GETTING THE DEAL THROUGH

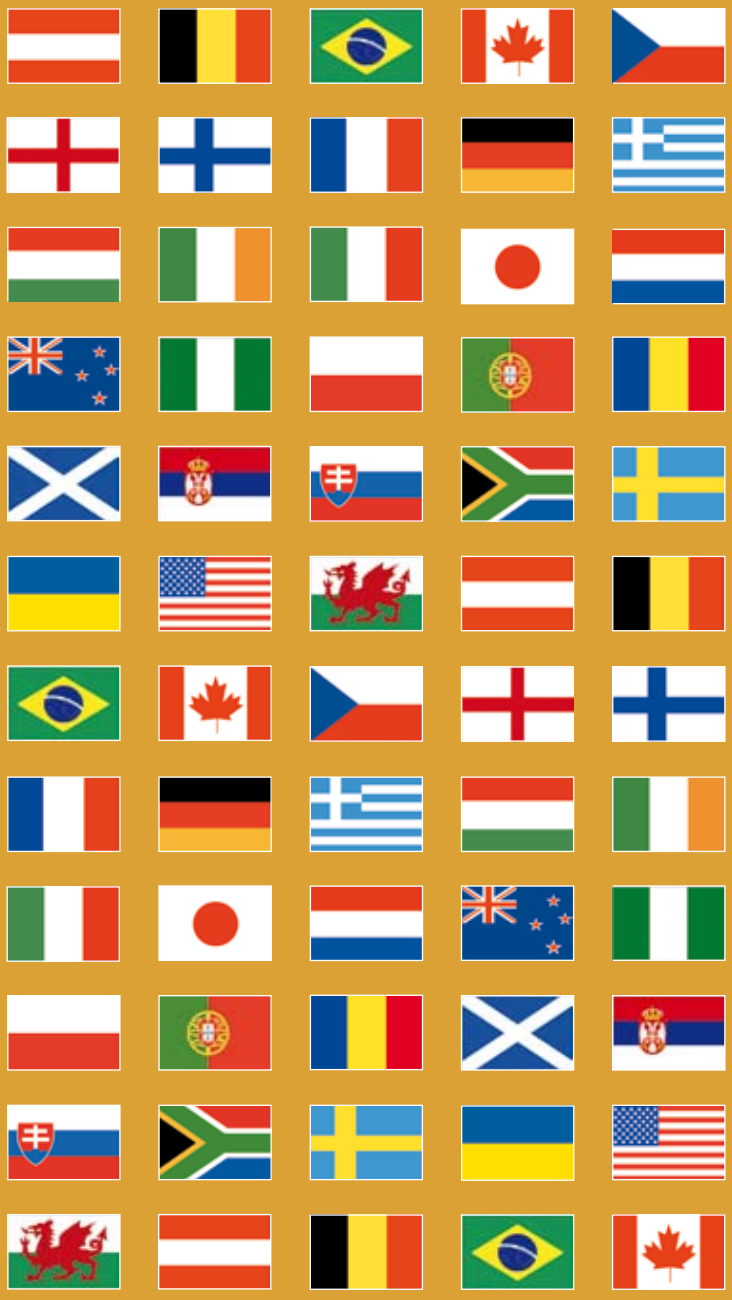
GCR
GLOBAL COMPETITION REVIEW

Private Antitrust Litigation

in 27 jurisdictions worldwide

2010

Contributing editor: Samantha Mobley



Published by
Getting The Deal Through
in association with:

Anderson Mōri & Tomotsune

Baker & McKenzie LLP

Barretto Ferreira, Kujawski, Brancher e Gonçalves – Sociedade de Advogados (BKBG)

Bell Gully

Boekel De Nerée

CHSH Cerha Hempel Spiegelfeld Hlawati

CHSH Gilescu & Partenerii / Cerha Hempel Spiegelfeld Hlawati

Cleary Gottlieb Steen & Hamilton LLP

Edward Nathan Sonnenbergs Inc

Hausfeld & Co LLP

Law Offices Panagopoulos, Vainanidis, Schina, Economou

Linklaters LLP

Maclay Murray & Spens LLP

Mannheimer Swartling

Marques Mendes & Associados

Matheson Ormsby Prentice

Mayer Brown LLP

McMillan LLP

Roschier, Attorneys Ltd

Salans

SimmonsCooper Partners

SJ Berwin LLP

Vasil Kisil & Partners

GETTING THE DEAL THROUGH

Private Antitrust Litigation 2010

Contributing editor:
Samantha Mobley
Baker & McKenzie LLP

Business development manager
Joseph Samuel

Marketing managers
Alan Lee
Dan Brennan
George Ingledew
Edward Perugia
Robyn Hetherington
Dan White
Tamzin Mahmoud
Ellie Notley

Subscriptions manager
Nadine Radcliffe
Subscriptions@GettingTheDealThrough.com

Assistant editor
Adam Myers
Editorial assistant
Nick Drummond-Roe

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen
Senior subeditor
Kathryn Smuland
Subeditors
Laura Zúñiga
Ariana Frampton
Sarah Dookhun

Editor-in-chief
Callum Campbell
Publisher
Richard Davey

Private Antitrust Litigation 2010
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1742-2280

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law Business Research

CONTENTS

Introduction Anthony Maton and Scott Campbell *Hausfeld & Co LLP* **3**

Austria Bernhard Kofler-Senoner and Hasan Inetas *CHSH Cerha Hempel Spiegelfeld Hlawati* **8**

Belgium Françoise Lefevre, Johan Ysewyn and John Biart *Linklaters LLP* **13**

Brazil Paulo Brancher *Barretto Ferreira, Kujawski, Brancher e Gonçalves – Sociedade de Advogados (BKBG)* **18**

Canada David Kent, Martin Low QC and Jonathan Hood *McMillan LLP* **24**

Czech Republic Lucie Bányaiová *Salans* **29**

England & Wales Samantha Mobley, Keith Jones and Francesca Richmond *Baker & McKenzie LLP* **33**

Finland Christian Wik, Inga Korpinen and Sari Rasinkangas *Roschier, Attorneys Ltd* **44**

France Mélanie Thill-Tayara and Marta Giner Asins *Salans* **49**

Germany Alexander Rinne and Monika Heymann *SJ Berwin LLP* **55**

Greece Aida Economou *Law Offices Panagopoulos, Vainanidis, Schina, Economou* **60**

Hungary Bernhard Kofler-Senoner, Tamás Polauf and Ditta Csomor *CHSH Cerha Hempel Spiegelfeld Hlawati* **64**

Ireland Hazel McElwain and Nina Cummins *Matheson Ormsby Prentice* **69**

Italy Mario Siragusa, Cesare Rizza and Marco D'Ostuni *Cleary Gottlieb Steen & Hamilton LLP* **75**

Japan Hideto Ishida and Shigeyoshi Ezaki *Anderson Mōri & Tomotsune* **82**

Netherlands Frederieke Leeflang *Boekel De Nerée* **86**

New Zealand Simon Ladd, Phil Taylor and David Blacktop *Bell Gully* **92**

Nigeria Babatunde Irukera and Ikem Isiekwena *SimmonsCooper Partners* **97**

Poland Anna Maria Pukszto and Patrycja Sałacińska *Salans* **101**

Portugal Mário Marques Mendes and Pedro Vilarinho Pires *Marques Mendes & Associados* **106**

Romania Bernhard Kofler-Senoner, Marius Magureanu and Paula Bourdenet *CHSH Gilescu & Partenerii / Cerha Hempel Spiegelfeld Hlawati* **111**

Scotland Catriona Munro and Sarah Hoskins *Maclay Murray & Spens LLP* **115**

Serbia Milica Subotić *Janković, Popović & Mitić* Bernhard Kofler-Senoner *CHSH Cerha Hempel Spiegelfeld Hlawati* **122**

Slovakia Soňa Hanková *Salans* **127**

South Africa Lee Mendelsohn and Mark Garden *Edward Nathan Sonnenbergs Inc* **132**

Sweden Tommy Pettersson, Stefan Perván Lindeborg and Elin Eriksson *Mannheimer Swartling* **138**

Ukraine Oleksiy Filatov and Oleksandr Mamunya *Vasil Kisil & Partners* **142**

United States T Mark McLaughlin, Andrew S Marovitz and Britt M Miller *Mayer Brown LLP* **146**

Hungary

Bernhard Kofler-Senoner, Tamás Polauf and Ditta Csomor

CHSH Cerha Hempel Spiegelfeld Hlawati

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation?

Competition was regulated for the first time in Hungary by Act V of 1923, which incorporated the main characteristics of the German UWG (Unfair Competition Act of 1909). Since then, competition rules have been further developed by Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices, which was a significant step forward in the course of the harmonisation of Hungarian competition law with EU law principles, and thereafter by Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act). The Competition Act has been further amended by Act LXVIII of 2005, Act CIX of 2006 and Act LXXXII of 2007. These most recent amendments to the Competition Act are not related in any way to the topic of private enforcement.

Competence relating to competition law issues directly based on the Competition Act is divided between the Hungarian Competition Authority and the county courts. Issues relating to unfair market practices fall within the competence of the county courts; other issues regulated by the Competition Act, such as, inter alia, cartels and abuse of a dominant position fall primarily under the competence of the Competition Authority.

The most important amendment of the Competition Act (the amendment), which entered into force on 1 November 2005, clarified various aspects of the private enforcement of claims for damages. The amended Competition Act specifically provides for the possibility of direct civil law actions for damages arising from competition law infringements. Such private antitrust enforcement may take place before courts of regular competence without the need to involve the Competition Authority beforehand as to the question of whether a breach of competition law has occurred.

To date there have only been a few court decisions in Hungary covering private antitrust litigation and there is no significant case law regarding claims for damages based on breach of the competition rules on cartels and on abuse of a dominant position. One such decision confirmed that claims for damages are permissible if a violation of any of the provisions of the Competition Act has occurred.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Applications for cease and desist orders and for damages with regard to unfair market practices on the basis of section 86 of the Competition Act may be filed with the relevant county court. The claimant may demand that the alleged violation is established by the court, that the violation must be terminated and that continued violation by the offender is prohibited.

Claims for damages, and cease and desist orders arising from the breach of other provisions of the Competition Act may be filed with the courts of regular competence on the basis of the general rules of indemnification under the Civil Code and the Civil Procedure Act (for details see question 4).

Further, civil law disputes sometimes involve challenges to the validity of agreements which constitute a breach of the Competition Act. The legal basis for such actions is section 200(2) of the Civil Code which sets out that agreements concluded in breach of legal regulations are generally null and void.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The relevant legislation is outlined in questions 1 and 2.

The relevant courts are as follows:

- In the first instance, county courts are competent for claims filed on the basis of chapter II (in accordance with section 86) of the Competition Act. In such cases, regional high courts serve as courts of appeal.
- Claims for damages arising from the breach of other provisions of the Competition Act (chapters III to V) may be filed with the courts of regular competence. If the value of the claim is below or equal to 5 million forints, it may be filed with the relevant local court in which case appeals are heard by the relevant county court; if the value of the claim exceeds 5 million forints it may be filed with the relevant county court, in which case appeals are heard by the relevant regional high court.
- In the case of civil law disputes involving challenges to the validity of agreements, the competent courts are the local courts.

4 In what types of antitrust matters are private actions available?

In the case of a breach of the provisions prohibiting unfair market practices, individuals and undertakings may file petitions for cease and desist orders and make claims for damages on the basis of section 86 of the Competition Act at the relevant county court.

In accordance with the general rules of tort, actions for damages may be filed on the basis of:

- prohibition of unfair competition;
- unfair manipulation of consumer choice;
- any agreement restricting economic competition; and
- abuse of a dominant position.

According to the related commentaries and legal literature, the provisions of the Competition Act relating to merger control are practically irrelevant in the context of private antitrust litigation as a breach of merger control regulations does not typically result in damage. It seems to be arguable, however, that actions for damages should also be possible in this context on the basis of the general rules of tort (ensuring claims for damages arising out of any unlawful conduct which is in breach of any legal regulation).

5 What nexus with the jurisdiction is required to found a private action?

Any individual or legal entity, regardless of nationality or domicile, may in principle file an action for damages with the relevant Hungarian court provided that the defendant fulfils certain criteria. Generally, the defendant must have a domicile or be resident in Hungary for a Hungarian court to be competent. In particular, actions against EU residents may be filed before Hungarian courts on the basis of Council Regulation 44/2001 on the jurisdiction and enforcement of judgments in civil and commercial matters.

In addition, pursuant to Hungarian conflict of law rules, Hungarian courts have jurisdiction with respect to a foreign defendant having domicile in a non-EU member state, inter alia, in the following cases:

- if the place of performance of the contractual obligation in question is in Hungary;
- for legal disputes relating to a tort if such tort was committed in Hungary, or if, as a consequence thereof, damage has occurred in Hungary;
- if a foreign enterprise has a branch or representative office in Hungary and the litigation pertains to the operations of the latter; or
- if the defendant owns assets in Hungary that may be subject to judicial execution.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals including those from other jurisdictions in certain circumstances (see question 5).

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

8 May litigation be funded by third parties? Are contingency fees available?

There is no explicit or implicit statutory regulation that would restrict or exclude the possibility of stipulating contingency fees for attorneys. Contingency fees are therefore legal in Hungary, but not very common.

To our knowledge, as yet, there exists no litigation funding by third parties in Hungary.

9 Are jury trials available?

Jury trials are unknown in the Hungarian court (judicial) system.

In Hungary, courts proceed with the involvement of professional judges. Trials before courts of first instance are generally heard by a single judge, whereas courts of second instance hear cases in councils comprising three professional judges. Labour law cases are exceptions to this rule (in the first instance two laymen sit with a professional judge).

10 What pre-trial discovery procedures are available?

Under Hungarian law pre-trial discovery procedures may be requested by an interested party before the initiation of or during a civil lawsuit, inter alia, if:

- evidence during the upcoming trial or at a later stage thereof would be impossible or such evidence would be seriously hindered;
- pre-trial discovery facilitates the completion of the trial within a reasonable period;
- the other party has a warranty obligation for the deficiency of certain items; and
- if a separate law makes it permissible to initiate a pre-trial discovery procedure.

The pre-trial discovery procedure is carried out in accordance with the general rules of taking evidence with minor differences, for example, if the pre-trial discovery procedure is initiated prior to the submission of the statement of claim, the competent local court based on the residence (seat) of the applicant or the local court in the territory where it is most practical to hold the pre-trial discovery procedure has competence for such pre-trial discovery. The evidence obtained in the course of the pre-trial discovery procedure may be freely relied on by all parties during the entire proceedings.

11 What evidence is admissible?

The Civil Procedure Act sets out the main forms of evidence admissible in civil proceedings such as the statements of the parties, witness testimonies, expert opinions, (on-site) inspections, documents and other physical objects. This list is not, however, exhaustive. Any other form of evidence may also be permitted as there are no limitations or restrictions in this respect.

12 What evidence is protected by legal privilege?

The Competition Act generally provides for a legal privilege covering certain documents prepared by an attorney for his or her client and further communication between an undertaking and its attorney. In-house counsel are not covered by such legal privilege.

13 Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions before a civil court are available even if there has been a criminal conviction with respect to the same matter. It is also possible for criminal and civil procedures with respect to the same matter to be pending in parallel.

A civil law claim for damages arising from a criminal act may also be enforced in the course of the respective criminal procedure. Amounts recovered in a criminal procedure may not be claimed again in a separate civil procedure.

14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

On the basis of the principle of the 'free use of evidence' and judicial practice, evidence and findings from a criminal procedure can be freely relied upon in a parallel civil procedure.

Civil courts, however, do not have the authority to hold that the convicted person has not committed a criminal act if this has already been established in a final and binding judgment delivered as a result of a criminal procedure. Civil courts, of course, do not have the authority to find somebody guilty of a crime. However, damages may be awarded even if the criminal court has not convicted the person accused.

There is no specific statutory provision or explicit jurisprudence protecting leniency applicants from follow-on litigation.

15 What is the applicable standard of proof for claimants and defendants?

The Hungarian rules of civil procedure do not require a specific standard of proof either for claimants or for defendants. The court

may freely assess the evidence in its entirety and deliver its judgment on the basis of such evidence at its own discretion.

Pursuant to the general rules of the Civil Procedure Act, the burden of proof lies with the party in whose interest it is that the court accepts certain facts or evidence to be true. No evidence is taken ex officio, except if otherwise provided by law.

The Hungarian law on damages is a 'exculpation system', in the course of which the defendant has to prove that he or she behaved in a given situation as it is generally expected that someone would act in that situation to exempt him or herself from liability.

The principle of a passing-on defence in private proceedings for damages has not yet been established in Hungarian legislation. However, the Hungarian Supreme Court developed a similar principle on the basis of which the claimants cannot demand compensation for loss that has already been otherwise reimbursed.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

As class actions do not exist under Hungarian law, the procedural deadlines set out herein are generally applicable with respect to regular (non-class) proceedings.

There is no absolute time limit for the duration of the procedure. To facilitate a timely completion of the procedure, however, several procedural deadlines are set out in the Civil Procedure Act (for example, the court must complete the preliminary examination of the claim within 30 days of its filing, the court has 30 days from the date of filing of the statement of claim to schedule a date for the court hearing and the first hearing must be scheduled to take place within four months following the date of filing of the statement of claim).

In addition, the Civil Procedure Act provides for a general rule pursuant to which a civil procedure must be completed within a reasonable period.

17 What are the relevant limitation periods?

Legal proceedings may be instituted on the grounds of conduct in contravention of chapter II of the Competition Act within six months of becoming aware thereof (subjective term). However, no legal proceedings may be instituted after five years following the date of such conduct (objective term). In the case of a continuous offence, the above-mentioned period will not commence as long as such offence endures.

Claims for damages on the basis of other competition law provisions, such as an infringement of the cartel prohibition or the abuse of a dominant position, etc (see question 4), may be filed by the plaintiff. Claims must be filed within five years of the date of occurrence of the damage or – if the plaintiff was unable to exercise its rights for justifiable reasons – within an additional one-year period as of the date when the reason that prevented it from exercising its rights ceases to exist.

18 What appeals are available? Is appeal available on the facts or on the law?

In the case of applications for cease and desist orders and claims for damages based on a breach of provisions relating to unfair market practices (chapter II of the Competition Act), appeals must be filed with the relevant regional court. In the case of damages claimed on the basis of a breach of the provisions of chapters III to V of the Competition Act, appeals must be filed with:

- the relevant county court if the appeal is against a decision of a local court; or
- the relevant regional high court if the appeal is against a decision of a county court.

Appeals must be filed within 15 days of the date of the receipt of the written decision of the court of first instance. Appeals at the first instance are available both on the facts and on the law.

An extraordinary appeal for review of the second instance decision by the Supreme Court is only available on questions of law (to be filed within 60 days of the receipt of the written decision of the court of second instance). This extraordinary appeal can be filed solely on the basis of procedural mistakes by the Court.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective actions comparable to US class proceedings are not available under Hungarian civil procedural law. There are, however, certain possibilities for combining the claims of different plaintiffs against the same defendants.

Two or more plaintiffs may initiate a joint action against the same defendants if:

- the subject matter of the lawsuit is a joint right or obligation that may only be resolved consistently, or the court's decision affects the plaintiffs or defendants irrespective of their participation in the procedure;
- the claims of the different plaintiffs are based on the same legal relationship; or
- the plaintiffs' claims have a similar legal and factual basis and the same court has competence for all defendants.

In the event of a procedure initiated by a joint action of several plaintiffs, only one procedure will be pending, but, in contrast to collective proceedings, the claims of the plaintiffs will be separately resolved by the court. The plaintiffs are generally free to perform procedural acts independently of one another. The court may consolidate related actions into one procedure either ex officio or at the request of the parties.

Further, a consumer protection organisation, the Hungarian Competition Authority or an economic chamber may introduce a civil law claim on behalf of consumers against any person who caused damage to a large number of consumers or caused significant damage to consumers by an activity violating an Act of Parliament. The Hungarian Competition Authority may file such a claim only if it has competence for such cases and has already established a breach of the Competition Act, which could be a cartel or a dominant position case. Claims may be filed with the court within one year of the date of the breach. The court may require the defendant to lower prices, to repair or replace products or to refund the price. The court may also authorise the plaintiff to publish the court's judgment in a national daily newspaper at the defendant's cost. The defendant must perform the obligations ordered by the court as regards each consumer, as required in the judgment. Consumers may enforce related civil law claims (for example, actions for damages) in separate lawsuits. To date, the Hungarian Competition Authority has not filed such an action.

20 Are collective proceedings mandated by legislation?

Not applicable.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 Have courts certified collective proceedings in antitrust matters?

Not applicable.

23 Are 'indirect claims' permissible in collective and single party proceedings?

A party suffering damage is entitled to full compensation including actual damages, justified expenses and lost profit. It therefore appears that indirect claims are permissible. Whether an indirect claim is permissible in fact will be decided by the court on a case-by-case basis upon consideration of all the circumstances of the case (for example, causality). In practice, however, Hungarian courts tend to be reluctant to award compensation for indirect claims.

24 Can plaintiffs opt out or opt in?

Not applicable.

25 Do collective settlements require judicial authorisation?

Not applicable.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

27 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Remedies

28 What forms of compensation are available and on what basis are they allowed?

The party suffering damage is entitled to full compensation (including actual damages, justified expenses and lost profit). Generally, the party causing the damage must restore the situation that existed prior to the occurrence of the damage. If this is not possible, it must compensate the other party for both material and non-material damage. The compensation must primarily be in the form of cash, except for cases when the circumstances justify natural compensation.

29 What other forms of remedy are available?

Hungarian civil procedural law recognises remedies and measures that may be requested even at the initial stages of or during the proceedings, such as partial or interim verdicts or preliminary injunctions.

A partial verdict is a decision passed by the court with respect to certain separate claims or parts of a claim that can be separately resolved, provided that there is no need for further proceedings in this respect and the hearing in respect of another claim or a claim for an offset must be delayed.

An interim verdict is a decision passed by the court with respect to the legal grounds of a claim prior to actually passing a decision on the amount of such claim.

Preliminary injunctions, which serve the purpose of preventing the plaintiff from suffering damage until a final ruling is delivered, are also available. A preliminary injunction remains in effect until the court repeals it at the request of one of the parties or in the final decision passed with respect to the merits of the case. In Hungary, preliminary injunctions are permitted only within the framework of a lawsuit and may be requested only after or simultaneously with the filing of the statement of claim.

30 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Hungarian law.

31 Is there provision for interest on damages awards?

Based on judicial practice, the party causing the damage must pay interest equal to the base rate of the National Bank of Hungary as from the date of the occurrence of the damage.

32 Are the fines imposed by competition authorities taken into account when settling damages?

Fines imposed by competition authorities are not taken into account when settling damages.

33 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The court must resolve on the settlement of the legal costs in its decision on the merits of the case or in its decision closing the proceedings. Generally, the party that loses the case must bear the costs of the proceedings, including the legal costs. The plaintiff, however, must bear its own legal costs if the defendant did not provide a cause for the action and acknowledged the plaintiff's claim during the first court hearing at the latest. Further, in the event of a partially favourable result of a lawsuit, the legal costs must be borne by the parties in proportion to the claims successfully recovered in the proceedings.

CHSH
Cerha Hempel Spiegelfeld Hlawati
Partnerschaft von Rechtsanwälten

Bernhard Kofler-Senoner **bernhard.kofler-senoner@chsh.at**
Tamás Polauf **tamas.polauf@chsh.at**

Fõ u 14-18
1011 Budapest
Hungary
Tel: +36 1 501 3871
Fax: +36 1 501 3877

Parkring 2
1010 Vienna
Austria
Tel: +43 1 514 35 581
Fax: +43 1514 35 38
www.chsh.at

34 Is liability imposed on a joint and several basis?

If several individuals or entities have jointly caused damage, they are jointly liable for the whole damage. This means that the party suffering the damage may claim the whole amount of the damage from any or all of the defendants. The court may, however, decide that the persons who caused the damage are liable and must provide compensation in proportion to their contribution in causing the damage, provided that this does not prejudice the compensation of the party suffering the damage.

35 Is there a possibility for contribution and indemnity among defendants?

The obligation to provide compensation for damage caused jointly by more than one person will be apportioned between the defendants according to their accountability. This rule does not apply when it is not possible to determine the defendants' contribution in causing the damage. In such a case the compensation must be provided in equal shares by the parties who caused the damage.

If one of the persons who caused the damage jointly provides compensation in excess of their own proportion of accountability, such person would have a claim against the other parties who caused the damage on a pro rata basis.

36 Is the 'passing-on' defence allowed?

The 'passing-on' defence is neither recognised by Hungarian case law nor legislation, and it is as yet uncertain how Hungarian courts would respond to this kind of defence.

37 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There are no other specific forms of defence in Hungary constituted either by statute or case law for the purposes of antitrust cases.

38 Is alternative dispute resolution available?

Hungarian law provides for general civil law mediation, which is also possible with respect to competition law issues. General civil law mediation includes practically all types of civil lawsuits with only specific exceptions, such as administrative lawsuits, defamation cases and certain family law issues. Private antitrust enforcement is, however, generally not conducted through mediation.

PRIVATE ANTITRUST LITIGATION 2010 ISSN 1742-2280