HUNGARY

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I. Introduction

As Hungary will became a member of the EU on 1 May 2004, there is no precedent for actions for damages for breach of EC competition law in Hungary.

The main source of Hungarian competition law is Act LVII of 1996 on the prohibition of unfair market practices and restriction of competition *("1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról"*, hereinafter referred to as the Competition Act)[1]. According to Section 86 paragraph (1) of the Competition Act, in case of breach of Sections 2-7[2] (Chapter II.), the competition authority procedure falls within the competence of the courts. According to Section 45, all competition authority procedures not falling within the competence of the courts fall within the competence of the Competition Office (*"Gazdasági Versenyhivatal",* hereinafter referred to as Competition Office). A difference in principle lies behind this difference in competence: situations caught by Chapter II. are of civil law dispute-nature between two (or more) directly interested parties, while the market practices caught by other chapters of the Competition Act are rather matters of public interest.

The procedures in respect of cartels and of abuse of dominant position are administrative[3] and fall within the competence of the Competition Office. Law-suits for damages are civil law disputes and so, fall within the competence of the courts.[4]

Since both the procedure in respect of unfair market practices prohibited by Chapter II. of the Competition Act and the law-suits for damages fall within the competence of the courts, the Hungarian courts judged claims for damages based on these unfair market practices on couple of occasions[5], but there is no significant case-law regarding claims for damages based on breach of the competition rules on cartels and on abuse of dominant position.

However, the Supreme Court (*"Legfelsőbb Bíróság"*, hereinafter referred to as Supreme Court) decided at one occasion that the courts did not have competence for the procedure in respect of assessing the existence of an abuse of dominant position. It therefore stopped the procedure in this respect, but ruled that the courts did have competence to

1 The structure of the Competition Act is as follows: Part One: Chapter I. – Scope of the Act, Chapter II. – Unfair Market Practices (those that are committed by market participants to the detriment of competitors), Chapter III. – Deception of Consumers, Chapter IV. – Cartel, Chapter V. – Abuse of Dominant Position, Chapter VI. – Concentration; Part Two: Chapter VII. - The Competition Office, Chapter VIII. – General Rules of the Procedure of the Competition Office, Chapter IX. – The Process of the Procedure of the Competition Office, Chapter X. – Remedy in the Procedure of the Competition Office, Chapter XI. – Law-suit Commenced by the Competition Office, Chapter XII. – The Procedure of the Court in competition cases, Chapter XIII. – The Enforcement of the Decision of the Competition Office, Chapter XIV. – Closing Provisions. New Chapter XIV. comes into force on 1 May 2004 on the procedures, which is about the application of EC competition rules at the Competition Office and at Court (present Chapter XIV. will be renumbered as Chapter XV.).

2 Sections 2-7 are the provisions of Chapter II. of the Competition Act: Section 2. – subsidiary clause on the prohibition of unfair market practices in general, Section 3. – false statement, infringement of good-will, Section 4. – breach of trade-secret, Section 5. – boycott, Section 6. – prohibition of copying, Section 7. – infringement of fair tender.

3 Section 44 of the Competition Act

4 Section 7. paragraph (1) second sentence of Act IV of 1959 on the Civil Code of the Hungarian Republic ("*1959. évi IV. törvény a Polgári Törvénykönyvről*")

5 BH 1998. évi 9. szám 442. jogeset,
BH 1994. évi 12. szám 687. jogeset,
BH 1994. évi 8. szám 430. jogeset
The above is the official way of citation of court decision published in the monthly periodical 'Bírósági Határozatok' (Decisions of Courts). The first four digits set the year, the following digit(s) set(s) the month when the periodical was issued, the last digits set the number of the case under which the case was published in the periodical.

proceed in respect of the claim for damages, therefore ordered the first instant court to continue the procedure in respect of the latter. We experienced further, that the courts, varyingly, stopped or suspended proceedings until the decision of the Competition Office, because they did not consider themselves having competence to decide on the question of the existence of the prohibited market practice itself, when cartels or abuse of dominant position were at issue, and at one occasion, the proceeding court ruled, that the decision of the Competition Office is a precondition to rule on the claim for damages[6].

The practice of the courts can be criticised from theoretical legal point of view, because the above cited rules do not, in fact, restrain courts assessing infringement of competition rules as one of the elements of the liability in damages, but only reserve the competence of 'competition authority procedure' (and not of the 'civil procedure') for the Competition Office.

Whatever the tension between practice and theory might be, private actions for damages, had to be, before 1 May 2004, based upon pre-existing national competition authority decision.

The amendment of the Competition Act came into force on 1 May, 2004. According to (new) Section 91/H. paragraph (1) of the Competition Act, in cases, where Articles 81 and 82 EC are to be applied, the provisions of Act III of 1952 on the Code of Civil Procedure ("*1952. évi III. törvény a Polgári perrendtartásról*", hereinafter referred to as Code of Civil Procedure) will be applied along with the provisions in Regulation 1/2003 (EC). Under Article 6 of this Regulation, the courts has the power to apply Articles 81 and 82 EC.

If no similar national competition rule comes into force, the practice of the courts may remain unchanged, resulting that the courts will not show willingness to decide upon the legal consequences of damages without having a competition authority decision first, in cases of infringement of national competition rules on cartels and abuse of dominant position.

II. Actions for damages – status quo and forthcoming reforms

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis?

The legal basis of liability in damages in respect of damages caused outside contractual relations and of those caused in the context of contractual relations[7] is identical, as Section 318 paragraph (1) of Act IV of 1959 on the Civil Code of the Hungarian Republic ("*1959. évi IV. törvény a Polgári Törvénykönyvről*", hereinafter referred to as Civil Code) provides: *"In respect of the liability for breach of contract and of the level of the compensation for damages, the rules on the liability for damages caused outside contractual relations shall be applied, with the difference that the compensation for damages shall not be lowered, except provided otherwise by law."*

Section 339 paragraph (1) of the Civil Code establishes the general rule of liability in damages caused outside contractual relations as follows: "Who causes damages to another person by infringement of law shall compensate therefor. He is exempted from liability if he proves that he behaved as it is generally expected in the given situation."

The elements of the liability in damages based on the above rule are the following: (i) the (active or passive) *behaviour* causing the damage, (ii) the *damage* itself (the fact that damage occurred and the volume of it), (iii) the *causality* between the behaviour and the damage, (iv) the *infringement of law* by the behaviour, (v)

6 BH 2004. évi 4. szám 151. jogeset,

7 We use the descriptive terms 'damages caused outside contractual relations' and 'damages caused in contractual relations' and do not use the analogous English terms 'tort' and 'beach of contract', since the legal institutions behind those terms are far different due to different legal systems and so analogous application of terms might cause misinterpretation.

the *fault*, that is to say, the one causing the damage did not behave in the given situation as it is generally expected[8].

The statutory basis, the legal grounds, the elements of the damages, the level of expectation and the method of liability is identical in respect of damages caused in the context of contractual relation and of damages caused within contractual relations, with the only difference being that while the court cannot reduce the liability in damages caused outside contractual relations, it can do so as regards compensation for damages caused in the context of contractual relations.

In court practice[9], however, the level of liability appears to be higher in respect of damages caused in the context of contractual relations.[10] [11]

(ii) Is this statutory basis different from other actions for damages?

There is a single general statutory basis for liability in damages, as described above.

However, it is noteworthy that liability in damages caused outside contractual relations can exist not only if there is no contractual relation at all, but also when there is a contract, but that is invalid. The liability of the parties to an invalid contract towards each other is governed by the general rules on liability in damages. The obligations of the parties to an invalid contract towards third parties is different from the above general rule on liability in damages in two respect: (i) the obligation to make good is limited in a way that it stands only for damages, which result from the entering into a contract by that third person and (ii) this obligation is not based on fault, therefore one can say it is not even a form of liability.

(iii) Is there a distinction between EC and national law in this regard?

There is no distinction between EC and national law regarding the legal basis for bringing an action for damages.

B. <u>Which courts are competent to hear an action for damages?</u>

(i) Which courts are competent?

There are no specific procedural rules on the competence of the courts hearing actions for damages. Actions for damages having case-value up to and including five million Hungarian Forints fall within the competence of the local courts, actions for damages having case value over five million Hungarian Forints[12] fall within the competence of the county courts.[13] Appeals from the local court are heard by county courts and appeals from the county court are heard by the table-courts.

(ii) Are there specialized courts for bringing competition-based damages actions as opposed to other actions for damages?

No

8 See explanation of term 'generally expected' at D/(iii)-(vi).

9 Please note that the Hungarian legal system is not based upon precedents.

10 The ground for higher liability in damages in respect of damages caused in contractual relations can theoretically be identified in higher expectation as to the behaviour in the given (in this case contractual) situation.

11 There are some specific rules in special cases of liability in damages caused outside contractual relations, that we consider irrelevant in the frame of the present study, except one the liability in damages for damages caused by authority decision.

12 Five million Hungarian Forints are, approximately equivalent to Euro 20.000,-.

13 According to Section 23. (1) point a) of Act III of 1952 on the Code of Civil Procedure ("*1952. évi III. törvény a Polgári perrendtartásról*") county courts have competence to hear cases having case value over five million Hungarian Forints. (The Capital Court ("*Fővárosi Bíróság*") is considered as county court according to Section 10. paragraph (1) of the Code of Civil Procedures.) According the Section 22. paragraph (1) of the Code of Civil Procedure, local courts have competence to hear cases not falling within the competence of the county courts.

C. Who can bring an action for damages?

(i) What limitations are there to the standing of natural or legal persons including those from other jurisdictions?

There are no limitations to the standing of natural or legal persons bringing an action for damages.

According to Section 89 paragraph (1) of the Code of Civil Procedure, a foreign plaintiff, upon request of the defendant, shall give security for the costs of the procedure. Should the plaintiff not give security contrary to the order of the court, the court stops the procedure upon request of the defendant, according to Section 157 point c) of the Code of Civil Procedure.

According to (new) Section 85 paragraph (5) of the Code of Civil Procedure, nationals and lawful residents of EU cannot be obliged to give security for the costs of the procedure, from 1 May, 2004.

(ii) What connecting factors(s) are required within the jurisdiction in order for an action to be admissible?

The general rule is that the Hungarian courts have jurisdiction if the seat (in the case of legal persons) or the habitual residence (in case of natural persons) of the defendant is in Hungary.[14]

In the following further cases the Hungarian courts also have jurisdiction:

- in the case of legal disputes connected to contracts if the place of performance is in Hungary[15],
- in the case of claims for damages caused outside contractual relations if the behaviour causing damages was carried out or the damaging result took place in Hungary[16],
- in the case of claims in connection with risk of damages if the place, where the damaging result threatens to take place is in Hungary[17],
- in the case of a law-suit against a foreign enterprise if that enterprise has a branch or representative office in Hungary and if the legal dispute connects to the activity thereof[18],
- in the case of a law-suit against a foreign national, who has established himself as independent entrepreneur if the legal dispute connects to the business activity of such a person[19],
- in the case of a pecuniary law-suit against such defendant, who does not have a place of living or habitual residence in Hungary, but the defendant has assets in Hungary, which can be drawn under enforcement, where a claim is also considered as an asset if the debtor of such claim has place of living in Hungary or if such a claim is secured by assets in Hungary[20].
- in the case of a law-suit arising from a consumer contract commenced by the consumer if the place of living or residence of the consumer is in Hungary and if the one contracting with the consumer acting in its professional or business capacity (a) acts in Hungary or targets its activity carried out elsewhere to Hungarian consumers or (b) has a branch or representative office in Hungary or is considered to be established in Hungary as independent entrepreneur[21],
- if the defendant responds to the merit of the case, not raising objection based on lack of jurisdiction, except if the jurisdiction of the Hungarian courts is disqualified[22].

14 Section 54. paragraph (1) of law decree 13 of 1979 on the international private law ("1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról" hereinafter referred to as Law decree on Conflict of Laws).
15 Section 55. of Law Decree on Conflict of Laws
16 Section 56/A. paragraph (1) of Law Decree on Conflict of Laws
17 Section 56/A. paragraph (2) of Law Decree on Conflict of Laws
18 Section 56/B. paragraph (1) of Law Decree on Conflict of Laws
19 Section 56/B. paragraph (2) of Law Decree on Conflict of Laws
20 Section 57. paragraph (2) of Law Decree on Conflict of Laws
21 Section 60. of Law Decree on Conflict of Laws
22 Section 62/H. of Law Decree on Conflict of Laws

The parties to a legal dispute may submit themselves to the jurisdiction of a country, except an exclusive or disqualified jurisdiction. The submission must not result in that consumer being sued in the courts of a country other than that which the place of living or residence of the consumer is or in that a consumer be restrained from commencing law-suit in the courts of a country in which the place of living or residence of the consumer is, except where the submission is dated after the legal dispute arose.[23]

(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

These actions are not available for claiming damages.[24]

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

According to Section 355 paragraph (1) of the Civil Code, the primary obligation of the person liable in damages is 'restitutio in integrum' (to *restore the original status*). Should this not be possible or if the person who suffered the damage does not wish 'restitutio in integrum' for good reasons, the person causing the damage shall *compensate* the one who suffered the damage for his pecuniary and non-pecuniary damages[25].

Pecuniary damages involve effective loss, loss of profit and costs in connection with reducing or diminishing damages.[26] In case the amount of the damage cannot be precisely calculated, the court is entitled to order general compensation, which is capable of compensating the damaged person in full.

The damages shall be compensated in money, except where the circumstances require compensation in kind[27].

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23 Section 62/F. and 62/H. of Law Decree on Conflict of Laws

24 There are other forms of actions available based on public interest, but none of them is available for claiming damages:
According to Section 92. paragraph (1) of the Competition Act, a consumer protection organization, the Competition Office – in a case falling within its competence and if it has established breach of laws – and an economic chamber ("*gazdasági kamara*") – regarding its members – are entitled to bring action for the civil law claims of the consumers against the one, who causes detriment regarding to a wide range of consumers or significant detriment by illegal activity, in case the consumers who suffered the detriment cannot be identified. The court is entitled to oblige the infringing person to lower the price, to repair or replace the product or to return the price. Further, the court may empower the plaintiff to publish the decision in a national daily newspaper to be paid for by the infringing person. The infringing person shall satisfy the claim of the consumer in accordance with the judgement, however, it does not affect the rights of the consumers to raise other civil law claims.
According to Section 39. paragraph (1) of Act CLV of 1997 on consumer protection ("*1997. évi CLV. törvény a fogyasztóvédelemről*", hereinafter referred to as: Consumer Protection Act) the General Inspectorate of Consumer Protection ("*Fogyasztóvédelmi Főfelügyelőség*"), an association for the representation of consumer interests, the public prosecutor ("*ügyész*") or the State Financial Supervising Authority ("*Pénzügyi Szervezetek Állami Felügyelete*") are entitled to bring an action against the person, whose illegal activity concerns a wide range of consumers or causes significant detriment for the protection of the interests of the wide range of consumers or in order to eliminate the significant detriment . Such actions can be brought even in case the consumers suffering detriment cannot be identified. The court may empower the plaintiff to publish the decision in a national daily newspaper at the cost of the infringing person. The infringing person shall satisfy the claim of the consumer in accordance with the judgement, however, it does not affect the rights of the consumers to raise other civil law claims.
According to Section 340. paragraph (8) of Act CXXIX of 2003 on public procurement ("*2003. évi CXXIX. törvény a közbeszerzésekről"*), the Public Procurement Committee is entitled to bring an action to establish the invalidity of a contract breaching the laws on public procurement or on the public procurement procedure, based on the general rules of the civil law.
According to Section 209. paragraph (2) of the Civil Code, in the event that a business organization applies unfair general terms of business, such term may be challenged before a court by organizations identified in separate legislative measure. According to Section 5 of law decree 2/1978. on the coming into force and the execution of Act IV of 1977 on the modification and the consistent text of the Civil Code ("*A Polgári Törvénykönyv módosításáról és egységes szövegéről szóló 1977. évi IV. törvény hatálybalépéséről és végrehajtásáról rendelkező 1978. évi 2. törvényerejű rendelet*") a) the public prosecutor, b) the minister ("*miniszter*"), the head of an authority having national province ("*országos hatáskörű szerv vezetője*"), c) the clerk ("*jegyző*") and the main-clerk ("*főjegyző*"), d) the economic chamber, the professional chamber ("*szakmai kamara*"), the local appellation organization ("*hegyközségi szervezet*"), e) the organization for representing consumer interests ("fogyasztói érdek-képviseleti szervezet").

25 See also II/G. (iii)

26 Section 355 paragraph (4) of the Civil Code

27 Section 355. (2) of the Civil Code

The primary form of compensation is lump-sum payment. It is also possible, however, to order payment of an allowance as compensation for damages (Section 355. (3) of the Civil Code).

(ii) Other forms of civil liability (e.g. disqualification of directors)

No other forms of civil liability are available for damages.

The Hungarian Civil Code contains a provision, which might serve as useful grounds for effective enforcement of competition rules. According to Section 341 paragraph (1) and (2) of the Civil Code, in case of the risk of damages, the person at risk is entitled to request the court to prohibit the activity threatening damages or to order that steps be taken to prevent such damages or to give security if that is necessary. This rule is to be applied if the risk of damages arise from unfair business activity[28]. However, there is as yet no court practice relating to the application of this provision, where the risk is caused by actions beaching competition rules.

Two other potential legal consequences under civil law, which are not forms of liability in damages, but may be of relevance here are: (i) ordering the return of the services in favour of the state[29]; (ii) fine for public purposes[30].

Publication of a judgement in a case for damages is not an available legal consequence.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

The infringement has to imply fault.

The test of culpability is whether the defendant failed to meet the standards of behaviour that would generally be expected in the given situation.

The test is not subjective, i.e. it is not that, what can be expected from the person at issue, but made independent from that very person, resulting in a kind of objectiveness. The expectation is generalized in a way that certain categories of persons are created based on the specialities of the given situation. These criteria are decided by the court in each case.

Both intent and negligence can be a base for liability in damages and there is no difference in the legal consequences thereof.

However, according to Section 342 paragraph (1) of the Civil Code, a provision of a contract disqualifying liability for damages caused by intent or major negligence is invalid.

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28 The term 'unfair business activity' is used by the Hungarian Civil Code (Section 341. paragraph (2) of the Civil Code. The term 'unfair business activity' differs from the terms used by the Competition Act (i.e. unfair market practices, deception of consumers, abuse of dominant position, concentration), since this rule of the Civil Code was incorporated into the Civil Code by Act IV. of 1977 and came into force on March 1, 1978, while the Competition Act is a piece of legislation enacted in 1996 and the two are not harmonized. There is no published court decision on analysing the relation/interaction of these terms, however, we may well conclude that any activity caught by the Competition Act would be found to qualify as 'unfair business activity' according to the Civil Code if tested by a court, but we are much uncertain to establish that activities outside the scope of the Competition Act would or would not be able to qualify as 'unfair business activity'.

29 The primary consequence of an invalid contract is that the original status before the entering into the contract shall be restored, which may result in the services already rendered being returned. The court, upon request of the public prosecutor, may order the return of services in favour of the state if such returns would be due to a party of an invalid contract, where that party entered into a prohibited or immoral contract or who acted on a misleading or threatening way or otherwise acted in fraudulent way. (Section 237 paragraph (4) of the Civil Code)

30 The person whose rights are infringed is entitled to claim compensation for damages. Should the amount of the compensation be inadequate compared to the gravity of the fault, the court is entitled to impose a fine to be used for public purposes. (Section 84 paragraph (1) point e) and paragraph (2) of the Civil Code)

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden of proof to the other party etc.)

According to Section 163 paragraph (1) of the Code of Civil Procedure, the court takes evidence for the purposes of determining the facts necessary to decide the case. According to Section 164 paragraph (1) of the Code of Civil Procedure, the facts necessary for deciding the case are to be proved as a general rule by the party in whose interest it is that the court accepts them to be true. No evidences are taken 'ex officio', except if the law provides otherwise.

The rule on the burden of proof in cases of claims for damages, according to the general rule on liability in damages[31], is as follows: the one suffering damages (the plaintiff) shall prove (i) the *behaviour* (active or passive) causing the damages, (ii) the *damage* itself (the fact that damage occurred and the level of it) and (iii) the *causality* between the behaviour and the damage. Further, it is the plaintiff to prove (iv) *that the behaviour infringes the law*.

Hungarian law on damages is an 'exculpation system', which means that it falls to the defendant to (v) exempt himself from liability on the ground that it was not his *fault*, that is to say it is for the defendant to prove that he behaved himself in the given situation as is generally expected[32].

Further, in case of acknowledgement of a debt, it is for the person who acknowledged the debt to prove that the debt does not exist, that the debt cannot be claimed in court or that the contract is not valid, under Section 242 paragraph (1) of the Civil Code. In such cases the burden of proof shifts to the person who made the acknowledgement.

The court is entitled to accept facts to be true if they are admitted by a counter-party, if the statements of parties are identical and if a counter-party does not dispute a statement against notice by the court.[33]

Further, the court is entitled to accept facts to be true if those are known by the court as facts of public knowledge, and the same rule applies in respect of facts officially known by the court. These facts are taken into consideration even if the parties do not rely upon them, but the court shall notify the parties of these facts.[34]

(ii) Standard of proof

According to Section 206 paragraph (1) of the Code of Civil Procedure, the court establishes the facts of the case, collating the evidences emerging from the statements of the parties and in the course of taking evidences, the court measures the evidences in entirety and judges according to its own conviction.[35]

It may worth to note, that the facts underlying an interim injunction shall only be made probable (lower level of certainty than conviction).[36]

(iii) Limitations concerning form of evidence

Because the Hungarian system on evidences is a 'free evidencing system', there are no limitations concerning the form evidence takes, The theoretical elements of the system are: (i) there is no exhaustive list of acceptable forms of evidence, the

31 Section 339. paragraph (1) of the Civil Code
32 See explanation of term 'generally expected' at D/(iii)-(vi).
33 Section 163. paragraph (2) of the Code of Civil Procedure.
34 Section 163. paragraph (3) of the Code of Civil Procedure.
35 Since there is neither solid literature, nor published court decision on the question of the conviction of the judge, no examples can be provided.
36 Interim injunction is available for preventing directly threatening damages or for preserving the 'status quo' ending in legal dispute or for the protection of specially estimated interest of the party.

court may use any evidence, which is capable of revealing the facts, (ii) forms of evidence, irrespective of whether or not they are listed in the Code of Civil Procedure, do not have a determined probative value nor a ranking, (iii) the court is not bound by any formal rules on taking evidences and (iv) the court decides based on its own conviction.

The Code of Civil Procedure lists witness statements, expert opinions, perambulation, documents and other material evidence, but the list is not exhaustive. It is not possible to take an oath in a Hungarian court case.[37]

Addressing some specific question, the following can be established.

- Evidence does not have to be documentary to be admissible.
- Even if an official of a company is called as witness, he is called in person. A witness shall give a statement on the facts and information that he knows about. Witnesses are given notice by the court that they shall tell the truth and the court clarifies if they are unprejudiced, i.e. independent from and not influenced by the parties.[38] If an official of a company concerned by the procedure is called to testify, the court will put greater emphasis on determining the impartiality of the witness. Giving a false statement as a witness is a criminal offence.
- Evidence from other jurisdictions is accepted by the Hungarian courts. However, the rules on public documents ("*közokirat*") are to be applied to public documents issued abroad only if they are legalized by the relevant Hungarian diplomatic body.[39] Private documents ("*magánokirat*") issued abroad have identical probative value to those issued in Hungary, but (a) documents issued abroad to prove a legal transaction also preserve their probative value that they have in the jurisdiction where they were issued and (b) proxy and documents issued for the purposes of the court case have identical probative value to those issued in Hungary only if they are legalized by the relevant Hungarian diplomatic body.[40] In case the probative value of a document is not regulated by the Code of Civil Procedure, the court is entitled to decide if such documentary evidence can be taken into consideration, based on the hearings and all data emerging from the taking of evidence.[41] The court can hear witnesses from other jurisdictions if they appear at the court. The court is entitled to summon a witnesses from abroad, but due to the (territorial and personal) scope of the Hungarian laws on civil procedure the addressed witness will not be under an obligation to appear at court and so no consequences can be applied for failure to appear, except if international agreement or mutual practice provides otherwise.
- Hungary is a member of the international agreement on civil procedure signed on 1 March, 1954, in The Hague, therefore a Hungarian court may turn to the courts of other signatory states of the agreement with the request to hear witnesses in addressed questions. Bilateral international agreements may also provide for the opportunity of requests addressed to foreign courts.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the courts vis-à-vis defendants, third parties, competition authorities (national, foreign, Commission).

There are no specific rules on discovery.[42] Since neither the Code of Civil Procedures addresses the topic, nor the published court practice has a saying on this, it is not possible to foresee how Hungarian courts will consider the admissibility of evidences, which are products of foreign discovery, taking into consideration the 'free evidencing system', however it is to be noted that there is no legal norm precluding the admissibility of such evidence.

The Code of Civil Procedure prohibits acting in bad faith. In this frame, according to Section 8 paragraph (3) point b) of the Code of Civil Procedure, the court shall

37 Section 166 paragraph (1) and (2) of the Civil Code.
38 Section 172. and 173. paragraph (1) of the Code of Civil Procedure.
39 Section 195. of the Code of Civil Procedure
40 Section 198. of the Code of Civil Procedure
41 Section 199. of the Code of Civil Procedure
42 There is no rule limiting the admissibility of evidences obtained through disclosure procedure outside Hungary, either.

impose a fine on the party, who conceals a fact or circumstance about which he must have known that such fact or circumstance is relevant to deciding the case.

Upon request, third party can be called as witness and so, can be called upon producing the documents available to him. Upon request, the court is entitled to order the other party to produce documents specified by the requesting party. Should the witness not comply with the order of the court to produce such documents, the court can impose fine on such witness. Should the party not comply with such obligation, it may affect the conviction of the court regarding certain facts relevant to the case.
The Code Civil Procedure protects business secrets in a way that those bound by confidentiality obligation regarding business secrets must not be heard as witness, expect released from such obligation.

(b) Proving the infringement

(i) Is expert evidence admissible?

The infringement is a legal issue to be decided by the court itself, therefore no expert evidence is admissible in this respect.

In case such knowledge is required for finding or evaluating a relevant *fact* or other *circumstance*, which the court does not have, the court orders a forensic expert to give an expert opinion.[43] The parties are entitled to obtain (private) expert opinion and to file it with the court as evidence. The (private) expert can be heard by the court as witness on the questions in which he possesses specific knowledge.[44] The amount of the damages suffered can be such fact on which an expert can give expert opinion.

(ii) To what extent, if any, is cross-examination possible? Can witness be subpoened?

The hearing is led by the president of the tribunal. The president and other members of the tribunal may ask questions. The parties may solicit questions and may be permitted by the president to ask questions directly to the witness.

The witness, who – against proper summon - does not appear at the court or leaves without permit, or who refuses to give witness testimony without giving reasons or against the order of the court shall bear the costs caused and can be fined by the court. Further, the court is entitled to order that the witness be brought before the court.

(iii) Under which conditions does a statement and/or decision by a national authority, a national court, an authority from an other EU Member State have evidential value?

The Competition Office does not issue statements. A (final and binding) decision of the Competition Office on an issue falling within its competence is decisive.[45] A judgement of a national court is 'res judicata'[46] in respect of rights arising from the same factual ground, between the same partners,while outside the sphere of the 'res judicata' it can be considered as one of the evidences. A statement or decision of a competition authority from a EU Member State can be considered as evidence. Judgement of a court of an EU Member State is 'res iudicata' in Hungary if the judgement is not passed in a matter falling within the exclusive jurisdiction of Hungary and if there is no legal ground to refuse the recognition of the judgement.

43 Section 177. paragraph (1) of the Code of Civil Procedure

44 Resulting from the 'free evidencing system', the weight of the evidences cannot be ranked, so not even the weight of a forensic expert opinion and a private expert opinion can be compared. However, the we understand from the practice of the courts that a forensic expert opinion has more weight than a private expert opinion. The difference results from the fact that the forensic expert is appointed by the court, therefore all procedural safeguards are applicable, while the private expert is employed by a party alone, therefore no legal rules safeguard his activity.

45 The Competition Office is to establish if the laws on cartel or abuse of dominant position are breached; if it does so, one of the elements of the liability in damages, that is to say the 'infringement of laws' (see Section II. A (i) and E (a) (i) above) is proven.

46 According to Section 229 paragraph (1), the final and binding judgement the parties are estopped from launching a new proceeding between the same parties for the same right arising from the same factual ground.

According to (new) Section 91/H. paragraph (3) of the Competition Act,[47] from 1 May, 2004, the observations of the Commission and the Competition Office on the application of Articles 81 and 82 EC can be considered as evidence in court procedure.[48]

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

No.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

Both direct and indirect causation can be proved. The causality shall be adequate, the adequacy of the causation is judged upon by the court in every and each case.[49]

F. Grounds of justification?

(i) Are there grounds of justification?

The Hungarian law on damages is an 'exculpation system[50]. It is for the defendant to exempt himself on the ground that the causing of damage was not his *fault*, that is to say it is for the defendant to prove that he behaved himself in the given situation as it is generally expected[51].

(ii) Are the 'passing on defence' and 'indirect purchaser' issues taken into consideration?

There is no court practice published on these issues.

However, if the plaintiff is not able to prove that he suffered damages (in case of, among others, successful 'passing on defence') the court will not order compensation.

The issue of the 'indirect purchaser' can be considered as a question of indirect causation. If the causality is adequate, even an indirect purchaser can be successful in claiming damages. Further, if the 'indirect purchaser' was able to prove liability in damages of all or more of those upstream in the marketing/production chain, the liability of such persons would be joint and several.[52]

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

Fault on the side of a party does not bar him from invoking the faulty action of the other party[53], e.g. in the field of damages, even if there is fault on the side of the injured party, it does not bar him from claiming compensation for damages.

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47 The amendment of the Competition Act comes into force on 1 May, 2004.

48 The court shall notify both the Commission and the Competition Office if the application of Articles 81 and 82 of the Treaty seems to be necessary, and they can submit their observation until closing the hearing. Upon request, the court shall forward those documents of the case to the Commission and/or the Competition Office, which are necessary for making observations. ((new) Sections 91/H. paragraph (2),(3) and (4) of the Competition Act)

49 The adequacy test, logically follows the 'but for' test. It is, however rather difficult or even impossible to provide clear cut answer on adequacy, because in practice the courts consider adequacy as question of foreseeability, but on case by case basis either as question of causality or as question of infringement of law, or as question of fault (all of these are different elements of liability in damages).

50 See Section II. E (a) (i) above.

51 See explanation of term 'generally expected' at D/(iii)-(vi).

52 Section 344 paragraph (1) of the Civil Code

53 Section 4 paragraph (4) last sentence of the Civil Code

According to Section 340 paragraph (1) of the Civil Code, the injured party is obliged to act to avoid or reduce the damage as it is generally expected in the given situation.[54] That part of the damage shall not be compensated, which results from breaching this obligation.

Further, irrespective of responsibilities, the court is entitled to reduce compensation due to exceptional circumstances[55], however the courts do not apply this rule in practice frequently. These circumstances cannot lie in the person of the plaintiff or of the defendant, but only in the facts of the damage causing action.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of the profit made by the defendant or on the basis of injury suffered by the plaintiff?

The damages are assessed on the basis of injury suffered by the plaintiff.[56]

(ii) Are damages awarded for injury suffered on national territory or more widely (EC or otherwise)?

Under Hungarian law there is no limitation of damages on a territorial basis.

(iii) What economic or other models are used by courts to calculate damage?

There is no published court decision indicating that courts would apply economic model(s).

The legal model used is that both pecuniary and non-pecuniary damages are to be compensated. [57]

(iv) Are ex-ante (time of injury) or ex-post (time of trial estimates used)?

Ex-ante (time of injury) estimate is used, when calculating damages.

(v) Are there maximum limits to damages?

No.

(vi) Are punitive or exemplary damages available?

No.[58]

(vii) Are fines imposed by competition authorities taken into account when settling damages?

No.

(b) Interest

(i) Is interest awarded from the date the infringement occurred, the date of the judgement or the date of a decision by a competition authority?

Interest is default interest and is awarded from the date the infringement occurred.[59] Interest is not awarded automatically, but only upon request.

(ii) What are the criteria to determine the level of interest?

54 See explanation of term 'generally expected' at D/(iii)-(vi).
55 Section 339 paragraph (2) of the Civil Code, There is no published court practice on the application of this rule, therefore no example can be provided.
56 Section 355 paragraph (4) of the Civil Code
57 Section 355 paragraph (1) of the Civil Code
58 See also footnote 25.
59 Section 360 paragraph (1) and (2) and Section 301 paragraph (1) of the Civil Code

According to Section 301 paragraph (1) of the Civil Code, the level of interest is the basic interest rate of the National Bank valid on the last day of the half calendar year in which the delay begins to run, i.e. in case of damages the last day of the half year in which the damage occurred. In case of business organizations the level of interest is the basic interest rate of the National Bank valid on the last day of the half calendar year concerned by the delay plus seven percent, according to Section 301/A paragraph (1) of the Civil Code.

Hungarian court practice – due to economic reasons, but without any legal basis – is that the level of interest established in national legislation is applicable only to claims in Hungarian Forints. The level of interest on claims in foreign currency, according to court practice, but still without any legal basis, shall be established based on the interest applicable to the currency at issue on the capital markets.[60] [61]

(iii) Is compound interest included?

No.

H. Timing

(i) What is the time limit in which to institute proceedings?

According to Section 324 paragraph (1) of the Civil Code, the statute of limitations in Hungarian civil law is five years, except law provides otherwise. Actions for damages can be brought within this dead-line. In case of liability in damages, the five years period starts on the day of suffering the damage. Should the right-holder be not in a position to raise his claim due to excusable reasons (e.g. does not know about the damage causing action), he is entitled to raise his claim within one year from ceasing the ban, even there was less than one year back from the period. Calling upon fulfilment or starting law-suit or modification of the claim by mutual agreement or acknowledgement of the claim interrupts the period.

However, according to Section 67 paragraph (4) of the Competition Act, no competition authority procedure may be commenced if three years has elapsed since the committing the behaviour infringing the Competition Act. As a result, if the procedure of the Competition Office is not commenced in due course, one element (infringement of law) of the liability in damages[62] in cases of infringement of national competition rules on cartel and abuse of dominant position may cause difficulties to prove. It remains applicable to actions for damages after 1 May, 2004, where infringement of national competition rules on cartel and abuse of dominant position will be at stake, however, it does not limit actions for damages based on infringement of Articles 81 and 82 EC, where such infringement is judged upon by the court directly.

(ii) On average, how long do proceedings take?

Our experience shows that procedures (including remedies) may well take two to five years.

(iii) Is it possible to accelerate proceedings?

There are no legal tools to accelerate proceedings effectively.

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60 BH 1995. évi . szám 342. jogeset,

61 A different way of calculating interest could be, that the capital amount of the claim in foreign currency is converted into Hungarian Forint as of the due date, the interest is than calculated in Hungarian Forint on this Hungarian Forint basis and than the capital amount plus interest is re-converted into the currency of the claim. This calculation seems not to contradict Hungarian legislation, but please note that the method of interest calculation published in the periodical 'Bírósági Határozatok' (see footnote 60) does apply, notwithstanding there is no precedent law in Hungary. It is necessary to note that the published decision really was reasonable on economic grounds at that time; the level of interest established by law was 20%, while the rate of inflation was far above 30%; it may well be understand,, that in case of applying the interest calculation pattern described in this footnote, the capital amount plus interest could well result in a lower real value than the simple exchange value of the original capital amount at the time of calculating the interest, which would have been unacceptable under economic terms. We expect it for the near future to clarify this issue on a more solid legal basis, either by legislation or by relevant court practice.

62 See Section II. A (i) and E (a) (i) above

(iv) How many judges sit in actions for damages cases?

One judge sits in first instance proceedings and three in second instance proceedings.[63]

(v) How transparent is the procedure?

The procedure is transparent because the hearings are public.[64] However, the court is entitled to order a closed hearing if – inter alia – the protection of business secrets so requires.[65] Our experience is that the courts are willing to order closed hearings upon the well-reasoned request of a party concerned. The court reaches its judgement on closed deliberation. The court always announces its resolutions publicly.[66]

Due to interpretation of law by the courts, the judgements in Hungary are not public, cannot be accessed freely and it's the discretion of the courts if to publish and what judgement in an official paper.

I. Costs

(i) Are the Court fees paid up front?

There is a duty ("*illeték*") to pay. The duty is to be paid at the time of commencing the procedure. The duty is to be paid either in the form of stamp duty ("*illetékbélyeg*") or in cash. If paid as stamp duty, it is to be pasted to the document commencing the procedure; if paid in cash the competent authority ("*illetékhivata*l") confirms the payment on an original copy of the relevant document.[67]

The duty does not have to be paid up front if the plaintiff is entitled to prenotation of duties ("*illetékfeljegyzési jog*").[68] The party entitled exemption from costs ("*költségmentesség*") does not have to pay duties at all. The rules are different, however – in the frame of actions for damages and in case of natural persons - the ground of awarding such rights is based on the rights of the poor.

The amount of the duty is six percent of the value of the claim, but minimized in HUF 7.000 and maximized in HUF 900.000.[69] If the value of the claim cannot be established[70], a symbolic value shall serve as ground for calculating the amount of the duty[71].

(ii) Who bears the legal costs?

The party losing the case shall bear the costs of the procedure.

In case the parties partly win and partly lose the case the court decides who bears the costs, taking into consideration the degree of success and the costs already advanced by the parties. Should there be no significant difference between the degree of success of the respective parties and the costs advanced by them, the court orders that the parties shall bear their respective costs.[72]

In the case of an action for damages or for other claim the amount of which is dependent on the deliberation of the court, the losing party can be obliged to bear the total costs of the procedure even if the court judges a lower amount for the

63 Section 11 paragraph (1) and (4) of the Code of Civil Procedure
64 Section 5 paragraph (1) of the Code of Civil Procedure
65 Section 5 paragraph (2) of the Code of Civil Procedure
66 Section 5 paragraph (3) of the Code of Civil Procedure
67 Section 73 paragraph (1) and Section 74 paragraph (3) and (2) of the Duties Act
68 Section 59 paragraph (1) of the Duties Act
69 Section 42 paragraph (1) point a) of Act XCII of 1990 on duties (hereinafter referred to as Duties Act)
70 For instance, in case of a claim to order that the defendant shall stop infringing behaviour threatening with occurrence of damages (see Section II. D (ii)).
71 Section 39 paragraph (3) of the Duties Act.
72 Section 81 paragraph (1) of the Code of Civil Procedure

plaintiff than he claimed, but the claimed amount cannot be considered as overestimated.[73]

The court passes decision on the bearing of the costs in the judgement or other decision closing the procedure.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

The fee of a legal representative is subject to the agreement of the contracting parties, i.e. the client and the legal representative. There is no legal provision prohibiting contingency fees or limiting the freedom of the parties to agree on contingency fees.

There is no experience of contingency fees being generally available for private enforcement of EC competition rules.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Under the general rule, the winning party can recover his costs from the losing party, including legal fees (based on the contract between the client and the lawyer) and out-of pocket expenses, however the court is entitled to decrease the legal fee if that is not proportionate to the case value or the work actually done.[74]

There are no items excluded as such.

However, (i) if the defendant did not provide cause for the action and accepts the claim on the first hearing, the plaintiff cannot recover costs and shall reimburse the costs of the defendant; (ii) any party carrying out procedural actions unsuccessfully or causing delays without good reason, missing dead-lines, failing to appear at court or causing superfluous costs in any other way cannot recover costs and shall reimburse the other party for the costs arising in connection with such behaviour; (iii) any party, who turns to court after successful mediation, can be obliged to bear all the costs of the court procedure except for those connected with the enforcement of the agreement reached via the preceding mediation.[75]

(v) What are the different types of litigation costs?

Litigation costs involve all costs arising in connection with the activity of the parties both outside court and at court, meaning that the cost of obtaining information, prior correspondence, stamp duty, the costs of the witnesses, the costs and fees of the expert, translation fees, costs of the hearing, legal fees etc. are all considered as litigation costs.[76]

(vi) Are there national rules for taxation of costs?

There are rules on establishing the cost of legal representation by an attorney at law. The fee due to the attorney is dependent on the agreement between the client and the attorney. If this amount is too high according to the consideration of the court, the court is entitled to lower the amount that the losing party shall cover. In lack of such agreement or if the represented party requires so, the fee of the attorney covered by the losing party is established in accordance with a scale of fees (between 1 and 5% of the case value) established by law. The out-of pocket and other connecting costs shall be listed and proved by the attorney upon request by the counter-party. [77]

73 Section 81 paragraph (2) of the Code of Civil Procedure
74 Section 2 paragraph (1) and (2) of the Decree of the Minister of Justice on the legal fees reimbursable in court procedures
75 Section 80 of the Code of Civil Procedure
76 Section 75 of the Code of Civil Procedure
77 We note that the traditional volume of the legal fee in Hungary is five percent of the case value. This tradition is mirrored by the relevant legislation, stating that in lack of agreement on the legal fee between the client and the lawyer or if the party to the procedure request so, the legal fee to be borne by the losing party in a first instance procedure is (a) 5% of the case value in cases having case value up to ten million Hungarian Forints, but minimum HUF 10.000, (b) if the case value is between HUF 10 million and 100 million, it is the amount according to (a) plus 3% of the case value above the 10 million, (c) if the case value is above HUF 100 million, it is the amount according

(vii) Is any form of legal aid insurance available?

According to our best knowledge there are 'one and a half' participants of the Hungarian insurance market. One of them offers services, but the other has shut the active operation down, they only maintain their pre-existing contracts. We consider that the Hungarian market is not developed in this respect.

Some forms of legal aid is available. According to Section 9 paragraph (1) of the Code Civil Procedures, the public prosecutor is entitled to start action if the right-holder is not able, because of any reason, to protect his rights.[78] According to Act LXXX. of 2003 on legal aid (*"2003. évi LXXX. törvény a jogi segítségnyújtásról"*), the poor is titled to receive legal services on the cost of the State, outside court procedures.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

There are no statistics available on this.

J. <u>General</u>

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

As we experience, the courts seem to consider that, according to Section 45 of the Competition Act, the procedures in respect of cartels and of abuse of dominant position are administrative procedures and fall within the competence of the Competition Office.

Law-suits for damages are civil law disputes and so, fall within the competence of the courts. That the act causing the loss constituted a violation of the law is one of the elements of liability in damages. A breach of the law on cartels or on abuse of dominant position can be considered as infringement of law. Liability in damages is established, however, only if all elements of liability are proved by the plaintiff and if the defendant does not exempt himself. The Hungarian courts do not show willingness to consider breach of competition rules on cartels and abuse of dominant position, therefore, absent a decision by the Competition Office, a court is not in a position to award damages for a loss allegedly caused by an act infringing the national laws prohibiting cartels or abuse of a dominant position. Following the entry into force in Hungary of Regulation 1/2003, the above situation has changed in relation to violations of EC competition law and will be seen if the court practice relating to infringement of national competition rules changes.

Further, we expect that the rules on damages suffered (the problem of the 'passing on defence') and causality (the problem of the 'indirect purchaser') may make actions for damages based on infringement of competition laws more difficult, as the Hungarian court practice has not yet faced these problems. Absence of economic models for calculating damages may also cause difficulties in private enforcement.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No, however, the question of competence (i.e. the competence of the Competition Office and that of the court) is closely connected to the fact that competition rules are regarded as being public policy, according to the point of the courts.

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to (b) plus 1% of the case value above the 100 million. The legal fee is 50% of the above in second instance procedure and in procedure for legal revision ("*felülvizsgálati eljárás*", an extraordinary legal remedy).

78 Please note that no published court decision is available on any case, where a public prosecutor have sued for damages instead of a disabled party.

(iii) Are there any differences according to whether the defendant is public authority or a natural or a legal person?

The liability in damages for damages caused by an administrative body acting in its authority can be established exclusively in case the damage could not be avoided through remedies or the damaged person exhausted ordinary legal remedies capable of avoiding the damages.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

No.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

No.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

Our considerations are included in point (i) above.

As far the applicable law is concerned (a) the law applicable at the place and time of the activity or omission causing damage shall apply to the liability for damage caused outside contracts, except provided otherwise as follows (b) if it is more favourable for the injured party, the law of that state shall apply, in the territory of which the damage came about, (c) if the places of residence of the party causing the damage and the injured party are in the same state, the law of that state shall apply.

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

There are no such statistics available.

III. <u>Facilitating private enforcement of Articles 81 and 82 EC</u>

(i) Which of the above elements of claims for damages (under Section II.) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

The amendment of the Competition Act aims to facilitate private enforcement of EU competition law, however we cannot report on how the Hungarian legal system will or will not react to such actions.

We consider that further legislation on making the direct route for action for damages clearly available also in case of infringement of national competition rules, would enhance the development of a more clear legal situation.

Making the publication of the judgement in an action for damages available as potential additional legal consequence, would further legal awareness.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Both standing (procedure by a permanent arbitration body) and ad-hoc arbitration, and mediation is available. However, there is no known practice of these in the field of private enforcement of EC and/or national competition rules.

IV. <u>Bibliography</u>

No bibliography was used for preparing the present study.

V. National case law summaries

Case Supreme Court Pf. IV. 24 909/2000/1. [2000]

Facts and legal issues

The first plaintiff was the manufacturer, the second plaintiff had been distributor of the margarine "Linco" in Hungary since 1994. The defendant started to market a margarine named "Linco" produced by a Slovakian company in Hungary in 1996. The price of the margarine marketed by the defendant was much lower than the wholesale price of the product, therefore the plaintiffs stated that the intention of the defendant was to displace the plaintiffs from the market and restrict competition with the adoption of the lower price. The plaintiffs requested the Court to establish that the practice of the defendant breached Section 2 of the Competition Act (the general clause on the prohibition of unfair market practices in general) and to prohibit the defendant from any further violation of the law. Furthermore, the plaintiffs claimed for a certain amount of damages.

The Court of First Instance decided that the practice of the defendant was in fact an abuse of dominant position, and therefore the subsidiary clause of unfair market practices in general could not be applied. According to the Competition Act, the courts do not have competence for the procedure in respect of abuse of dominant position, because this procedure falls within the competence of the Competition Office, and so the Court of First Instance stopped the procedure.

Held

The Supreme Court changed the decision of the Court of First Instance. The Supreme Court stopped the procedure in respect of abuse of dominant position (because of the competence of the Competition Office), but ruled that the Court did have competence to proceed in respect of the claim for damages, therefore ordered the Court of First Instance to continue the procedure in respect of the latter.

Case Table Court, Szeged Gf. I. 30.351/2003. [2003]

Facts and legal issues

The plaintiffs, a manufacturer and distributor and a distributor of cigarettes marketed their products to the defendant. The defendant accepted and marketed the products but denied signing the agreements with the plaintiffs, stating that the contracts used by the plaintiffs contained similar and harmful conditions. The defendant did not pay the price when it was due. Instead, the defendant initiated a proceeding of the Competition Office stating that the plaintiffs abused their dominant position. The Competition Office did not find that the plaintiffs abused their dominant position and the Supreme Court, acting in the procedure initiated for the revision of the decision of the Competition Office, dismissed the claim, i.e. upheld the decision of the Competition Office.

The plaintiffs sued the defendant for the price of the marketed products. The defendant stated that the plaintiffs' commercial practice was abusive and launched a counter-claim for damages in excess of the plaintiffs' claim, based on the breach of different sections of the Competition Act.

Held

The Table Court held that the defendant shall pay the price of the products to the plaintiffs and dismissed the defendant's counter-claim. Regarding the refusal of the counter-claim of the defendant the court established that one element of the liability in damages, i.e. the infringement of law, was missing. Further, the Table Court found that the court was lacking competence to establish infringement of law in cases, where the Competition Office found the behaviour at issue to be legal. The Table Court also established that the result of the procedure of the Competition Office was a precondition to decide upon the claim for damages.