LIDC Kiev Congress 2013

REPORT OF THE HUNGARIAN COMPETITION LAW ASSOCIATION

HUNGARY

QUESTION B: “ON WHAT LEGAL GROUNDS COULD OR SHOULD COMMERCIAL PRACTICES, I.E. MANUFACTURING, MARKETING, DISTRIBUTION OR ADVERTISEMENTS, OF ITEMS PRODUCED OR SERVICES RENDERED IN VIOLATION OF STANDARDS, STATEMENTS, COMMITMENTS OR CSR VOLUNTARILY ISSUED OR ADOPTED BY AN UNDERTAKING, BE SANCTIONED OR PREVENTED?”

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1. Please summarise briefly the different types of CSR policies which exist in your country and which types give rise to legal concerns?

‘CSR’ refers to an undertakings’ commitment to conduct business in a way which has a positive impact on the environment, consumers, employees, communities, stakeholders and all other members of the public sphere\(^1\), however, its notion has no clear and accepted definition.\(^2\)

Based on local surveys\(^3\), it can be generally stated that CSR has been present in the activities of Hungarian top-tier and multinational companies only in the past ten years. In Hungary, CSR is treated as a communication tool and considered as part of the image communication, therefore CSR programs are supervised by the PR / marketing departments. Surveys reflect that CSR is already an integral part of the strategy planning of leading firms, however, CSR activities are only rarely represented at the top management level of local companies.\(^4\) In contrast to multinationals which conduct CSR activities – that is more or less influenced by group level CSR commitments –, small and mid-size undertakings in Hungary do very rarely conduct CSR activities.

Remarkably, only a very little (but growing) proportion of local consumers find the seller’s CSR activities as an important / determining factor of their purchase decision\(^5\), as it is the purchase price which is of utmost importance for the Hungarian average consumer\(^6\).

The types of local CSR programs range between voluntary work (Provident), employment of persons with disabilities (Telenor); child support (Raiffeisen Bank); equal opportunities (Magyar Telekom); selective waste collection (Electrolux); donation / sponsorship (Audi Hungaria); education programs (Kürt), shelter programs (McDonald’s), etc. CSR commitments may be reflected in drawing up codes of conduct, development of policies and initiatives, as well as in implementing mechanisms for the supervision of such commitments.

The Hungarian Group believes that only those CSR policies might give rise to legal concerns which refer to a specific commitment of its publisher (advertiser). For instance, if a CSR policy refers to the fact that its signatory does not use any child labour in connection with the production of goods it sells, but in fact, the producer of the goods does employ children, this

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\(^1\) See http://en.wikipedia.org/wiki/Corporate_social_responsibility, last visited on 15 May 2013


\(^5\) http://www.hrportal.hu/c/csr-pr-fogas-vagy-felelos-mukodes-20090910.html

\(^6\) The Hungarian average consumer is particularly price sensitive which is also acknowledged in the practice of the Hungarian Competition Authority, see the Lidl Magyarország case, decision Vj/012-017/2011., section18.
may be qualified as a misleading unfair commercial practice for which the signatory would be liable. In contrast, general declarations and mission statements in CSR policies such as “we are committed to environmental sustainability” does not reflect any specific commitment, therefore such statements are unlikely to trigger the trader’s liability.

We note in advance that there is no relevant practice available in the Hungarian jurisdiction regarding the prosecution / breach of CSR commitments; thus, in practice, CSR policies did not give rise to any specific legal concerns in Hungary, yet.

Legal concerns might arise in the context of sponsorship of certain undertakings and relating to certain products: the Hungarian Act on Business Advertising (Act 2008 of XLVIII) specifically prohibits sponsorship activities relating to of tobacco products if it concerns events or activities involving or taking place in several Member States of the European Economic Area or otherwise having cross-border effects; events in connection with sporting and cultural events, or events or activities relating to health care. Further, tobacco companies are also required to publish the amount of their spending on sponsorship during the current year on their website and in at least two national daily newspapers. Regarding the prosecution of the tobacco sponsorship ban, BAT Hungary has been fined with HUF 10 million (approximately EUR 30,000.) by the National Consumer Protection Authority (NCPA) in 2009 for awarding the “BAT Publicum’s Prize” at the National Theatre of Pécs.8

In the context of media services, the Act CIV of 2010 on the freedom of the press and the fundamental rules on media content generally prohibits surreptitious advertising in the media content. This prohibition refers to any commercial communications the publication of which deceives the audience about the true nature of the communication. In relation to CSR programs, the Act CLXXXV of 2010 on Media Services and Mass Media (Act on Media Services) provides that in media services information concerning the corporate social responsibility of an undertaking shall not qualify as a surreptitious commercial communication, but such reports may only contain the name, logo and trademark of the undertaking and its product or service, if it is closely connected to its social responsibility. The slogan of the undertaking or any parts of its commercial communication may not appear in the report and the information may not expressly encourage the purchase of the product or the use of the service offered by the undertaking.

2. Does the law in your country permit the prevention or sanctioning of a business which carries out commercial practices that breach a CSR policy voluntarily adopted by the business? In particular

2.1. Please set out the relevant legislation and its material aspects. Does the law differentiate between different types of commercial practices that breach a CSR policy? In particular, please distinguish between sui generis laws and those laws which are more

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7 under Article 20(1)
9 under Article 20 (3)
10 under Article 32 (9)
general in nature but can be applied to such practices? For instance, if a business breaches its own self-imposed CSR policy, are consumer protection laws applicable? Are there sui generis laws dealing specifically with breaches of CSR policy?

In Hungary, there are no special sui generis laws in force, which address specifically the breach of CSR policies, however, there are legislative acts which are more general in nature, but applicable if an undertaking breaches its own self-imposed CSR policy which may constitute a violation of the provisions of the Competition Act\(^\text{11}\), the UCP Act\(^\text{12}\) (the local implementation of the EU Unfair Commercial Practices Directive), or the Act on Business Advertising.

If the undertaking breaches its own, self-imposed CSR policy, the provisions of UPC Act\(^\text{13}\) would be applicable to such conduct, provided such breach could be considered as a commercial practice potentially affecting the transactional decision of any consumer in the territory of Hungary. Under the UCP Act, consumers are exclusively natural persons.

According to the Article 5 of UCP Act, codes of conduct shall not encourage unfair commercial practices.

Moreover, the Annex of the UCP Act (so called ‘blacklist’) also lists those conducts, which are specifically ex lege unfair. According to the first and the second point of the blacklist, claiming to be a signatory to a code of conduct when the undertaking is in fact not, as well as claiming that a code of conduct has an endorsement from a public administrative authority or other body vested with public administrative authority, which it did not have, are specifically unfair and therefore prohibited.

The Act on Business Advertising applies to any business advertising performed by persons in their capacities as advertisers, advertising service providers or publishers of advertisements, to sponsorship as well as to codes of conduct relating to them. The CSR breach would be considered as a misleading advertising - subject to the provisions of the Act on Business Advertising - if its addressees were exclusively undertakings (non-natural persons) acting for purposes which do not relate to their respective independent professions and economic activities\(^\text{14}\). Thus, the pertaining provisions of the Act on Business Advertising apply only to B2B relations.

Article 2 of the Competition Act lays down a general clause which prohibits unfair economic activities, which infringe or jeopardize the legitimate interests of competitors, trading parties or consumers or is contrary to the requirements of business fairness. Further, Article 8 of the Competition Act might be also applicable in relation to the breach of CSR commitments. This provision generally prohibits deceiving trading parties (business partners) in economic competition. Paragraph (2) sets out some particular cases of deception of trading parties, which are prohibited according to that Article.

Summarizing the above,

\(^{11}\) Act LVII of 1996
\(^{12}\) Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers
\(^{13}\) UCP Act Article 2. a)
\(^{14}\) Article 2 of the Act on Business Advertising.
- if a CSR breach is considered as commercial practice (such as advertising) affecting any consumer (including any kind of business-to-consumer communications), the UCP Act would be applicable;
- if the CSR breach is committed by advertising (e.g. misleading advertising) which does not concern any consumer (but trading parties / business partners), the provisions of the Act on Business Advertising would apply to such conduct.
- In contrast, if the CSR breach could not be qualified as ‘advertising’, but same deceives / unfairly influences trading parties (business partners), this conduct would be subject to the provisions of the Competition Act.

2.2. Are the relevant laws identified above enforceable by public or regulatory authorities?

2.2.1. public or regulatory authorities?

The UCP Act is enforced by three public authorities in Hungary:

The National Consumer Protection Authority (NCPA) and its local inspectorates have general competence to proceed against unfair commercial practices. However, if the commercial practice concerned relates to an activity of the undertaking which is supervised by the Hungarian Financial Supervisory Authority (HFSA) such as banks, insurance companies and financial service providers, the HFSA shall also prosecute unfair commercial practices by such entities. If the commercial practice is capable of materially affecting competition, the Hungarian Competition Authority (HCA) has the power to proceed. The provisions on misleading and comparative advertising vis-à-vis business partners as well as the provisions of the Competition Act are also enforced by the HCA.

2.2.2. consumers;

Yes. (see explanation below)

2.2.3. competitive businesses? For instance, can a business which competes with the offending company bring an action e.g. unfair competition?

Yes. (see explanation below)

2.2.4. suppliers to and purchasers of the goods or services of the business (e.g. the supplier of Fair Trade coffee to a business that fails to, contrary to its well publicised CSR policy, buy Fair Trade coffee)

Any person (including suppliers, consumers and competitors) may submit a complaint or an informal complaint to the HCA if observing a conduct which infringes the Competition Act or the Act on Business Advertising (misleading of business partners, unfair manipulation of consumer choice, misleading advertising falling within the competence of the HCA). This may result, subject to the decision of the HCA, in the introduction of a competition supervision proceeding. The lodging of both complaints and informal complaints is free of charge. Upon request of the complainant or of the person making an informal complaint, the HCA does not disclose the identity to the undertaking concerned. A complaint can be made

15 Article 10 of the UCP Act
by the use of the form published by the HCA, whereas informal complaint may be submitted without any formal requirements. Hence, even handwritten notes or letters or e-mails can be used for making informal complaints.

Consumer protection proceedings of the HFSA and NCPA can be also launched on the basis of a consumer complaint, but these authorities are also entitled to launch proceedings on their own initiative. Consumer complaints to the HFSA and NCPA are reviewed within the framework of administrative proceedings.

Article 15 (1) of the UCP Act provides that proceedings under the Act shall not prevent injured parties from enforcing civil law claims, which are based on the unfairness of a commercial practice, directly before Court. Accordingly, local consumers and business may file court action for compensation of damages they have sustained. The burden of proof of the accuracy of factual claims in relation to the commercial practice shall rest with the undertaking. Further, both consumers and business partners may file court action based on the infringement of Article 2 of the Competition Act (the general clause) and claim damages as well as restitution for such infringement. (See our answer in detail under item 2.4 below.)

2.3. If enforceable by regulatory authorities, what are the causes of action and range of remedies available to regulatory authorities? In particular

2.3.1. Can a regulatory authority obtain injunctive relief against the business that markets goods or services that breach its own CSR policy?

I. Injunctive reliefs:

According to the Competition Act the Competition Council may, by an interim measure, prohibit by its order to continue the engagement in an illegal conduct or order the elimination of the unlawful situation if prompt action is required for the protection of the legal or economic interests of the interested persons or if the formation, development or continuation of economic competition is threatened.

Article 27 of the Act on Business Advertising also used to empower authorities and courts in the past to prohibit the disclosure of an advertisement which has not been published before if publication had breached the provisions of Act on Business Advertising, however, the Hungarian Constitutional Court established that the respective provision of the Act disproportionately restricted the freedom of the press and free speech, so it has been nullified as being unconstitutional in 2010.\(^\text{16}\)

II. Causes of actions

The causes of actions and the competence for the prosecution of infringement by Hungarian public authorities have been described in detail under 2.1 and 2.2.1, respectively, above.

III. Range of remedies

The Competition Council of the HCA proceeding in the case may in its decision

\(^{16}\) Decision of the Constitutional Court 23/2010 (III.4) AB
(i) establish that the conduct is unlawful;
(ii) order a situation violating competition laws to be eliminated;
(iii) may prohibit the continuation of the conduct which violates the provisions of any of the Acts mentioned in item 2.1;
(iv) where it finds that there is an infringement of the law, it may impose obligations;
(v) may order a corrective statement to be published in respect of untruth information.

The NCPA is entitled to
(i) order the termination of the unlawful situation;
(ii) issue a ban of the unlawful conduct;
(iii) order the business entity to terminate the deficiencies and disparities exposed within the deadline;
(iv) ban, restrict or impose conditions regarding the supply of the goods until the infringement is eliminated
(v) order the temporary closure of the commercial establishment affected until the infringement is eliminated, where deemed necessary for the protection of human lives, health, physical integrity, or for the prevention of dangers posing significant threats to a broad range of consumers; or
(vi) impose a consumer protection fine.

The HFSA may in administrative proceedings
(i) issue a notice to terminate the deficiencies and comply with the law
(ii) order the termination of the unlawful situation;
(iii) impose a ban of the unlawful conduct;
(iv) order to terminate the deficiencies and disparities exposed within the deadline, as well as to and subsequently notify the Authority on the introduced measures;
(v) ban, restrict or impose conditions on the activity until the infringement is eliminated;
or
(vi) impose a consumer protection fine.

According to the Article 92 of the Competition Act, the HCA may file an action to enforce civil law claims of consumers where the infringing activities concerns a large group of individually not known consumers that can be defined based on the circumstances of the infringement. The HCA is empowered to file the action only where it has commenced competition supervision proceedings with respect to the infringement in question. No action may be filed after the end of three years following the date when the infringement was committed – regarding the time limit, the duration of the competition supervision proceeding shall not be taken into account. Where, with respect to the consumers affected by the infringement, the legal grounds for the claim and the amount of damages demanded, or the overall contents of the claim in the case of other claims, can be clearly established irrespective of the individual circumstances of the consumers affected by the infringement, the HCA may request the court to award such claims and order the business entity in question to satisfy these claims, or failing this, to request the court to declare the infringement covering all consumers indicated in the claim. If according to the court’s decision the violation was established covering all consumers indicated in the claim, the consumers affected may file charges against the business entity and are required to verify only the amount of damages and that the damage is the direct result of such infringement. The court’s decision shall specify the consumers who are affected by the violation, and therefore are entitled to demand satisfaction based on the judgment, and shall determine the data required for their identification. In its
ruling the court may authorize the HCA to publish the court’s decision in a national daily newspaper (at the expense of the infringer), or to make it available to the general public (by means consistent with the nature of the violation.). If the court’s decision, apart from having established the violation, also orders the business entity to provide satisfaction for a specific claim, the infringer shall be required to satisfy the claim of the consumer on whose behalf the judgment was awarded. If the consumer’s claim is not satisfied voluntarily, the consumer may request judicial enforcement. The court shall probe the consumer’s entitlement in its proceedings for the issue of an enforcement order.

The HCA has already filed one action to enforce civil law claims of consumers. The infringers have been the operators of webpages which contain real estate ads, and based on the same database. The HCA carried out a competition supervision proceeding, and established, that the examined conduct was unlawful, and imposed HUF 6.6 million (EUR 22,500) fine. After the competition supervision proceeding, the HCA observed unfair terms in their contractual practice, so brought an action to the court. The court established the unfairness of the objected terms, and cancelled them pertaining to all the contracting parties. (The court’s decision is not final and binding.)

Similarly to the HCA, the NCPA and the HFSA are also entitled to file court actions for the enforcement civil law claims of consumers where the infringing activities concerns a large group of individually not known consumers, provided that the infringement of consumer protection laws have been established by the authority proceeding in the case. The enforcement of the claims of the HCA, NCPA and HFSA does not prejudice the right of consumers to take individual action by themselves against the infringers under the general provisions of civil law.

2.3.2. Can a regulatory authority impose fines or imprisonment on businesses that breach their voluntary CSR policies by way of punishment? If so, what are the criteria to be taken into account to determine the size of that fine or period of imprisonment?

As it is the competence of Hungarian criminal courts to impose punishment for criminal acts, consequently, pubic authorities cannot impose imprisonment for the criminal breach of the above identified legal provisions.

If the breach of CSR infringes the legal provisions mentioned in item 2.1., local regulatory authorities may impose monetary fines.

(i) **NCPA:** In the event of a violation of consumer protection regulations, the NCPA may impose a fine by resolution which may range between HUF 15,000 (EUR 50) and 5 % of the net sales revenue of the undertaking in the preceding business year. The fine may not exceed HUF 2 billion (EUR 6.5 million) for the most serious violations of the law (or if the infringement concerns the lives, health, or physical integrity of a broad range of consumers, or results in substantial financial injury to a broad range of consumers). In connection with setting the fine, the NCPA shall consider the circumstances of the case, with particular emphasis on the sphere and gravity of damages caused to consumers, the duration of the

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17 see press released o the HCA under http://www.gvh.hu/domain2/files/modules/module25/19129651F7AABB35E.pdf, last visited on 15 May 2013
18 see Article 38 of the Act 1997 of CLV on Consumer Protection
19 see Article 116 of the Act 2010 of CLVII ont he HFSA
violation and repeated offense, and on the advantage gained by such violation. In case of mid-
size and small undertakings no fine can be imposed in case of the first time violation of
consumer protection provisions\(^{20}\), unless the breach concerns a broad range of consumers.

(ii) **HFSA:** In the event of a violation of consumer protection laws by financial
organisations, the HFSA may impose a fine between HUF 100,000 (EUR 300) and HUF 2
billion (EUR 6.5 million).\(^{21}\) When determining the amount of the fine, the HFSA shall
consider (i) the gravity of the infringement; (ii) the effect of the unlawful conduct on the
market or safety of operation; (iii) effect on other market operators and clients; (iv) effects on
other participants of the financial sector; (v) the risk perpetrated by the conduct, the amount of
damages caused and voluntary restitution of the damages; (vi) cooperation of responsible
persons of the infringer with the HFSA; (vii) good faith or bad faith of the person subject to
the authority’s measure and the material advantage obtained by them in connection with the
conduct; (viii) concealment of information or the attempt thereof; (ix) repeated infringement.

(iii) **HCA:** According to the Article 78 of the Competition Act, the proceeding Competition
Council of the HCA may impose a fine on persons violating the provisions of the Act. The
maximum fine shall not exceed ten per cent of the net turnover, achieved in the business year
preceding that in which the decision establishing the violation is reached, of the undertaking
or, where the undertaking is member of a group of undertakings, which is identified in the
decision, of that group of undertakings. The maximum fine imposed on social organizations
of undertakings, public corporations, associations or other similar organizations shall not
exceed ten per cent of the total of the net turnover in the preceding business year of
undertakings, which are members of them. The Competition Act also lays down the criteria to
be taken into account by the proceeding competition council to determine the amount of the
fine. It shall be established with respect to all circumstances of the case taken into account, in
particular the gravity of the violation, the duration of the unlawful situation, the benefit gained
by the infringement, the market positions of the parties violating the law, the imputability of
the conduct, the effective cooperation by the undertaking during the preceding and the
repeated display of unlawful conduct. The gravity of the violation shall be established, in
particular, on the basis of the threat to economic competition and the range and extent of harm
to the interests of consumers and trading parties.

The HCA has published Notice No. 1/2007 on the method of setting fines in cases of unfair
influence on consumer decisions.\(^{22}\) The notice describes the basic principles of the practice of
the HCA, summarizes past experience and outlines the practice to be followed in the future. In
general, as a starting point, the HCA first refers to the advertising expenses of the undertaking
and presumes that the company intended to realize a profit that exceeds its expenses. Second,
the HCA examines the aggravating factors (effect on the market; the nature of the product
(health care products); the intensity of the communication, including the scope of the
consumers at which the advertising was directed, and the application of the complex
communication campaign; the duration of the illegal conduct; the advantage gained by the
illegal conduct; etc.) and the extenuating circumstances of the case (first proceedings
launched; although the violation of competition law rules shall be established on the basis of

\(^{20}\) Article 12/A of the Act of XXIV of 2004 Act on SME’s

\(^{21}\) Article 62 (1) of the Act on the HFSA

\(^{22}\) see the Notice under

2.4 If enforceable by private undertakings (e.g. competing businesses), what are the causes of action and remedies available to private entities? e.g. competing businesses where another business has failed to comply with its CSR policy? In particular, 2.4.1.

Can undertakings obtain financial compensation against competing businesses that breach their CSR policies? If so, what are the criteria for determining the level of compensation? For instance, where a business can prove that it has lost substantial business to a business promoting chocolate sourced from Fair Trade farmers, can it recover compensation if it is proven that in fact, the business was not selling chocolate so sourced? What about a collective e.g. the Fair Trade cocoa farmers themselves? Will they have locus standi to bring an action and if so, what type of action?

Although there is no relevant practice available in Hungary regarding the breach of CSR commitments, in theory, breaching CSR policies may be considered as the breach of the prohibition on unfair competition as set forth in Article 2 of the Competition Act.

This contains a general clause which provides that "it is prohibited to conduct economic activities in an unfair manner and, in particular, in a manner which violates or jeopardizes the lawful interests of competitors, business partners and consumers, or in a way which is in conflict with the requirements of business integrity."

This general clause establishing the general prohibition on unfair competition in Section 2 is a so called "subsidiary provision". If the market practice subject to the litigation does not fall under any specific provisions (denigration and discrediting of competitors, passing off, acts infringing trade secret, prohibitions of calls to boycott and unfair influencing of a bidding process), it shall be evaluated under this subsidiary provision and Section 2 can be used as an independent legal ground.

The Competition Act does not define unfairness. Therefore, in the lack of a normative definition, it is the task of the judge to define the concept of "fairness" in light of the specific behaviours subject to the legal dispute. Fairness is interpreted as the prevalence of "good morals" among competitors. In the course of adjudicating whether a practice is fair, in particular social expectations, usages and standards will be decisive factors. However, the alleged unfairness must have an impact on competitors that is equal to the expressly-named incidences. Causing confusion, discrediting a competitor or making false allegations about a product are pretty harmful practices, and in order for any commercial conduct to be prohibited directly under the general clause, it has to be equally serious and harmful to competitors.23

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According to the court practice, for example, if the competitor uses a product name which does not comply with the legal requirements for using such a name, this constitutes unfair market practice. The basis of the unfairness is that the infringing party gains a competitive advantage over his competitors who comply with legal rules, and he saves on the investment costs necessary for the production of goods complying with the legal requirements.24

On the basis of the breach of the prohibition of unfair competition (Section 2 of the Competition Act), the injured party may demand:

(i) declaratory relief (the violation of the law to be established);
(ii) the cessation of the violation of the law and to enjoin the infringing party from any further violation of the law;
(iii) that the infringing party gives satisfaction (makes an apology) by making a statement or by another appropriate manner, and, if necessary, that sufficient publicity be given to the satisfaction (apology) on the part or at the expense of the party violating the law;
(iv) to terminate the infringement, the restitution in integrum, and to deprive the goods - manufactured or placed on the market through the violation of the law - of their offending character, or, if this is not possible, the destruction thereof, and the destruction of any special devices and facilities used for the manufacture thereof;
(v) compensation for damages in accordance with the rules of tort law, and
(vi) that the defendant disclose information about the parties participating in the manufacturing and marketing of the products involved in the case as well as information about the business relations it has established to distribute such products.

The court has also the competence to impose a fine.

As a general rule, pursuant to Section 156(1) of the Hungarian Civil Procedure Code25, a court may issue a preliminary injunction in order to (i) prevent imminent damage; (ii) maintain the status quo during a legal dispute; or (iii) to protect the claimant's rights requiring special protection. This stands as long as the burdens imposed by such a measure do not exceed the benefits that may be gained by it. The facts relating to the reasoning of the request for a preliminary injunction must be of a probable nature.

The civil law remedies which are not irreversible can be requested by way of interim relief.

Damages may be claimed if it can be proven that the aggrieved party suffered damages which were caused by the action or omission of the other party, thus there is causal connection between the loss of business and the infringing conduct (i.e., the claim that chocolate is sourced from Fair Trade farmers).

This causal connection can arise out of an active conduct or passive omission and can be either direct or indirect.

The party causing the damages may be exempted from liability if it proves that the causing of damages was not illegal or can be exempted from liability by proving that it acted in a way that can generally be expected under the given circumstances.

24 BDT 2005.1087
25 Act No III of 1952 on the Civil Procedure Code
Under Hungarian law, it is the injured party only who is entitled to enforce its claim. It is not possible to assign the right to initiate an action. Any association of traders cannot start action on behalf of its members. It has *locus standi* only if the association is the injured party itself.

Two or more claimants, in the instant case, several Fair Trade cocoa farmers, can initiate a joint action if any of the following apply:

(i) The subject matter of the claim is a joint right or obligation that can only be judged uniformly, or the judgment will affect the claimants jointly irrespective of one of the claimants' absence from the procedure.

(ii) The claimants' claims are based on the same legal relationship.

(iii) The claimants' claims have similar legal and factual bases and the same court has jurisdiction for all defendants.

2.4.2.

If so, how close must the connection be (nexus) between the commercial practice which breaches the CSR policy and the goods produced or services supplied by the business with the CSR policy for the private business to be able to obtain relief (whether injunctive or financial). In this regard, imagine three situations by way of example,

2.4.2.1. coffee marketed with a Fair Trade label on it which was not sourced from Fair Trade coffee farmers;

2.4.2.2. coffee marketed by a business which has imported coffee using ships which emit excessive carbon dioxide and do not comply with the business’s “green” CSR policy;

2.4.2.3. Coffee marketed by a business which advertises its CSR policy of providing 2% of all sales revenue to educating children in the third world but upon audit, is found not to have complied with that policy.

Will the remedies differ in such circumstances? E.g disgorgement of profit or compensatory damages.

What is decisive is whether the conduct infringes the prohibition of unfair competition and whether as a result of such an infringement, the private business suffers damages. In such a case, the claims mentioned above under Section 2.4.1 can be enforced.

As for Section 2.4.2.3, we refer to the obligation of so-called public commitment regulated in Sections 593-596 of the Hungarian Civil Code. Public commitment is a gratuitous undertaking made in written form to provide a financial contribution for a specific public purpose defined by the obligor. This commitment can be made either in an agreement concluded with the obligee or in a unilateral declaration of the obligor.

In the instant case, if there is a public commitment made in written form and if there is a specific beneficiary designated to utilize the contribution, the breach of this commitment may have legal consequences since the beneficiary may claim the performance and also damages, if there are any, in connection with the non-performance.

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26 Act No IV of 1959 on the Civil Code
If the obligor has not designated any specific beneficiary to receive the contribution for the specified purpose, the court shall appoint one on the basis of the public prosecutor’s petition.

2.5. **What powers do private or public concerns have to obtain information from businesses with CSR policies to prove or disprove that they have complied with or are complying with such policies?**

Private and public concerns do not have power to obtain information directly from the businesses failing to meet CSR. However, private and public concerns may submit a complaint or an informal complaint to the HCA or file action before court, moreover, consumer representative associations may initiate administrative procedure before NCPA or before HFSA, in which procedures the breach of CSR may be proved as follows:

(i) **HCA**: The procedure of HCA composes two phases: 1.) investigatory procedure, 2.) competition supervision proceeding. Upon the complaint or the informal complaint the investigator of the HCA shall have authority to obtain the data necessary for examination of the notification, to conduct a hearing for the parties concerned. If the party affected refuses to cooperate in this investigatory phase, no administrative penalty may be imposed nor may any means of coercion be used. The documents of the case may not be inspected by the complainant. Upon the complaint or the informal complaint the HCA may initiate a competition supervision proceeding *ex officio*, therefore the complainant and the person making an informal complaint do not become parties, not even when the HCA initiates its proceeding based on the document which they submitted. During the competition supervision proceeding, the HCA have the possibility to use the investigative measures as follows: request for information, hearing of witnesses, access to documents, on-site inspection, seizure, sealing or the making of forensic images about the computer database. In this second phase administrative penalty may be imposed if the affected business entity refuses to cooperate.

When no administrative proceeding is initiated by the HCA on the basis of the complaint, the complainant may turn to the Municipal Court of Budapest for legal remedy. In the course of court proceedings the provisions of the Hungarian Civil Procedure Code on administrative actions shall be applied. In course of the lawsuit the burden of proof shall lie upon the party claiming the infringement. Means of proof shall, in particular, include testimonies, opinions of experts, inspections, documents and other physical evidence. The court may order to launch the inquiry within thirty days. Contrary to case of formal complaint, if the HCA does not initiate any competition supervision proceeding, the person making the informal complaint may not turn to the court for legal remedy.

In case of misleading advertising, the procedure differs as follows: Upon the complaint or informal complaint, HCA may request the advertiser to furnish evidence as to the accuracy of factual claims in advertising. In the absence of compliance by the advertiser, factual claims shall be deemed not to be accurate. The investigator does not have any choice; he shall issue an order opening an investigation in case the infringement is likely rendered.

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27 Chapter XX of the Hungarian Civil Procedure Code
28 The Competition Act (Act LVII of 1996) Article 88/B Section 7
29 Article 29 of the Act on Business Advertising Activity
30 Article 30 Subsection 1 of the Act on Business Advertising Activity
In case of unfair manipulation of consumer choice cases falling within the competence of the HCA, the procedure differs as follows: Upon the complaint or informal complaint, HCA may request the undertaking to furnish evidence as to the accuracy of factual claims in relation to the commercial practice. In the absence of compliance by the undertaking, factual claims shall be considered to be inaccurate. The investigator does not have any choice; he shall issue an order opening an investigation.

(ii) **NCPA:** In case of unfair manipulation of consumer choice cases falling within the competence of the NCPA, consumer representative associations are entitled under the Act on Consumer Protection to initiate and take part in the administrative procedure as clients and in that procedural position motion for evidentiary procedure. The complaint of the consumer representative association shall be inquired in 30 days by NCPA. The following evidentiary measures may be used in NCPA’s procedure: request for information, hearing of witnesses, access to documents and other physical evidences, seizure, inspection, opinions of experts.

(iii) **Court:** Consumer representative associations are entitled to file an action against the manipulative undertaking if several consumers are concerned. In such court procedures the general rules of Act on the Code of Civil Procedure shall be applied. The burden of proof shall lie upon the party required to produce evidence, so mainly on the applicant. Means of proof shall, in particular, include testimonies, opinions of experts, inspections, documents and other physical evidence.

In case the private concerned is the injured party of the misleading advertising or the unfair manipulation of consumer choice, he can file an action in court. In proceedings of the court the burden of proving the accuracy of factual claims in advertising shall rest on the advertiser/undertaking.

3. Do you consider that the laws in your country deal satisfactorily with commercial practices where a business commits a breach of its own CSR policy? In particular,

3.1. In your country, is there a significant issue with businesses not complying with their own CSR policies or exaggerating their effect?

There is no relevant practice available. To the best knowledge of the Hungarian Group, no breach of CSR policies has been established, yet.

3.2. What concerns do consumers/businesses have about non-compliance? How serious do consumers/businesses in your country view a business who fails to adhere to its CSR policies? Do consumers feel that breaches of CSR policy should be a matter of legal sanction or simply be a combination of adverse public comment (e.g. in the press) and the commercial sanction of consumers moving their custom to other businesses seen as a sufficient deterrent? Does this latter view only work where there is sufficient

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31 Article 14 of the UCP Act
32 Article 26 Subsection 1 of the UCP Act
33 Article 46 Subsection 2 a) of the Act on Consumer Protection
34 Article 39 of the Act on Consumer Protection
35 Article 15 Subsection 1-2 of the UCP Act and Article 24 Subsection 5 and Article 29 Subsection 2 of The Act on Business Advertising Activity
transparency about a business’ commercial practices i.e. there is sufficient confidence that breaches of a CSR policy by a business can be detected?

According to local surveys, Hungarian consumers show very little interest / concerns in consumer protection matters.36 No relevant survey is available on consumer expectations relating to the breach of CSR commitments.

3.3. In what ways (if at all) do you consider that your country’s laws fail to meet those private and public concerns?

n.a.

3.4. How should the law be changed to meet those failings? Please differentiate between failings as to substantive law and failings as to remedies.

n.a.

3.5. Do you consider that the laws of your country deal satisfactorily with the ability of consumers or regulatory authorities to police the compliance of businesses with their CSR? What powers of investigation/disclosure of documents and/or internal information/examination of key employees exist?

The Hungarian Group believes that there is no gap in the relevant laws of Hungary.

4. In your country, what issues are raised by competition law in your country where a number of undertakings in a horizontal relationship (e.g. fish wholesalers) agree voluntarily to commit to a CSR policy? In particular,

4.1. Is the position different if those undertakings have a substantial market share? In a collectively dominant position?

4.2. Where that CSR policy becomes a de facto or de jure standard (private or government-encouraged) for trade in goods or services, what is the position under the competition law of your country? Please consider the position in particular where the CSR standard is protected by IPRs (e.g. a logo which indicates to the consumer compliance with the CSR Standard and which is a registered trade mark or collective mark). In such circumstances, can those IPRs be subject to FRAND-type (Fair, Reasonable and Non-Discriminate) licences, and if so on what domestic legal basis?

I. Horizontal cooperation issues

One of the typical manifestations of CSR policies can be realized when (potential) competitor companies, operating on the same market level, act similarly or in the same way. It is generally stated that the relationship between actual or potential competitors may be commonplace and economically beneficial, and even necessary, too. However, problems may

arise during implementation of CSR measures if same realizes an unlawful cooperation between competitor undertakings which have as their object or potential or actual effect the prevention, restriction or distortion of competition, such as
(i) the direct or indirect fixing of prices or business terms and conditions;
(ii) the limitation or control of production, distribution, technical development or investment;
(iii) the allocation of sources of supply, or the restriction of their choice as well as the exclusion of a specified group of consumers from purchasing certain goods;
(iv) the allocation of markets, exclusion from sales, or restriction of the choice of marketing possibilities;
(v) the hindering of market entry;
(vi) discriminatory practices, or
(vii) making the conclusion of contracts subject to the acceptance of obligations, which, by their nature or according to commercial usage do not belong to the subject of such contracts.

Cooperation between market participants might have significant achievements, including innovation, cost savings, risk sharing, improved product quality and selection. There is a need that certain cooperation forms are excluded from the scope of the general prohibition of competition restriction, such as agreements which support the reasonable and harmonic economic development. Accordingly, the Competition Act provides under Article 17 that prohibition on agreements restricting or distorting the competition shall not apply to an agreement if it complies with all of the following requirements:
(i) it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness;
(ii) a fair part of the benefits arising from the agreement is conveyed to the consumer or the business partner;
(iv) the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals;
(iv) it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.37

The above general test is also applicable with regard to the adoption of CSR policies or CSR standards by competitors or associations / organizations of undertakings which operate with the participation of competitor undertakings. In its practice, the HCA, which is responsible for the enforcement of the prohibition of competition restrictive agreements, also considers the Communication of the European Commission on horizontal cooperation agreements which lists the main aspects of beneficial horizontal cooperations. The Hungarian group believes that CSR having a significant positive impact on the environment, consumers, employees or communities could potentially benefit from the exemption under Article 17 of the Competition Act if restrictions of competition are outweighed by such beneficial effects. The Hungarian Group notes that there is no relevant practice available on horizontal cooperation competition issues of CSR in Hungary.

37 Article 17 of the Competition Act
38 COMUNICATION FROM THE COMMISSION Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Text with EEA relevance) (2011/C 11/01)
II. Abuse of a Dominant Position

CSR policies might under certain circumstances also trigger liability under the general prohibition of abuse of a dominant position which is prohibited by Section 21 of the Competition Act.

CSR undertakings might be linked to the use of a certification mark by undertakings. If the holder of such mark refuses to grant a licence, this conduct might be considered as an abuse of a dominant (economic) position. The Competition Act prohibits the abuse of a dominant position, which covers in particular, the following conducts:

(i) the refusal to establish or maintain business relations adequate for the nature of the transaction without any justification;
(ii) the hindrance of competitors from entering the market in any other unjust manner; or
(iii) creating a market environment that is unreasonably disadvantageous for the competitors or to influence their business decisions for the purpose of gaining unjustified benefits.

However, the refusal to grant a license and limitations on the scope of license granted cannot be considered as in and of themselves per se infringements of competition law (cf.: C-238/87, Volvo]. If we apply the doctrine of abuse of dominant position to intellectual property rights, we are in effect placing an external competition law limitation on the given rights.

There is no relevant practice available on abusive practices specifically relating to the CSR of undertakings having a dominant position of the relevant market.

III. CSR standards protected with IPRs

In practice, the companies adopting the CSR use a specific logo which indicates to the consumers the compliance with the CSR Standard. This logo can be a registered trade mark, or in particular certification mark.

The Hungarian Trademark Act provides that certification marks are trademarks that distinguish goods or services of specified quality or of other characteristics from other goods or services by attesting to such quality or characteristic (Article 101(1)). The holder himself may not use the certification mark for the purpose of certification, however, he shall authorize its use for such purpose with respect to the goods or services complying with the prescribed quality requirements or with other characteristics.

It shall be noted that Article 21 of the TRIPS Agreement sets forth that compulsory licenses may not be granted for trademarks. In respect of trademarks, we refer to the fact that there are numerous limitations on the trademark right holder’s exclusive right of use, based on competition policy:

- the use of indications of the characteristics of the goods or service;
- indicators for the proper use of the goods or service, particularly in the case of accessories or spare parts;
- use of the trademark in comparative advertising.
We refer to the fact that LIDC has analysed in the detail the issue of compulsory access to IP and network facilities. Competition law limitations on intellectual property rights, under the heading of abuse of a dominant position, can only be allowed upon the existence of special circumstances in the cases of functional, industrial creations (software, non-unique original databases). Even in these cases, they can only be allowed if it can be proven that the subject of protection is an indispensable (essential) facility. The use of a logo cannot be considered as an essential facility.

**SUMMARY**

In Hungary, CSR activities are generally conducted by top-tier and multinational companies and it includes various range of programs and initiatives of undertakings mainly focusing on values outside business. CSR is part of the image communication of companies, therefore such programs are eligible to influence the purchase decision of consumers. However, as a general rule, only those CSR might give rise to problems, which formulate specific commitments instead of more general mission statements of companies.

The Hungarian legal framework already addresses the issue of voluntary commitments by undertakings, as well as non-compliance with such commitments. Prosecution of breach of such commitments – depending on the material effect on competition or scope of activity of the undertaking – are delegated to three public authorities, including the Hungarian Competition Authority, the National Consumer Protection Authority as well as to the Hungarian Financial Supervisory Authority. Competitors could enforce the general clause on the prohibition of unfair competition before Hungarian courts which may order injunction, award damages, or, in principle, impose a fine if the unlawful conduct can been established. The burden of proof always lies on the publisher that its statement / commitment is true.

The Hungarian group established that there is no legal gap regarding the relevant laws on CSR in Hungary, since Hungarian law provides several causes of action / remedies in case of the breach of CSR commitments, including damages claims. There is no relevant practice available in the Hungarian jurisdiction regarding the prosecution and breach of CSR commitments; as CSR policies did not give rise to any specific legal concerns in Hungary, yet.

Due to the growing importance of CSR in the context of commercial communications, the Hungarian Group recommends that CSR should be treated as a commercial practice if it reflects specific commitments of undertakings. However, the Hungarian Group believes that there is no need to address the issues raised by CSR with *sui generis* legal regulations.