

COMMENT

The ceasefire is over

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On April 10, 2013 the Hungarian Competition Authority (“GVH”) closed the investigation of the *Melon* cartel without establishing an infringement of national or EU competition law. Considered by many as the end of a “war”, in reality, it was just the beginning of a long-lasting ceasefire, which now seems to have come to an end.

The story began in the summer of 2012 when it was heralded by the press that, with the support of the Ministry of Agriculture and the Melon Association, an agreement was created among producers, wholesale traders and supermarkets. According to the agreement, Hungarian melon would be sold by supermarkets on an agreed minimum price. The agreement would benefit—the press reported—producers, wholesale traders, retailers and (paradoxically) consumers as well. The agreement was celebrated all around for a week when the penny dropped; photos appeared of aborted 69 HUF/kilo melon promotions due to the established 99 HUF minimum price. The press discovered that actually this was a cartel!

The parties’ first reactions were fuelled by surprise. The State Secretary for Agriculture first acknowledging that “Yes, it was a cartel”, then, after some days of reflection, “No, it wasn’t” made clear that they did not know (and did not care) that competition law was contravened. This change in state of mind was due to the initiation of proceedings by the GVH, which at first seemed to be in a politically delicate but legally easy situation. While deep government involvement was evident, evidence lay in newspapers, internet sites, YouTube videos, ready to be picked up. However, this legally clear situation was about to change dramatically, with the beginning of a state of war over the entire agricultural sector. The first act of war came in the form of a proposed (retrospectively applicable) amendment of

the Act on Interbranch Organisations. According to this proposal an anti-competitive agreement would not fall under the Competition Act if the agreement is open for participation to all market participants and does not lead to undue revenue for the participants. The decision on what is “undue” was placed into the hands of the Ministry of Agriculture—one of the originators of the cartel. The proposal also had a clause prohibiting the imposition of a fine under TFEU art.101, as the GVH was also proceeding under EU law. However, the need to extend the cartel-saving amendment to the application of EU law was fortunate for the GVH as it gave sufficient ground for the allied force, the European Commission, to intervene.

Unfortunately, the European Commission was (surprisingly?) rather slow in stopping the escalation of the situation. Still being a proposal to be discussed by more than one Parliamentary Committees and to be voted on by the Parliament itself, a sufficiently high level intervention by the Commission might have saved the day. All that rolled out, however, from the Brussels arsenal was a supporting letter addressed to the GVH and to the MP who submitted the proposal (by chance himself a melon producer and wholesaler).

That week, despite the opposition, the proposal became law, changing the legally clear situation to a legal trap for the GVH. Should it apply the new law and stop proceedings according to the will of the lawmaker? Or should it disregard the blatantly non-EU-law-conforming legislation and impose a fine under EU law? Or should it go half-way and establish the infringement of TFEU art.101 without a fine? The GVH finally chose not to fight. In its decision it reasoned that the content of the public interest was put into question by the two colliding pieces of legislation. One Act says that cartels should be banned to protect public interest, the other Act that it is in the public interest not to pursue an anti-competitive agreement in the agricultural sector if they are approved by the Minister. Until further clarifications therefore, the GVH chose to initiate a ceasefire by saying that there is no possibility to proceed against restrictive agreements in the agricultural sector until this issue is cleared up. And thus spoke no more, for two years.

Meanwhile the European Commission was pulling heavy artillery into position, taking steps towards an infringement procedure. Preparing for a quick breakthrough instead of a long fight, it was not questioning how the general exemption of national cartels fits into the Common Agricultural Policy, but only attacked the weakest point, the prohibition of the imposition of a fine for a breach of European competition law (probably for DG Agri being less belligerent than DG Comp).

The Hungarian Government’s defence was determined: it argued that fines may not at all be that important for the application of competition law. However, before things became really serious, the Government sued for terms, proposing the removal of the incriminated element. Here the cautious approach of the European Commission

backfired. As the exemption of agricultural cartels as such was not put into question, only the exemption covering the absence of fines for EU law infringements, it could not but agree to this tactical withdrawal, which took shape in the form of an amendment to the Hungarian Competition Act adopted this June. The amendment basically moves the general exemption from the IBO Act to the Hungarian Competition Act, omits the prohibition of the imposition of a fine under EU law and makes it clear that the Competition Authority is free to decide on the issue of the applicability of EU law. The reasoning of the amendment remains silent on the real causes, and states that the reason for it is only to make it even clearer that the exemption is only applicable when EU law is not applied. If anyone understood it that way before.

In any case, the GVH has every reason to be happy with the new set of rules. Though cartels below EU thresholds would still qualify for exemption by the Ministry, no doubt all major cases could be initiated under EU law. Though now the constrained silence of the

Authority is formally over in the field of agriculture, it is still questionable whether the GVH would indeed start warring on the restrictions of competition within the sector. For example, beside the probable hostility of the sector's opinion leaders, the Hungarian Government itself may not necessarily fully support such an increasingly belligerent approach by the GVH (one may think of the recent right of the Hungarian Government to exempt from merger review any concentrations considered to be of strategic nature or the recent exemption (again by law) of an arrangement among electronic waste recycling companies from the prohibition of anti-competitive agreements).

For these reasons, it would be unreasonable to expect that the Competition Authority revisits the *Melon* cartel, now that the content of public interest is cleared up. Rather the main question is whether it is now really free to act or remains under the (self)constraining effects of shellshock. For the ceasefire is over.