

Hungary: The Hungarian Competition Office held in the watermelon cartel case that the statutory immunity relating to agricultural products may be in violation of EU competition law

June 2013

Introduction

The Hungarian Competition Office (“**HCO**”) launched competition supervision proceedings in 2012 against six major supermarket chains and two agricultural professional organisations for forming a price cartel in respect of Hungarian-produced watermelons. On 10 April 2013, the HCO terminated the proceedings due to the immunity from competition liability for anticompetitive practices in respect of agricultural products under Act No. 128 of 2012 (the “**Agricultural Organisations Act**”).

The HCO held that the above national legislation may be in violation of the EU competition rules, making it impossible for the HCO take action against cartels relating to such products and making the criteria of fair (compliant) market practices ambiguous in respect of the concerned sector.

The investigated conduct

In the course of the competition supervision proceedings commenced on 27 August 2012, the HCO disclosed that six major supermarket chains in Hungary (Aldi, Auchan, CBA, Lidl, Spar and Tesco) and two professional organisations (Magyar Dinnye Szövetség Közhasznú Egyesület [Hungarian Watermelon Nonprofit Association] and Magyar Zöldség-Gyümölcs Szakmaközi Szervezet és Terméktanács [Hungarian Fruits and Vegetables Interprofessional Organisation and Product Council]) held a meeting on 6 July 2012 at the Ministry of Agricultural Development (the “**Ministry**”). The meeting was proposed and led by the Ministry.

The participants at the meeting, concerned about watermelon prices running too low in the preceding year and affecting the subsistence of watermelon producers, agreed: (i) to distribute Hungarian watermelons above a mutually agreed “fair” minimum price at the start of the watermelon season, and (ii) to restrict the distribution of watermelons produced outside of Hungary.

The purpose of such agreement was to avoid watermelon prices reaching an undesirable floor price, crippling Hungarian watermelon producers and further reducing the area used for watermelon production. The HCO established that the undertakings subject to the proceedings actually complied with such agreement, as the price of the Hungarian watermelons did not go below the set price.

The Agricultural Organisations Act

Following the launch of the investigation (on 19 November 2012), the Hungarian Parliament adopted the Agricultural Organisations Act, which provides, *inter alia*, for the following:

- (i) Agricultural producers enjoy immunity from competition liability for entering into an anticompetitive agreement relating to agricultural products, if (a) the purpose of such agreement is to secure a fair revenue for agricultural producers, (b) no actors of the concerned market are prevented from realising such revenue and (c) Article 101 of the Treaty on the Functioning of the European Union (the “**TFEU**”) is not applied. The ministry responsible for agriculture shall issue a statement on whether the conditions of the immunity are fulfilled and the HCO must proceed according to such statement.

(ii) In addition, the HCO must (a) suspend imposing a fine for anti-competitive practices in violation of Article 11 of the Competition Act or Article 101 TFEU conducted in respect of agricultural products and (b) call the involved parties to act in compliance with the applicable laws. If such parties fail to comply within the deadline set by the HCO, the HCO is entitled to impose a fine on them.

Pursuant to the ministerial presentation of the Agricultural Organisations Act, before the adoption of the Agricultural Organisations Act, the Hungarian competition law practice measured all sectors of the economy according to the same standards and disregarded the vulnerability of agricultural production due to its characteristics (seasonal market presence of other products, weather effects, security of supply, being basic products of consumer purchases) different from other sectors.

Therefore, this sector requires special (preferential) treatment. The legislator argued that the different standard required in respect of agricultural products is in accordance with Article 39 TFEU. In addition, there is no classical cartel activity if all actors of the relevant market are equally affected.

The HCO's decision

The HCO perceived that despite the competition law immunity set out in the Agricultural Organisations Act, the practices of the undertakings subject to the proceedings may have violated paragraphs a) and c) of Article 101(1) TFEU, which prohibits as being incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; and (c) share markets or sources of supply.

The HCO was of the view that given its power to apply EU competition law under the Competition Act and Council Regulation (EC) No 1/2003, the Agricultural Organisations Act may only be applied if Article 101 TFEU is not applicable to the case. In the HCO's opinion, fixing the watermelon price on a nationwide level and discriminating against watermelons from abroad were in fact anticompetitive practices capable of affecting trade between Member States, and therefore Article 101 is applicable.

However, the HCO held that it lacks the power necessary to resolve any eventual contradiction between the EU competition rules and national legislation, as such resolution could only be initiated by Hungarian courts in the course of proceedings for a preliminary ruling by the Court of Justice of the European Union. In the absence of such competence, the HCO terminated the proceedings and applied the immunity rules outlined above.

The HCO's concerns about the Agricultural Organisations Act

In conclusion, the HCO noted that the Agricultural Organisations Act makes it impossible for the HCO to effectively take action against and impose sanctions on cartels relating to agricultural products. For this reason, the HCO was concerned that the provisions of the Agricultural Organisations Act may violate (i) Article 5 of Council Regulation (EC) No 1/2003 authorising the national competition authorities to impose fine for violation of Article 101 of the TFEU and (ii) Article 4(3) of the TFEU pursuant to which member states must provide for the effective implementation of Article 101 of the TFEU.

Finally, the HCO expressed criticism that the second relevant provision of the Agricultural Organisations Act under which the HCO must suspend imposing a fine for anti-competitive practices makes it questionable as to whether the public interest is protected.

Furthermore, the same provision makes the criteria of fair (compliant) market practices ambiguous in respect of the concerned sector. In the HCO's view, it is in the public interest to focus the HCO's resources on



infringements not affected by any such uncertainty. Therefore, the HCO decided that it was unreasonable to continue with the proceedings.

For further information please contact Eszter Ritter (eszter.ritter@kinstellar.com) and / or Tamás Oláh (tamas.olah@kinstellar.com).