

Exclusion from public procurement as a penalty for anti-competitive behaviour

According to Section 62 (1) n) of Hungary's Act on Public Procurement¹, every company that was fined by the Hungarian Competition Authority (“HCA”) for committing an infringement of Section 11 of the Hungarian Competition Act² (prohibition of anti-competitive agreements) is excluded from Hungarian public procurement procedures for three years. The exclusion is rather severe because a company penalised in this way is not eligible to submit a bid on its own in public tenders or to participate in them as a sub-contractor. There has been a fierce debate within the Hungarian legal community about whether the exclusion starts on the date when the HCA's decision is delivered to the infringing parties or on the date when – in the case of a court review – a court delivers a final and binding judgment. Even though the law itself seemed to be quite evident on this issue, a recent judgment³ by the Hungarian Curia (the highest court in Hungary) put an end to the legal debate. The Curia unfortunately sided with the Public Procurement Authority (“PPA”), which argued that the exclusion from tenders starts on the day when the HCA's decision is delivered to the parties, regardless of whether there is a judicial review. Thus, the importance of alternative legal tools for companies that are being investigated for breaching anti-trust rules became more important.

The notion of “self-cleaning” in public procurement law

The legal concept of self-cleaning was introduced into EU law from German and Austrian law. The Austrian Constitutional Court ruled in 1998 that excluding a participant from a public procurement procedure without giving it the opportunity to prove its reliability was a violation of the principle of equal treatment. Subsequently, the Austrian Public Procurement Act introduced the legal concept of self-cleaning. Then, EU law also adopted this concept and self-cleaning was specifically regulated in Section 57 (6) of Directive 2014/24/EU. In order to implement the rules set out in the Directive, Hungary also introduced *self-cleaning* in the Act on Public Procurement.⁴ According to the Hungarian rules, *any company that is subject to an exclusion may submit an application to the PPA in order to establish that the measures taken by it provide sufficient justification for its reliability despite the existence of a ground for exclusion*. There are three conjunctive conditions that must be met to prove “reliability” and thus enable the company to participate in public tenders after infringing competition rules.

The conditions to be able to “self-clean”

First, the infringer has to pay or promise to pay compensation for any damage caused by the infringement.

Second, the infringer also needs to prove that it has disclosed all relevant facts and circumstances in a comprehensive manner by actively collaborating with the competent authorities (in the case of a competition law infringement, this is the HCA).

¹ Act CXLIII of 2015 on Public Procurement

² Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition. Article 11 is the Hungarian equivalent of Article 101 of the TFEU.

³ Decision of the Curia no. Kfv.II.37.320/2022/9.

⁴ Article 188 of the Act on Public Procurement

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Third, the infringer has to take specific technical, organizational and personnel measures that are appropriate to prevent further infringements.

If the infringer proves during the self-cleaning procedure that it meets all three of the above conditions, the PPA may conclude that even though an infringement was committed, the infringer sufficiently demonstrated its reliability and, as a consequence, its exclusion from public tenders is no longer necessary. However, the PPA's case law appears to evolve in peculiar directions when it comes to assessing these three conditions.

Cooperation with the authorities: a road to “mandatory” leniency?

In recent decisions, the PPA has followed a strict approach to assessing whether the second condition for self-cleaning (cooperation with the authority) is met. The PPA only accepts self-cleaning requests by anti-trust infringers if they submitted a leniency application or participated in a settlement procedure during the HCA's investigation. A leniency applicant may receive immunity from fines or receive a fine reduction if it voluntarily submits evidence of its own wrongdoing to the competition authority. In a settlement procedure, companies may also receive a fine reduction in exchange for the waiver of the right to judicial review. In both cases, infringers must acknowledge their involvement in the anti-trust infringement.

Should a company under investigation by the HCA choose to challenge the HCA's assessment (e.g. because it is convinced that no infringement was committed, or because the evidence the HCA collected is inconclusive, etc.), it may find itself in a rather precarious situation after the HCA delivers its final decision. As we explained earlier, the exclusion from public tenders is immediate,

and it seems that the PPA is reluctant to accept a request for self-cleaning unless the alleged infringer has acknowledged its involvement in the wrongdoing. The precarious situation will exist regardless of whether the alleged infringer goes on to challenge the HCA's decision in court.

This approach creates a difficult choice for every company which believes it is innocent: it either “cooperates” with the HCA (meaning that it acknowledges an infringement that it did not commit – thereby also exposing itself to private damage claims) or it chooses to seek judicial review, but in the latter case, it will be excluded from public procurement for three years. This may be critical in some sectors where the vast majority of a business's income comes from public tenders (e.g. the health care sector.)

Last ray of hope – immediate legal protection

Against this background, companies that do not wish to acknowledge an antitrust infringement can only hope to obtain what is known in Hungarian law as *immediate legal protection* from an administrative court. According to Section 50 of the Code of Administrative Litigation⁵, *any person whose rights or lawful interests are violated by an administrative decision may request immediate legal protection from the proceeding court in order to eliminate the directly threatening disadvantage and temporarily resolve the dispute concerning the underlying legal relationship*. With such a temporary injunction, the court suspends the enforceability of the HCA's decision and it may halt the exclusion from public tenders.

In order to obtain immediate legal protection against exclusion from public procurement procedures, a company has to prove that the private interest threatened by its immediate exclusion

⁵ Act I of 2017 on the Code of Administrative Litigation



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from tenders outweighs the public interest in the exclusion of infringers. In a recent case, CERHA HEMPEL Dezső's competition team was successful in proving that a company fined for participating in an alleged bid-rigging cartel would go bankrupt during the three-year exclusion period without the opportunity to verify its innocence during the court review of the HCA's decision. Since it is unlikely that the PPA's or the HCA's practice will change any time soon, we believe that a request for immediate legal protection is now the only option to avoid irreparable harm to companies that are not willing to acknowledge an infringement.

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