartel. Nevertheless, such legal presumption may be rebutted by the defendants, and the above judgment may provide a useful reference in this regard.

Source: *Eszter Ritter, Zsuzsanna Németh*, The Hungarian Metropolitan Court dismisses a claim for damages on the basis of bid-rigging established by the Hungarian Competition Office (Közlekedésfejlesztési Koordinációs Központ v Strabag Építő and Debreceni Magas, Mély és Útépítő), 24 October 2012, e-Competitions, N°50300, www.concurrences.com

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