BH 2015.160. „Sweet Life"

The plaintiff had been involved in the production of honey as of 2007 and lemon juice as of 2008, both in small packages and had been distributing these in large packs under the trade name 'Sweet life'. In June 2010, the 1st defendant, founded by a shareholder of the 2nd defendant, **entered the market with honey and lemon juice products similar to the ones distributed by the plaintiff**, under the fancy name 'Honey-Sweet Dream'. The packages of these products have been **under design protection** since April 2012.

The plaintiff filed a private enforcement claim against the defendants in which he asked the court to establish that they have infringed the Competition Act because of the characteristic appearance of the packaging of 'Honey-Sweet Dream' products, by which the plaintiff and its products are normally recognized. He also asked for an injunction ordering the defendants to cease producing and distributing and restrain from doing so in the future, as well as ordering the destruction of the printing devices used for manufacturing. Besides that, he claimed also for damages. In their counterclaim, the defendants contested the deception.

The court of first instance ruled that, from the date of launching the 'Honey-Sweet Dream' products on the market until April 2012, **the defendants committed passing off, as their products, due to the applied graphics and packaging features, created confusion for the consumers** with the plaintiff's products. **Nevertheless, in respect of the period counted from the priority date of the design protection, the court rejected the claim**, including also the claim for the destruction of the devices used for the manufacture of the packages under protection.
The court of second instance rejected the plaintiff's enforcement claim as a whole, explaining that the plaintiff failed to demonstrate that the appearance of his products had become well-known by the consumers, as well as that **there was no real risk of confusion in light of the overall impression**.

In his petition for review, the plaintiff asked the Curia to abolish the judgment delivered by the court of second instance, by reason of irrational consideration of evidence. He requested also the abolishment of the first instance judgment, insofar as it rejects his claim, expressing that in the meantime, the designs had been cancelled by the Hungarian Intellectual Property Office.

The Curia allowed the petition for review, concluding that the court of second instance had wrongly required the plaintiff to disclose information relating to the turnover and market share in order to prove the well-known status of his products. The plaintiff has proved, beyond any reasonable doubt, his presence at the market, from which it logically follows that his products are known by consumers. The Curia held that the court of second instance **had wrongly established the lack of deception. Namely, the overall impression on consumers created by the appearance of the products is a crucial aspect** when judging this issue. In the given case, the subtle differences between details of the packages can be detected only by thorough examination, and thus they do not provide a due distinction for reasonably well-informed and circumspect consumers. The Curia considered it as a decisive factor that **the plaintiff's products were parts of the same product family** distributed in packages of various colours, and **the packages of the defendant's products matched the colours of this product family**, so they pretended, for good reason, to belong to the plaintiff's product family. Based on these arguments, the Curia has abolished the judgment of the court of second instance, while it has upheld the greater part of the first instance judgment.

As far as the protected designs are concerned, the Curia underlined that **the court of first instance had rightly rejected the plaintiff's claims in respect of the period counted from the priority date of the designs**, because it is impossible for a design holder to make unlawful use of his own design. Nevertheless, as the plaintiff initiated a **cancellation procedure** against the designs, **the outcome of that procedure is conclusive**. Thus, the court of second instance should have stayed the proceeding until the final conclusion of the cancellation procedure, but it has failed to do so. And as it was impossible to establish the outcome of the procedure from the files of the present case, the Curia partially abolished the first instance judgment, inasmuch as it had rejected the claim, and ordered the court of first instance to rehear the case in this respect.

BH 2017.410. 'Pork Jelly Festival'

Between 2000 and 2013, the plaintiffs organised every year a festival related to a dish characteristic for a Hungarian city, and they were also granted trademark protection relating to the event. The defendants (the local self-government and a non-profit company owned by the former) concluded a cooperation agreement with the plaintiffs on the joint organisation of the festival in the future, in which they agreed that plaintiffs would consent to the use of name rights and other rights. The cooperation then failed and as of 2014, the defendants organised the festival on their own, under a similar name.

The plaintiffs, after the final rejection of their trademark infringement claim, **filed a private enforcement claim based on the violation of various provisions of the Competition Act (general prohibition of unfair business practices, passing off, comparative advertising).** The defendants asked the court to reject the enforcement claim for several reasons: firstly, they referred to limitation of actions; secondly, they claimed that since nonprofit organisation of events is not an economic activity, the parties to the proceeding are not competitors; thirdly, they contended that the trademark protection did not confer on the plaintiffs the exclusive right to organise an event related to the dish in question.

The court of first instance rejected the claim in respect of both defendants because of the expiration of the limitation period of six months to be counted from the infringement. Besides that, the court rejected the claim in the absence of competitive relationship, holding that the 1st plaintiff had not actually entered the market as an event organizer. Finally, the court noted that the plaintiffs, instead of asking for the establishment of any infringing conduct, had requested the court to declare the unlawfulness of the service performed by the defendants; however, the Competition Act provides no legal ground for that. The court of second instance then upheld the first instance judgment.

In their petition for review, the plaintiffs contested the reasoning of the courts related to the limitation of action, as the infringement is also constant if it is repeated regularly. The plaintiffs also objected the reasons related to the incompatibility of the claim, stating that the defendants have not entered the market with a different kind of service that fosters economic competition, but they have appropriated the plaintiff's event, in the same period of the year.
The Curia held that the final judgment was unlawful, for the following reasons:

1. **As the 1st defendant had made a one-time decision** at the end of 2013 **on organising a festival** every year and selecting the person of the organiser, and as no subsequent

decision was demonstrated by the plaintiffs, **the expiration of the limitation period was lawfully established.**

2. The Curia agreed that the 1st plaintiff was not entitled to bring any proceedings, as **the 1st plaintiff had not personally organised the events.** Even though he performed activities of economic nature, these were insufficient for establishing that he was a competitor.
3. Nevertheless, the Curia expressed that the court of second instance was wrong when concluding that the 2nd defendant's activity was not constant. **Events held on a yearly basis shall be considered as constant, with special regard to the necessary preparatory and follow-up tasks.**
4. The Curia agreed the position taken by the courts according to which the 2nd defendant's conduct could not be judged under the legal provisions referred to in the letter of claims, i.e. the service itself cannot be declared unlawful. Nevertheless, the Curia concluded that **the claim shall be judged according to the so-called general clause of the Competition Act.** In this respect, the Curia underlined that **it was the 1st plaintiff who recognized the business opportunity in the dish characteristic for a particular city and in the related traditions. The knowledge and experience relating to the organisation, the respective business relations, as well as the material and intellectual expenditure on promoting the event represent altogether a pecuniary right that is apparently held by the plaintiffs, and the appropriation of which without the plaintiffs' consent violates the general requirement of fair business practice.** This is especially so, because considering the seasonal nature of the festival, the plaintiffs do not have real opportunity to organise an event on their own.

For these reasons, the Curia abolished the final judgment in respect of the 2nd defendant and altered the first instance judgment, establishing that by organising the event related to pork jelly without the plaintiff's consent, the 2nd defendant violated the general requirement of fair business practice, thus it banned the defendant from further infringement and ordered him to make amends. The Curia stressed that **in case an agreement is concluded between the parties on all issues related to the organisation of the event, the defendant's conduct shall be no more infringing.**

BH2018.178. 'Performance-linked bonuses'

The defendant is a Hungarian chain store, the plaintiff was one of its suppliers. **In the supply contract, the defendant stipulated a bonus program** consisting of constant and dynamic elements which the plaintiff had to pay to the defendant in form of subsequent discounts. Between 2007 and 2009, the plaintiff paid almost 11 million HUF (~ 34 000 EUR) to the defendant on this legal basis. **The Hungarian Competition Authority concluded that** the application of the bonus system was one-sided and without due reasons, thus it constituted an **abuse of dominant position**. The Authority imposed a fine of 50 million HUF (~ 155 000 EUR) and ordered the defendant to cease applying the bonus system.

After that, the plaintiff **filed a private enforcement claim based on the severability of the supply contract and requested the court to order the defendant to refund the amounts paid earlier and pay the lawful interests.** He referred to the provisions of the Act on Trade that had already been referred to in the decision of the competition authority. In its counterclaim, the defendant purported that **for the nullity of contracts violating statutory**

law, established case-law requires that the legal norm in question must lay down nullity separately, in addition to other sanctions. The defendant stated also that severability shall not affect the principal service and its consideration, as well as that even in case of nullity the requested legal consequence shall not apply because **the parties would not have entered into the contract without the disputed clause.**

The court of first instance rejected the claim, explaining that the Act on Trade does not provide in any way that the prohibited conduct should lead to the nullity of the contract at the same time, and such consequence does not follows from the explanatory memorandum of the Act either. The court of second instance then upheld the first instance judgment.

In his petition for review, the plaintiff requested the Curia to abolish the final judgment. He contended that in the given case the sanction provided by a specific area of law does not exclude nullity as a civil law sanction, and **the legislator could not have intended to render a prohibited conduct lawful** by imposing a fine. Thus, the courts acted unlawfully when they failed to establish the nullity of the contract clauses that were in conflict with law. The plaintiff underlined that the legal consequences of nullity shall be drawn only in respect of the severable part of the contract, as well as that the bonus system does not forms part of the price, as it is a price determination mechanism.

The Curia ruled that the final judgment was unlawful. It pointed out that the Act on Commerce serves obviously the purpose of protecting micro-businesses, small and medium-sized enterprises which, due to their position, are forced to apply prices dictated by the purchaser. **Purpose of the fine imposed by the Hungarian Competition Authority is to punish the infringing conduct, as well as to prevent the infringing enterprise and other market players from committing future infringements. Thus, the sanction provided by public law is unable to repair the impairment of the plaintiff's rights**, i.e. it shall not be considered as a legal consequence that excludes civil law sanctions such as nullity in the given case. **In addition, in the present case the abuse of dominant position resulted in a prohibited contractual content** because it is the service (the discount to be paid subsequently) laid down by the contractual clause that is prohibited by law. The Curia underlined that in case of severability, the contract as a whole shall be null and void only if the parties would not have entered to it without the null and void clause. **In other cases the severable clause shall be left out from the contract**, and all payments, which have been made on the basis of that clause, shall be refunded. The Curia did not accept the defendant's reference that he would not have entered into the contract without the clause in question. **Namely, it was the defendant who forced that clause on the plaintiff by abusing of its dominant power, therefore it is unacceptable that he wants to be exempted from the legal consequences with reference to the same conduct.** Based on the above, the Curia abolished the final judgment of the second instance court and altered the first instance judgment in favour of the plaintiff.

EBH 2012.G.1. 'Unilateral agreement in restraint of trade?'

In 2005, the Hungarian Competition Authority initiated a supervision proceeding on the basis of a complaint lodged by the plaintiff and other companies. In 2007, the Authority stayed the proceeding for one month so that the defendant could eliminate its infringing conduct of minor importance. **After the defendant had prepared its rules of procedure relating to the authorisation of repair workshops during the stay period, the Authority terminated the**

proceeding. **The plaintiff filed a private enforcement claim thereafter**, by referring to the violation of the Competition Act and provisions of EU law.

The court of first instance rejected the claim. Its judgment was then upheld by the court of second instance. Both courts explained the decision by the same reasons: first, courts are bound to the decision delivered in the proceeding before the Competition Authority; second, the legal provisions referred to by the plaintiff shall not apply to the defendant's allegedly infringing, unilateral conduct.

In his petition for review, the plaintiff requested the Curia to abolish the final judgment and replace same by a judgment in favour of his enforcement claim.

The Curia held that the petition was unfounded and rejected it. As to the legal opinion of the courts of first and second instance, the Curia established the following:

1. **Courts are bound to the decision of the Competition Authority** (or, in case of a judicial review, the court decision) establishing an infringement or, on the contrary, the lack of any infringement, **only if that decision has been adopted by the Authority in a supervision proceeding initiated during a pending civil proceeding, and the court was obliged by law to stay that civil proceeding**. In the present case, however, the supervision proceeding had been terminated before the plaintiff filed his private enforcement claim, thus the decision of the Authority shall be regarded as an evidence. In addition, the Competition Act does not exclude the possibility that in a civil proceeding, initiated after the termination of the proceeding before the Authority, the court calls the Authority to deliver an opinion.

2. Both courts established correctly that **the prohibition of cartels applies to agreements between independent enterprises, as well as to concerted practices**. The defendant would have breached this prohibition if he had participated in the conclusion of agreements aimed at preventing the plaintiff from entering the market. The agreements concluded by the defendant and its authorised repair workshops, however, do not qualify as such.

3. In the opinion of the Competition Authority, the defendant's conduct was a minor threat of restricting competition because it failed to adopt the rules of procedure. The rules of procedure were prepared after the had been ordered by the Authority to do so, and they included an 'anger or litigation' clause according to which the defendant shall not enter into a contract with any person who has initiated any proceeding against him or with whom he has engaged in litigation. Thus, the rules of procedure has not afforded a remedy to the plaintiff, while the actual infringement was realised by the delay in preparing the rules of procedure. **As a consequence, the defendant's conduct has not realised the infringement purported by the plaintiff (i.e. cartelisation); however, the actual infringement is not in causal relationship with the damage alleged by the plaintiff**. Failing to fulfil all the cumulative requirements of civil liability for damages, the plaintiff's enforcement claim has been rejected.

BH 2015.142. Passing off: confusion of agricultural machines

The plaintiff filed a private enforcement claim, asking the court to establish that, **by manufacturing and distributing products which are so similar to his harvesting adapters**

that it creates confusion, the defendants committed passing off and infringed the general prohibition on unfair business practices. The plaintiff sought for an injunction ordering the defendants to cease the infringing activity and refrain from it in the future, to give satisfaction, as well as ordering the seizure and destruction of the infringing goods. **In their counterclaim, the defendants referred firstly to the expiration of the limitation period**. Secondly, they contended that **their products differ in many details from the plaintiff's products** and, as these products are purchased by a **special group of customers**, there is no likelihood of confusion.

The court of first instance rejected the claim, while the court of second instance granted it. The court of second instance explained that the defendants manufacture and distribute their products with a (dominantly yellow) colour and appearance by which the plaintiff's products are usually recognised. According to the appeal court, passing off can be established because **the defendants' products**, considering their overall impression, **show an identity with the plaintiff's products to such extent that they can be regarded as versions of the plaintiff's products marketed under a new trade name**. As the infringement was constant, the appeal court did not accept the defendants' reference to the expiration of the limitation period. It applied the legal consequences requested by the plaintiff; however, it did not order the destruction of the products by reason of economic rationality, instead it ordered that they should be deprived of their infringing character.

In his petition for review, the 2nd defendant requested the Curia to abolish the final judgment and uphold the first instance judgment. He stated that the appeal court had given a contradictory explanation when it had excluded the reasonable likelihood of confusion and at the same time established the passing off, with regard to a sub-category of confusion, i.e. that his products make the impression that they are akin to the plaintiff's products. The defendant stated that the court had acted like 'laymen' when examining the products which, though, are purchased by a special group of customers.

The Curia affirmed the final judgment. It pointed out that in a review procedure, it is not allowed to reconsider any evidence, except if the consideration of the lower court is either contradictory to the records of the case or irrational. In the present case, however, the Curia did not detect any grave irrationality: such a mistake can be established only in cases where evidence obviously points to the one and only conclusion. The Curia affirmed the position of the court of second instance relating to the interpretation of passing off. **Namely, passing off is realised also if the competitor's product gives the impression that the two products are related to each other, i.e. it seems to be a version of the product that is already known by consumers. There is a likelihood of confusion, if the product that has been placed to the market at a later date is capable of suggesting that it originates from the competitor who entered the market earlier**. In addition to goods and services, the respective provision of the Competition Act prohibits also creation of confusion with the competitor itself who has already achieved positive consumer evaluation due to his expenditures.