

Communication concerning the decision of the Curia of Hungary in
administrative case number Kf.38.305/2018

In its decision number Vj/8-1751/2012 (public version) delivered on 11 January 2016, the Hungarian Competition Authority, the defendant to the case, found that the first plaintiff's decisions taken between 9 June 2000 and 2 December 2012 – the implementation of which had been also helped by the second plaintiff as of July 2000 – had contributed to the management of the so-called BankAdat database in a manner as to restrict competition and contrary to section 11, subsection (1) of Act no. LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition (hereinafter referred to as the Hungarian Competition Act) and – as of 1 May 2004 – Article 101, paragraph (1) of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) and that the plaintiffs' unlawful conduct had consisted in enabling the members of the above database to share individually searchable, strategic data of a commercially confidential nature – not available from other sources or not available without significant delay from the point of view of the market – among themselves. As a result of the aforementioned infringement, the defendant imposed a fine of 4 billion Hungarian forints on the first plaintiff and a fine of 15 million Hungarian forints on the second plaintiff. Based on section 78, subsection (6) of the Hungarian Competition Act, the defendant held the third to thirty-third plaintiffs, an intervener in their support and another financial institution jointly and severally liable for the payment of the eventually non-recovered part of the fines imposed on the first and second plaintiffs.

Proceeding upon the plaintiffs' action, the High Court of Budapest quashed the defendant's decision and terminated the competition proceedings.

Acting upon the defendant's appeal, the Curia of Hungary upheld the first instance court's judgement also with regard to the latter's right reasoning.

The Curia reasoned that the court of first instance had correctly concluded that the defendant had been unable to prove the plaintiffs' unlawful conduct, since it could not demonstrate any anti-competitive objective and had been unwilling to prove any actual anti-competitive effect, because it had considered the demonstration of such effect impossible, in addition, it had tried to carry out a counterfactual analysis, but the latter had covered only one segment of the relevant market, *id est* the lending market of the Hungarian market for financial services and had been carried out in an inappropriate manner. The defendant established the potentially anti-competitive effect of the information exchange concerned without any detailed impact assessment and by making only general references to the Horizontal Guidelines, as a result of which it did not comply with its obligation to produce evidence.

The Curia stressed that an information exchange might have an anti-competitive effect by virtue of section 11, subsection (1) of the Hungarian Competition Act or Article 101, paragraph (1) of TFEU if there was *prima facie* evidence to show that such information exchange would have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. The competition authority is entitled to assess the potential (possible) effects of a completed infringement only if the existing circumstances have prevented it from assessing them prior to the completion of the infringement, which means that there is a kind of sequential logic in the taking of evidence.

Budapest, the 2nd of March 2020

Administrative and Labour Department of the Curia of Hungary