

Preliminary injunction in cartel cases is crucial to avoid certain immediate negative effects of cartel decisions

The undertaking participating in a cartel is not excluded from public procurement if it challenges the decision of the Hungarian Competition Authority (GVH) and at the same time requests immediate preliminary injunction in its court claim. However, if you fail to request preliminary injunction from the court, the GVH's decision is final and enforceable despite challenging the decision.

In an important recent decision, the Curia (Hungarian Supreme Court) clarified the scope of Section 62(1)(n) of the Public Procurement Act. Accordingly, no economic operator may participate in a public procurement procedure if it has committed an infringement of competition law and a fine was imposed either by a decision by the Competition Authority issued not more than three years ago in a cartel case, which has become final and enforceable, or, by a court decision that become final and enforceable, in a court proceeding, challenging a decision of the Competition Authority.

According to the facts, the plaintiff fined by the Competition Authority, challenged the GVH's decision before the court, but failed to request preliminary injunction. As a result, the plaintiff was excluded from a public procurement procedure and unsuccessfully claimed that the above-mentioned provision of the Public Procurement Act (Kbt.) does not apply, because it challenged the GVH's final and enforceable decision before the court.

The plaintiff challenged the exclusion from the tender before the Public Procurement Authority, without success, and therefore the plaintiff appealed to the court against the decision of the Public Procurement Authority rejecting the appeal. In this case, the Curia ruled in a review procedure that if the plaintiff does not seek a preliminary injunction to stop the immediate negative effects, such as the exclusion from tenders, in its legal challenge submitted against the GVH final and enforceable cartel decision, the decision remains enforceable and the exclusion provision from the public procurement procedure applies to the plaintiff.

The Curia pointed out that, until the contracting authority's decision was passed, the plaintiff could have requested in a preliminary injunction, the suspension of the GVH's decision. Failing to do so however, resulted to the fact, that the plaintiff has to wait until the final and enforceable decision of the court.

It is notable, that the wording of the referenced point of the Kbt. is imprecise, since the court does not make a *final* decision, and on the other hand, the court does not issue a decision establishing an infringement of the law subject to a fine. The court of first instance referred these inaccuracies to the Constitutional Court, which, however, pointed out that it was not necessary to annul the contested provision, since the indicated inaccuracies could also be remedied by the interpretation of the law by ordinary courts. In doing so, the Constitutional Court also followed the practice established since the beginning of its operation, according to which a legislative error does not in itself necessarily constitute an unconstitutionality, and it is not the task of the Constitutional Court to remedy it.