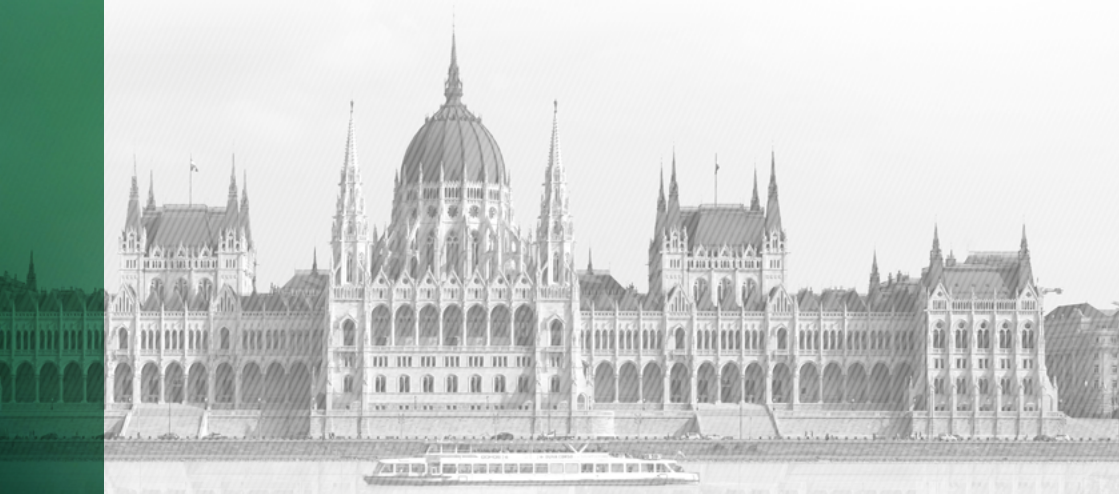
HUNGARIAN COMPETITION AUTHORITY

TWENTY YEARS OF EU COMPETITION LAW IN HUNGARY

EDITED BY MARTIN MILÁN CSIRSZKI



COMPETITION MIRROR

EDITED BY ANDRÁS TÓTH

TWENTY YEARS OF EU COMPETITION LAW IN HUNGARY

Edited by
Martin Milán Csirszki

András Tóth (series editor)

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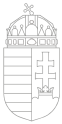

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Foreword

Not so long ago, I attended a panel discussion that revolved around the development of cartel law in Hungary. The panel consisted of renowned Hungarian competition law practitioners and scholars as well. First of the many questions that arised during the discussion was the level of development of Hungarian cartel law in regional comparison. The answers by panelists, of whom some contributed also to this book, were clearly in line with one another. Hungarian competition law, in particular cartel law, performs well compared to other countries in the region. Of course, one could also say that – out of politeness – no other response would have been realistic to such a question at the headquarters of the Hungarian Competition Authority. For those who may have had doubts about the sincerity of the answers, I hope that reading this book will dispel their scepticism.

More than three decades have passed since Hungary became a market economy as a result of the regime change. Furthermore, 2024 marks the 20th anniversary of our accession to the European Union. These are not long periods in the life of a country, but they have been enough that on a dynamic development trajectory the Hungarian professional community of lawyers and economists could raise competition law, as the foundation of a market economy, to a level that we can be proud of. Obviously, being part of the European Union for 20 years, whose original objective was economic integration, played an important role in advancing this legal area. However, in certain aspects, this also holds true in reverse. Hungarian competition enforcement has also been able to add to the fine-tuning of EU competition law.

Not only the authors of this book but also many more experts have contributed to reach the current sophisticated state of play of Hungarian competition law. In one way or another, all chapters can be interpreted as an important aspect within the development history.

The book consists of three main parts with thirteen chapters. Part I with a single chapter introduces our route to the accession of the EU and the process through which the Hungarian Competition Authority has become an active and esteemed agency in the fruitful network of international competition law. Part II sheds light on the obligatory and voluntary implementation of EU competition law provisions into the Hungarian legal system. First of all, a general overview is provided to set the stage for further analyses. Then, the transposition of the ECN+ Directive as well as of the rules of private enforcement are put under scrutiny separately. In the subsequent chapter, the voluntary implementation of legal professional privilege is analysed. Finally, in Part II, the last chapter is concerned with the similarities and differences between Hungarian and EU merger control. Part III includes seven chapters on the practice of competition law from a wide variety of viewpoints. First, beyond the conventional competition proceedings, the unorthodox possibilities in Hungarian competition enforcement are introduced. Second, the differences, divergences and conflicts between EU and Hungarian competition law are disentangled. Third, the preliminary rulings derived from Hungarian competition law are examined. Fourth, readers may delve into the impact of Hungarian cases on the interpretation of by-object restrictions. The subsequent two chapters put private enforcement at the centre of the analysis: not only the first experiences of Hungarian cases, but also Hungary's contribution to the discourse on private enforcement are scrutinised, respectively. Last but not least, one may peruse the application of EU competition law in the case law of Hungarian administrative courts.

As it emerges from this brief summary, the book aims to give a comprehensive inquiry into both theory and practice as well as substantive and procedural issues not only as regards public but also private enforcement of competition law. The enforcers, private practitioners, legislators and judges who have actively shaped this legal area are the safeguards that this edited volume contributes significantly to the further development of Hungarian competition law.

Martin Milán Csirszki
editor

I. Introduction

József Sárai

The preparation for Hungary's accession to the EU from the Hungarian Competition Authority's perspective – from the outset until the accession and further on...[1]

"The desirable development of economic life and every social activity in general requires an appropriate balance between freedom and organisation (regulation). The continuous changes in the conditions of life – and in economic life in particular the development of production and transportation technology, moreover the change in proportions of consumption – make it necessary to adapt the relationship between freedom and organisation to the changing circumstances."

(Quotation from the ministerial justification of the Hungarian "Act XX of 1931 on Cartels")[1]

1. Introduction

"From the outset" – as it appears in the subtitle of my chapter, raises questions. How can we define this "outset" and how did it all begin? There might be several options. The idea of the need to elaborate a modern, market and economy-oriented competition law emerged as early as the late 1980s, in the final years of the planned economy. From another point of view, the actual enforcement of the Hungarian Competition Act started in 1991, when the Hungarian Competition Authority (GVH – Gazdasági Versenyhivatal) began its operation. There could be a further possibility, April 1992, when the free trade

1 The author is grateful to Ferenc Vissi, the first President of the Hungarian Competition Authority, for his valuable suggestions to this essay.

agreement-based provisions of the EC/Hungary Association Agreement[2] entered into force, obliging Hungary to assess any anticompetitive agreement or abusive practice which "may affect trade between the Community and Hungary" on the basis of criteria arising from the application of the EEC Treaty's competition provisions[3], moreover obliged Hungary to approximate its laws, among others its "rules on competition" to the Communities' legal system[4].

In my study I begin even earlier, with the elaboration process of the first Hungarian Competition Act, since in a way it had some influence on the measures which were necessary to prepare both the competition law and the competition authority itself for the accession.

In this volume there will be another chapter focusing specifically on the harmonisation of competition legislation, therefore I will try to limit myself to giving a broad overview of this element only.

2. Preliminary circumstances

2.1. General situation

During the second half of the 1980s the Hungarian social-economic system went through considerable changes. Partly as a consequence of its membership in the IMF and closer co-operation with the World Bank[5], from the mid '80s the liberalisation of the economy began, and gradually evolved. To some extent this manifested in price liberalisation. It was recognised very soon that in parallel with the dismantling of the central price setting regime and with the gradual transformation of the economy towards a real market economy, there was a social and economic need for a real, effectively enforceable competition law. This idea arose at the regulatory authority for prices and material flows – the National Price Office, which was responsible also for "market surveillance" at that time – and basically the professional staff of this body worked on this project. The preparatory work began by studying past competition

2 In December 1991, when the EC/Hungary Association Agreement was signed, the European Economic Community was the signatory on the European side.

3 Chapter II, Articles 62-66 of the Association Agreement contained the "Competition and other economic provisions".

4 Articles 67-68 of the Association Agreement.

5 Hungary became a member of the IMF in May 1982 and co-operation with the World Bank began almost at the same time.

laws of the country[6], furthermore numerous 'country studies'[7] were conducted aimed at mapping the regulatory, enforcement and sanctioning breach of national and community competition laws.

The new competition rules had been completed by February 1990. However, the last socialist Prime Minister decided to postpone the submission of the bill to Parliament and to leave it to the first post-socialist government. He thought that it would give far greater reliability and higher legitimacy to this important new Act if it was enacted by the first freely elected Parliament. Finally, Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices was enacted on 20 November 1990 and entered into force on 1 January 1991.

2.2. The first market-economy oriented Competition Act

The Act contained a few provisions, which intentionally had a provisional character reflecting the transitional feature of the economy of the late '80s and early '90s, such as:

- Using the same legislative technique as the European competition law, the 1990 Competition Act contained general clauses and particular prohibitions. Nevertheless, the scope of particular prohibitions was far more detailed than in the European law in order to provide educative, broader explanation and understanding for the domestic market players for which this piece of law was a novelty.
- The 1990 Competition Act contained a general clause which declared it unlawful "to engage in unfair economic activity, including, in particular, any conduct that offends or jeopardises the legitimate interests of competitors and consumers or is contrary to the requirements of fair business practices". This provision provided significant room for manoeuvre to the GVH (i.e. it gave a wide range of possibilities to the competition authority to find certain practices unlawful. In the early years of competition law enforcement this solution of the Act generated increased criticism from businesses and foreign advisers).
- As regards restrictive agreements, horizontal ones and resale price maintenance (RPM) were banned[8], but the prohibition did not cover non-price related vertical agreements. Although in theory it was also possible to identify practices consti-

6 Act V of 1923 on the Prohibition of Unfair Competition, Act XX of 1931 on Cartels and Act IV of 1984 on the Prohibition of Unfair Economic Activity should be mentioned from this point of view.

7 Among others, the substantive and procedural rules of the competition laws of Germany, the United Kingdom, France, Sweden, Denmark, the European Economic Community, and the USA had been studied. The surveys also covered the mapping of sanctioning systems and the setup and operation of enforcement institutions.

8 The 1990 CA prohibited "concerted practices and agreements between competitors" and "agreements to fix resale prices if competition could thereby be restricted or excluded" [emphasis added].

tuting vertical restraints other than RPMs by the general clause of the Act, as well as by the abuse of dominant position prohibitions, the Act deliberately remained silent concerning the explicit prohibition of non-RPM vertical restrictions. According to strong professional opinions at the time, in the transitional period[9] of the Hungarian economy a clear-cut explicit prohibition on all kinds of vertical restrictions would have been harmful for the rearrangement of economic relations of businesses.

- Defining the scope of the prohibition on restrictive agreements, the Act excluded those agreements which "*aimed at stopping abuse of dominant position*". Clearly, with this solution – accepting this kind of competition violation by law – the legislators intended to stimulate a fight against the wide-spread abusive practices stemming from the market structure inherited from the planned economy.
- Compared to the European legal provisions in force, in the field of abusive practices, the Act contained a far more detailed list of prohibited abuses in order to call the attention of businesses to the potential danger of these practices. Aiming at simplifying the definition of market power, the Act contained a market share criterion (30 % for single firm dominance and 50% as joint dominant position for up to three businesses).
- The merger control introduced by the 1990 CA was an entirely new phenomenon in the Hungarian competition law. As an obvious transitional element, one of the assessment criteria might be mentioned. According to this, the GVH could also authorise a transaction *"if the merger promoted activities in foreign markets that were advantageous to the national economy"*.

2.3. GVH policy vis-à-vis privatisation

After the GVH began its operation, a deliberate political decision was made concerning the role of the GVH in the privatisation process. It was decided not to give any role to the GVH in privatisations. By eliminating a potential opponent of certain privatisation transactions (i.e. the GVH), the objective of this measure was to increase political consensus over the role of competition policy. Naturally, the GVH dealt with the cases in which the merger notification thresholds set by the Competition Act had been met by a privatisation transaction, moreover, in one of these cases a prohibition decision was reached[10].

In privatisation cases, where the notification thresholds were not met, another solution was applied for the involvement of the GVH. The authority had an advisory

9 I.e. during the period when the centrally planned economy moved towards market economy and as a consequence of these changes the traditional economic relationships of market players also changed, disintegrated dramatically, and numerous businesses ceased to exist.

10 In the "Gasztrolánc student catering" case – VJ-172/1994.

role in the process. Namely, a high ranked competition official (one of the Vice Presidents of the GVH) was delegated into the Board of Directors of the State Privatisation Agency (SPA) as a "permanent invitee". In this way the GVH also received all the materials submitted to the decision-making meetings of the SPA, and the delegate of the GVH was able to advocate pro-competitive privatisation solutions. At the same time, the GVH also accepted that fostering competition was not the only aspect to be taken into consideration by the Board of Directors. In this way the GVH managed to protect its independence by staying out of the politically sensitive privatisation process.

3. Association phase

Almost one year after the GVH began its operation by enforcing the 1990 Competition Act, in December 1991, Hungary signed an Association Agreement[11] (Agreement) with the European Communities. The free trade related provisions (and so the rules on competition) of the Agreement entered into force in March 1992. The legal provisions of the Agreement relevant for the work of the GVH in the association period were as follows:

- the Association Agreement provided that agreements restricting competition, abusive practices and distortive public aid were incompatible with the proper functioning of the Agreement (in so far as those were capable to affect trade between Hungary and the Communities);
- all these practices had to be assessed on the basis of criteria arising from the application of the Communities' competition rules;
- the Association Council[12] had to adopt the necessary implementing rules within three years of the entry into force of the Agreement;
- with regard to public undertakings, and undertakings to which special or exclusive rights had been granted, the principles stemming from the European law, in particular entrepreneurs' freedom of decision, had to be upheld;
- Hungary undertook to approximate its "existing and future legislation to that of the Community" – this relates in particular to the rules on competition.

Soon after the signing of the Association Agreement, in February 1992, the GVH prepared a submission for the Government suggesting to separate – within the Hungarian administration – the specific responsibilities for the implementation of the competi-

11 "Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part". https://eur-lex.europa.eu/resource.html?uri=cellar:2c277fec-1ecc-41e3-8463-5f2aa9bd59cf.0004.02/DOC_2&format=PDF

12 At ministerial level, political dialogue in connection with the Europe Agreement took place within the Association Council, which had the general responsibility for any matter the Parties wished to put to it.

tion-related provisions of the Agreement. According to this, the task of controlling state aid which would have been suitable to affect trade between Hungary and the European Communities was allocated to the Ministry of Finance. Concerning the issues of public undertakings and treatment of special and exclusive rights, the Ministry of Justice was entrusted. As regards the traditional antitrust issues, the GVH undertook all responsibilities.

In the association period the GVH began to work on several aspects.

3.1. Law approximation

There were basically four motivating factors for the elaboration of a new Competition Act during the first half of the 1990s:

1. After a few years of enforcement of the 1990 Competition Act it seemed obvious that in parallel with the changes of the economic situation of the country, the provisional rules built into the Act at the end of the 1980s needed a revision.
2. The law approximation obligation undertaken by Hungary in the Association Agreement also meant a strong incentive for the reform of the 1990 Competition Act.
3. As time passed, the GVH accumulated experience concerning the application and the shortcomings of the existing rules. These were listed during the years, and from 1994, when the preparatory work on the new Competition Act began, these were carefully analysed.
4. Last but not least, foreign advisors from Europe and also from the United States made a few observations which were thoroughly contemplated in the process aiming at fine-tuning the 1990 Competition Act.

In the autumn of 1994 several expert groups were set up at the GVH and each of them studied one of the more than 50 provisions of the 1990 Competition Act in respect of a need for reform. (This Act originally consisted of 67 Articles.) Some of the main items were as follows:

- extension of the scope of the Act,
- extension of the prohibition of restrictive agreements to non-price vertical restraints,
- review of the definition of dominant position,
- change of the notification thresholds for mergers and acquisitions (M&As),
- modernisation of the criteria used for assessing M&As,
- extension of the investigative powers of the GVH.

After almost 2 years of preparatory work the Parliament enacted the new Competition Act in June 1996[13]. The Act entered into force on 1st January 1997. The new Competition Act unequivocally reflected the law harmonisation obligations of the country.

13 Act LVII of 1996 on the Prohibition of Unfair and Restrictive Practices – after numerous amendments this is still the current effective Competition Act of Hungary.

In 1996 and the subsequent years, in the area of competition law, the basic philosophy of the Hungarian legislators was (and actually has remained until now) that a close harmonisation (i.e. the incorporation of the majority of the EC competition norms into the Hungarian law) was also in the interest of the business community[14]. The acceptance of this concept made it possible for undertakings – to the extent the Competition Act reflected the main rules of the EC competition law – to face very similar rules in the field of competition both in the national and in the Community legal systems. This not only resulted in savings for the undertakings (uniform requests for information in the respective merger controls or individual exemption systems, uniform criteria for assessment, etc.), but the harmonised competition rules could also successfully contribute to diminishing the risk of possible conflicts between different competition laws. Furthermore, in this way, businesses at an early (pre-accession) stage were able to familiarise themselves with the rules which later became applicable to their practices after the accession of the country to the European Union. Building on this reasoning, all the EC norms, which were not contrary to national interests, were introduced into Hungarian law. This approach towards law approximation – together with the other authoritative approach concerning the endeavour to find a proper balance between freedom and level of organisation in legislation[15] – has remained the two guiding principles of finetuning the Hungarian competition law system to date.

3.2. Major changes to the Hungarian competition law introduced in 1996 – in a nutshell

- The territorial scope of the Act was extended also to competition violations carried out abroad if those could have effects in the territory of the Republic of Hungary;
- the new Act prohibited restrictive agreements between undertakings (instead of only between competitors) – in this way the scope of the prohibition was automatically extended;
- the criteria for individual exemption were also harmonised with the EC solution; in this context the four exemption criteria of Article 85(3)[16] of the EC Treaty were incorporated into the Hungarian law;
- the extension of the prohibition to all types of vertical restraints made it necessary

14 As it was underlined in the "White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union" harmonisation "is considered to be extremely useful both in terms of psychological and of economic impact for the economic operators who no longer have to deal with different approaches ...". (COM(95) 163/FINAL, May 1995).

15 See the motto of this article: the quotation from the ministerial justification of the Hungarian "Act XX of 1931 on Cartels".

16 In 1996 the numbering of provisions was made according to the Rome Treaty…

to build the EC block exemption regulations (BERs) into the national competition law system;

- according to the modified Act, dominant position meant the possibility of an undertaking to pursue economic activities without taking into account the reactions of its competitors or partners on the upstream or downstream markets;
- in the field of concentration control a few changes were made, among others by introducing joint acquisitions and concentrative JVs to the definition of M&As, the market share criterion was abolished from the notification threshold and the so-called dominance test – which was prevailing also in the European merger control regime at that time – was also introduced.

3.3. Cooperation within the Association Committee / Competition Law

The Association Council was the highest political forum responsible for the implementation of the Europe Agreement. On the Hungarian side, the heads of the Hungarian ministries and autonomous state administrative bodies were the members of this organ. The Association Committee – composed of representatives of the members of the Council of the European Communities and of members of the Commission of the European Communities on the one hand, and of representatives of the Government of Hungary normally at senior civil servant level, on the other hand – had a more operative function by holding meetings regularly and discussing issues arising in the context of implementation of the Agreement. A third level of the cooperation consisted of specialised sub-committees. From the point of view of competition law and policy, the "Sub-Committee on Competition" fulfilled this function.

The Sub-Committee on Competition held meetings once or twice a year, its venue alternating between Brussels and Budapest. In the first years (between 1992 and 1996) the elaboration of the "implementing rules" was the main issue. As a result of this work, in November 1996 the Association Council made its decision[17], accepting this way the implementing rules. This decision was incorporated into the Hungarian legal system in the form of a Government Decree[18].

A further, recurring topic of the meetings of the Sub-Committee on Competition

17 Decision No 2/1996 of the Association Council "Implementing rules for the application of the competition provisions applicable to undertakings provided for in Article 62 (1) (i), (1) (ii) and (2) of the Europe Agreement".

18 Government Regulation 230/1996 (XII. 26.) on the promulgation of Decision No 2/96 of the Association Council, association between the European Communities and their Member States, on the one hand, and the Republic of Hungary, on the other hand, of 6 November 1996 adopting the rules necessary for the implementation of Article 62 (1) (i), (1) (ii) and (2) of the Europe Agreement between the European Communities and their Member States, on the one hand, and the Republic of Hungary, on the other hand, and the rules implementing Article 8 (1) (i), (1) (ii) and (2) of Protocol No 2 on ECSC products to that Agreement.

was the incorporation of the EC block exemption regulations (BERs) into the Hungarian law. This issue was quite controversial. On the one hand, in the European Communities the BERs served the elaboration of the single market of the Communities. In Hungary there was no need to have BERs, since in Hungary the country's single market existed (but the Association Agreement requested Hungary to take over the EC BERs as well). On the other hand, in the EC regime, experience from a great number of individual exemptions were crystallised into the EC BERs. In Hungary, until the middle of the 1990s, the practice of individual exempting agreements had not yet evolved (though the possibility of granting individual exemptions existed already under the 1990 Competition Act). Consequently, when working out the national BERs, the Hungarian legislators had to rely, to a great extent, on the EC block exemption regulations. This did not mean however, that the Hungarian decrees would have been slavish copies of their EC equivalents. The Hungarian legislators strove to simplify (and, as far as possible, adjust to the Hungarian circumstances) the EC regulations, e.g. by defining appropriate market share thresholds, below which the block exemption decree concerned had its effect. Between 1997 and 1999, such decrees were adopted for agreements on:

- the insurance sector (Gov. Regulation 50/1997. (III.19.) on the exemption from the prohibition on restriction of competition of certain groups of insurance agreements);
- exclusive distribution (Gov. Regulation 53/1997. (III.26.) on the exemption from the prohibition on restriction of competition of certain groups of exclusive distribution agreements);
- exclusive purchasing (Gov. Regulation 54/1997. (III.26.) on the exemption from the prohibition on restriction of competition of certain groups of exclusive purchasing agreements);
- franchise (Gov. Regulation 246/1997. (XII.20.) on the exemption from the prohibition on restriction of competition of certain groups of franchise agreements);
- motor vehicle distribution and servicing (Gov. Regulation 247/1997 (XII. 20.) on the exemption from the prohibition on restriction of competition of certain groups of motor vehicle distribution and servicing agreements);
- R&D (Gov. Regulation 84/1999 (VI. 11.) on the exemption from the prohibition on restriction of competition of certain groups of research and development agreements);
- specialisation (Gov. Regulation 85/1999 (VI. 11.) on the exemption from the prohibition on restriction of competition of certain groups of specialization agreements);
- technology transfer (Gov. Regulation 86/1999 (VI. 11.) on the exemption from the prohibition on restriction of competition of certain groups of technology transfer agreements).

Later, as the EC BERs were fine-tuned at the end of the 1990s, there was a new wave of adjustment of the Hungarian BERs to the reformed EC ones at the beginning

of the 2000s – this process was also discussed at the meetings of the Sub-Committee on Competition.

3.4. Informal meetings with the European Commission, DG IV

In the middle of the 1990s the DG responsible for competition (at that time called "DG IV") began to organize informal meetings/conferences for the so-called candidate countries' competition authorities and state aid authorities. The idea to have such joint meetings was born when the DG IV officials had a meeting in Budapest at the GVH. This way the first such informal conference was held in Visegrád (Hungary) in June 1995, for the competition and state aid authorities of the Visegrad 4 countries[19]. Later, this event was extended to all 10 candidate countries[20], taking place annually[21]. These meetings allowed the participants to discuss developments of competition law approximation and law enforcement experiences multilaterally, but it was also possible for the DG IV to discuss specific questions with the national authorities of the candidate countries bilaterally.

As regards the relationship between DG IV and GVH, the issue caused by one of the decisions of the Hungarian Constitutional Court was a recurring discussion point at the bilateral meetings for Hungary during these annual conferences. Because of a constitutional complaint, the Hungarian Constitutional Court analysed the competition-related Article of the EC/Hungary Europe Agreement on the one hand, and the 'Implementing Rules' on the other hand. The complaint stated that the requirement set out in Article 62 (2) of the Agreement, according to which all the practices contrary to Article 62(1) had to be assessed based on the criteria arising from the application of European competition law, violated the Hungarian Constitution, since this way the legislative autonomy of the country was harmed. Similarly, according to the complainant, the "implementing rules" also raised constitutional concerns, since the obligation of the GVH to "ensure that the principles contained in the Block Exemption Regulations in force in the Community were applied in full" was anti-constitutional, because it would have required the GVH to apply a law created by a foreign legislator.The anti-constitutional nature of Article 62 of the EC/Hungary Europe Agreement was not stated by the Hungarian Constitutional Court, however, certain provisions of the "Implementing Rules" were found anti-constitutional. To solve this problem, new "Implementing Rules" had to be

19 Hungary, Poland, Czech Republic and Slovakia.

20 Hungary, Poland, Czech Republic and Slovakia, Estonia, Lithuania, Latvia, Slovenia, Bulgaria, Malta.

21 1995: Visegrád (HU), 1996: Brno (CZ), 1997: Sofia (BG), 1998: Bratislava (SK), 1999: Krakow (PL), 2000: Tallin (EE), 2001: Ljubljana (SI). In 2002 the meetings of the European Competition Network began and this kind of meeting among the European Commission and the candidate countries ceased.

elaborated for Hungary. The new set of rules was created by Decision 1/2002 of the EC/Hungary Association Council. This decision of the Association Council was incorporated into the Hungarian law by Act X of 2002, which used the regulatory techniques of the Agreement on the European Economic Area. This way, a new, parallel competition law was enacted for the GVH for all the cases which would have been capable to affect the trade between the EC and Hungary. This law has never been applied in practice.

3.5. Professional training for the GVH staff

From the start of its operation, the GVH's work had been assisted by foreign experts in different forms. In these years the staff of the GVH received training from both European and US sources.

The European Commission financed an educational campaign, which allowed the GVH's experts to receive a series of training provided by lawyers of a well-known, acknowledged law firm from the United Kingdom between 1994 and 1996. The experts of the law firm which provided technical assistance visited the GVH several times for one-week sessions, and held presentations about the European competition law and law enforcement practices. The milestone cases of DG IV and the European courts were also thoroughly presented. The law approximation work of the GVH which resulted in the reform of the 1990 Competition Act and in the enactment of the 1996 Competition Act was also assisted. The colleagues of the advisory firm assisted with various versions of the draft, and in the final stage of drafting the new Act they provided valuable suggestions.

As time passed, in 2001-2002, in the course of a different campaign, another law firm from Scotland repeated the training for the GVH staff about European competition law and the recent European competition cases of DG Competition and the EU courts. As there were numerous new colleagues among the staff of GVH, this training was also very useful considering that directly preceding the accession of Hungary to the EU, this campaign helped the preparation of GVH for the EU membership.

Beside the European training programmes, the assistance provided by the DOJ and the FTC from the USA (USAID program) should also be mentioned. These agencies provided expert assistance for the GVH by sending economists and lawyers to Budapest for 3-month missions each time, so the GVH staff had the possibility to gradually contact them with their everyday professional questions. This kind of technical assistance was applied between 1992 and 1996. Later, between 2001 and 2004, funded by the United States Agency for International Development, the US FTC and the GVH organised nine regional competition seminars for the competition authorities of the West Balkan region. GVH colleagues also participated in these events, sometimes even as speakers. The topic of these events focused mainly on investigative techniques in competition and consumer protection issues. Each seminar consisted of both discussions and a simulated investigation of hypothetical cases. In addition to its professional utility, these events made it possible for the interested competition authorities' colleagues to establish personal acquaintances among themselves.

In addition to technical assistance received from foreign sources, there was a well-organised internal preparation programme as well, aiming to increase the knowledge and understanding of colleagues about the law enforcement practice of DG Competition in concrete cases. This project involved the short presentation of EU competition cases (DG Competition decisions and EC court judgements), focusing on the most essential lessons of the cases. Between 1998 and 2002, GVH's staff studied 137 European competition cases in this form (in the area of restrictive agreements, abusive practices and merger and acquisition control). All case descriptions were discussed during the regular "Tuesday afternoon professional sessions" organised internally within the authority and the case descriptions were made available on the intranet of the GVH. In 2000 some of these case descriptions were published by the GVH also in the form of a textbook in Hungarian[22].

3.6. Structural / institutional changes at the GVH

In the early 2000s several structural changes were made within the organisation of the GVH. Originally, when the authority began to operate in 1991, the investigators of the GVH were separated by sectors of the economy. To some extent this setup was inherited from the National Price Office (NPO), as around half of the investigators of the GVH came from this institution. Otherwise, this organisation – having investigative units by sectors of the economy – was rational in the first years, because the NPO colleagues had an extensive knowledge of the market structure of the respective sectors in the years of the planned economy, as well as the market players and their business relationship.

In 2001 the increasing importance of anti-cartel measures appeared also in the portfolio of the GVH, which was reflected in the setup of a separate unit for cartel detection in August 2001. In September 2004 another special unit was set up for consumer fraud cases. The next step was the allocation of M&A cases to a third unit. The last step involved the regrouping of the "rest", i.e. the non-cartel type horizontal cases and vertical restrictions to an "Antitrust Unit", and as a result, the last remnants of the previous sector-based internal organisation of work disappeared from the GVH's structure. It should be noted that neither the EU Commission (DG Competition) nor the European Competition Network interfered with the internal structure of any national competition authority (NCA) of the EU, provided that the NCA was able to fulfil its obligations emanating from EU membership and rules regulating the basic elements of ECN cooperation. Despite this, however, it might be stated that – as it later became obvious – these changes within the GVH internal organization were appropriate steps also from the point of view of the future EU membership and ECN coordination.

22 Boytha Györgyné – Hargita Árpád – Sárai József – Tóth Tihamér: "Competition law cases – practice of the European Court of Justice" p. 444, Osiris Publishing Company

4. Pre-accession period

4.1. Joining the ECN

In November 2002 DG Comp invited the representatives of all the candidate countries' competition authorities to a meeting in Brussels. This was the first joint meeting organised for the competition authorities of the incumbent EU Member States and the ten candidate countries. During this meeting the establishment of the European Competition Network (ECN) was declared.

Naturally, the competition authorities of the ten candidate countries – and among them the GVH – were not allowed to contribute to the preparation of Regulation 1/2003[23]. But these authorities did contribute to the elaboration of the details of the would-be cooperation, including the notices which "further detailed" Regulation 1/2003[24]. Several working groups[25] were set up to discuss the potential professional questions of cooperation within the network and to formulate the best possible solutions on how these questions might be solved. The representatives of the GVH actively participated in these working groups during this preparatory phase which lasted from November 2002 until May 2004. This was an extremely good exercise for the competition authorities of the candidate countries. At least it was very beneficial for the GVH, since this way – even before the ECN would begin its operation in May 2004 – we could familiarise ourselves with the practice of DG Competition and other competition authorities and with the details of the planned future cooperation within the network.

In parallel with our participation in the work of these ECN working groups, we began the elaboration of GVH's internal cooperation: how the different sections of the authority should cooperate internally in all the cases where the GVH would apply EU competition rules directly. When the details of the ECN-wide cooperation became final and known, the GVH's internal rules for intra-agency cooperation also evolved. In the spring of 2004, an internal "Decree of the President of the GVH" was published about the internal rules on how intra-GVH cooperation should be implemented in ECN cases, and the GVH staff received a thorough training about these new rules. The

23 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

24 From this point of view the "cooperation notice" should be mentioned in the first place ("Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC"), but the candidate countries' competition authorities were also able to contribute with their ideas to the elaboration of the "effect on trade", "cooperation with the national courts", "exempted agreements" "handling of complaints" and "informal guidance" notices.

25 E.g. working group for sanctioning policies and working group for solving the question of how cooperation concerning leniency applications ought to be solved, etc.

training on intra-GVH cooperation ran in parallel with a thorough explanation – for the whole staff – of the essential features of the ECN-wide network cooperation. These steps formed a very important element of the preparation for EU membership in the field of competition law enforcement.

4.2. Central European Competition Initiative

Initiated by the Hungarian and Polish competition authorities, in April 2003 the competition authorities of the Visegrad 4 countries and Slovenia concluded a cooperation agreement: the "Declaration of the Central European Competition Initiative" (CECI), "to a better understanding of each other's competition regimes" mainly with the aim to foster further effective co-operation. In practice this cooperation promoted the exchange of experience in the form of workshops organised by the members of the CECI. Between 2003 and 2007 nine workshops were held, most of them in Budapest. The workshop organised in September 2003 was dedicated to the topic of accession preparations. Chaired by a representative of DG Competition and assisted by speakers from the Swedish Konkurrensverket and the French Ministry of Economy, competition officials from the Czech, Hungarian, Polish, Slovak and Slovenian authorities talked about the measures taken to prepare their authorities for the future enforcement of European competition rules. At that time discussions on this topic proved to be very useful and timely for the participating authorities.

4.3. OECD-GVH Regional Centre for Competition in Budapest

A very important event was for the GVH the establishment of the OECD-GVH Regional Centre for Competition[26] (RCC) in Budapest, in February 2005, even if this is not directly EU-related. This was the second regional centre set up in cooperation with the OECD[27]. The RCC provides technical assistance for the competition authorities of the Central, East and South-East European regions in the form of workshops, seminars and training programmes organized in Budapest and also in the capitals of the beneficiary authorities. European judges belong to the beneficiaries of the RCC as well.

During its operation between 2005-2023 the RCC organised 151 professional events and invited more than 5300 participants to these seminars and workshops. The number of expert speakers – predominantly from the OECD countries – was close to 1000.

26 https://www.gvh.hu/en/gvh/oecd-gvh-rcc/oecd_gvh_regional_centre_for_competition_in_budape; https://www.oecd.org/daf/competition/oecd-gvhregionalcentreforcompetitioninbudapest.htm

27 The OECD/Korea Policy Centre Competition Programme began to operate in May 2004. Since then, a third centre was set up in Peru, in November 2019 (OECD Regional Centre for Competition in Latin America in Lima).

The activity of the RCC is highly appreciated both by the OECD and the beneficiary authorities and this is a great acknowledgement for the work of the GVH.

4.4. Law harmonisation in the pre-accession period

In the first years of the 2000s, the development of Hungarian competition law was fundamentally motivated by the approaching EU-membership. For Hungary – similarly to all the other candidate countries at the time – the accession coincided with the general procedural reform of European competition law (the so-called "modernisation"). Consequently, not only the tasks stemming from the accession in general, but also the impacts arising from the new procedural regime of EC competition law were taken into consideration during this preparatory process. The accession-related harmonisation of competition law was carried out in two phases. The first one was implemented in 2003 – i.e. prior to the accession –, and the second in 2005.

The modernisation of the European competition law envisaged the decentralised application of the EU competition rules. This meant that the competition authorities of the Member States became responsible for the effective enforcement of these rules. For the EU competition rules to be applicable in Hungary, national adaptation rules of complementary nature were needed. Consequently, the amendment in 2003 focused primarily on the elaboration of rules, which were necessary for the GVH and the national courts to effectively apply the EU competition rules and to cope successfully with the tasks stemming from the accession. The major elements of the amendments were as follows:

- the scope of the 1996 CA was fine-tuned by stipulating that during the application of Articles 81 and 82 of the EC Treaty[28] the procedural provisions of the 1996 CA were applicable;
- the GVH was designated as the Hungarian authority carrying out the various functions conferred upon national competition authorities by the competition law of the EU;
- the 1996 CA was supplemented by a new chapter, which contained provisions on the procedure to be followed upon GVH's application of the European competition law[29]. In this context:
  - it was confirmed that proceeding in cases under the EU competition law, the

28 In 2003 the numbering of provisions was made according to the Amsterdam Treaty…

29 Obviously, it was neither necessary nor possible to regulate under the Hungarian competition law the same issues, which were originally regulated by Council Regulation (EC) No 1/2003 (i.e. the "Modernisation Regulation"). However, it seemed rational to establish rules, which were special compared to the other provisions of the 1996 CA and to clarify how the general procedural rules of the 1996 CA would be applied in cases in which the GVH followed the substantive rules of the EC competition law.

GVH would cooperate with the European Commission and the competition authorities of all other Member States;
- it was also regulated that the GVH would submit to the Commission the "preliminary position" of the Competition Council[30];
- the amendment obliged the Competition Council to substantiate in the reasoning of its decisions the applicability of evidence originating from another competition authority and used in the case concerned;
- it was clarified explicitly which procedural actions would be carried out in the event that the proceedings of the European Commission or the competition authority of another Member State influenced the proceedings of the GVH;
- detailed rules of procedure were elaborated for the cases where the European Commission would conduct the proceeding but the involvement of the GVH would also be necessary during the investigation;
- since the "amicus curiae" function became an entirely new task for the GVH considering the application of the EU competition rules by national courts, it was also necessary to elaborate detailed procedural rules in this context.

The amendment was adopted in July 2003, but the provisions of the amending Act entered into force only from the date of the accession of the country to the European Union, i.e. from 1st May 2004.

5. Accession, the first experiences...

5.1. Post accession law harmonisation

With the accession of Hungary to the EU, in the field of competition law a further harmonisation question became timely. At the same time, as the European competition rules became directly applicable also in the new Member States and in addition to this, the competition authorities of these countries had to apply EU competition norms from the beginning of their countries' membership, the law harmonisation obligation existing under the Association Agreement got a completely new interpretation. The obligation to approximate their national competition rules to those of the EU ceased for the previous candidate countries (and among them also for Hungary, of course). However, it had to be borne in mind that it remained reasonable for the Member States to follow the major changes in the EU competition law, because it was in the interest of both the law enforcers (i.e. the competition authorities) and the businesses to face the same (or at least very similar) set of rules under the EU and national competition laws. Hence, the GVH held the view that it was worth continuing the approximation of the national competition law to the EU norms also in the post-accession period.

30 According to Article 11(4) of Regulation 1/2003.

The main point was, without doubt, to decide whether to keep or abandon the individual exemption regime in the Hungarian Competition Act. Although from an approximation point of view it seemed reasonable to abolish it, there were several arguments for the continued possibility of exemption in the national law, since the factors, which made the reform necessary in the EU law, did not prevail in Hungary. First, due to the relatively low number of applications, this case category did not increase the GVH's workload. Consequently, sufficient human resources remained available for the detection and investigation of hard-core infringements of the Hungarian competition law. Furthermore, despite the almost 15-year practice in competition law enforcement – because of the rare exemption cases – the legal practice of the GVH was inadequate to draw a line between agreements to be exempted and those not to be. Naturally, the arguments against keeping the system and those for the approximation were also considered. Among them the reference to a possible collision of the two regulatory regimes proved to be decisive. The provision, which removed "individual exemption" from the Hungarian competition law, entered into force on 14 July 2005.

5.2. GVH's experience concerning ECN cooperation

So far, for the GVH, the cooperation within the ECN has proved to be very positive from the outset.

At the beginning, the GVH joined all the horizontal working groups and sectoral sub-groups set up within the ECN. On the one hand, this opened a new possibility for the GVH staff to establish new contacts with colleagues from other ECN competition authorities (NCAs), and on the other hand, it became an extremely useful forum for discussing issues in the context of operation of the ECN or even beyond.

Furthermore, the GVH had the honour of becoming the co-chair of one of the working groups entrusted to analyse the initial experience of the operation of the network and to solve the issues arising in the field of cooperation. Later on, the task of this working group was changed to assist everyday cooperation matters with the aim of fine-tuning cooperation potentials. This involvement helped the GVH to a great extent to become a valuable member of the network.

Based on the recognition that within the network the approximation of laws and practices served best the smooth functioning of cooperation and law enforcement, the GVH always strived to fulfil the law harmonisation ideas. Among others, this manifested in the immediate adjustment of the Hungarian leniency regime to the ECN Model Leniency Programmes[31]. Hungary was the first Member State to implement the

31 The ECN elaborated the "ECN Model Leniency Programme" in 2006 and in 2012 this was fine-tuned and updated. The GVH made the necessary amendments in the Hungarian leniency programme in due time, without delay.

ECN+ directive[32].

The GVH was also very active in organising the meetings of different ECN fora in Budapest. Among others, the Leniency Working Group, the Cartel Working Group, the Chief Economists' Working Group, and the Merger Working Group had their meetings organised by the GVH at its premises. The last event of this kind was the ECN DGs' meeting held in November 2023.

The everyday case-related work within the ECN brought very good experience for the GVH. As the data show, in the practice of the GVH and in the case categories of restrictive agreements and abusive practices around 40 per cent of the cases were dealt with under the EU competition rules. Between May 2004 and mid-March 2024 (in almost 20 years) the GVH initiated antitrust proceedings under the EU competition law in 162 cases, out of which 140 have been closed.

6. Conclusion

It can be stated that both the pre-accession preparation of the Hungarian Competition Authority for the EU membership and the involvement of the GVH in the work of the ECN have proved successful[33]. Through its efforts invested in the ECN cooperation, the GVH has benefited a lot and successfully built into the national competition law all the rational solutions and techniques experienced in this international cooperation. In addition, the GVH has also managed to become a useful and acknowledged member of the ECN.

32 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The provisions of the directive were implemented by Act XIX of 2020 with effect from 1 January 2021.

33 On the "eve" of accession, on 28 April 2004, the French *'Le Figaro économie'* published an article "La Hongrie championne de l'antitrust". As the article stated: "La république magyare applique mieux les règles que certains pays déjà membres de l'Union".

II.

Implementation and harmonisation

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An overview of competition law harmonisation in Hungary

1. Introduction

In the second half of the 1980s, the legal framework for a market economy began to be established in Hungary, and the necessary basic legislation was adopted, in order, *inter alia*, to establish companies, and to restructure and privatise state-owned enterprises. From the first free elections in 1990, there was no question that Hungary wanted to take part in the European integration process, that it wished to join the European Economic Community (EEC) and that it was ready to take the necessary steps to do so. An important precondition for social and economic transformation was the early establishment of domestic rules on economic competition, the driving force of the market economy, which was achieved with the adoption of Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices. By international standards, this was a modern competition regulation, which was ahead of many similar laws introduced in more developed market economies. The fact that one of the first economic laws of the freely elected Hungarian Parliament created a market regulation that was very similar to the competition rules of the EEC was a serious message. On the one hand, it created a market-friendly law, which was also important in order to gain the confidence of foreign investors, and on the other hand, it started the process of approximating Hungarian competition law to Community law, the harmonisation of legislation, which has characterised Hungarian competition regulation and practice to date.

2. A period of harmonisation in connection with association

Hungary's so-called associate status, prior to its accession to the EEC, was achieved by the signing of the European Agreement (EA) on 16 December 1991,[1] which included provisions on economic competition in Article 62. The implementing rules on antitrust, which mainly contained enforcement and consultation elements for the Commission and the Hungarian Competition Authority (GVH), entered into force a few years later, on 1 January 1997, following adoption by the Association Council in 1996 in Decision No. 2/96 and publication in Government Decree 230/1996 (XII. 26.).

In 2002, due to the constitutional concerns raised by legal interpretation, Association Council Decision No. 1/02, which replaced Association Council Decision No. 2/96, set out the implementing rules following the EEA model, and listed the secondary EU legislation to be taken into account, the then applicable versions of the Community block exemption regulations, and the six interpretative communications issued by the Commission, which gave legal force to the Commission's non-binding material.[2] The Decision was incorporated into national law by Act X of 2002, which duplicated the competition rules.[3] The EA did not contain any rules on merger control.[4]

The accession to the European Union (EU) on 1 May 2004 required changes in Hungarian competition law for several reasons. In itself, the alignment of the Hungarian and Community legal systems required the introduction of new procedural rules in Act LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition (Competition Act), while at the same time, the decentralisation of the application of Community competition law, implemented by Regulation (EC) No. 1/2003, took place, to which we also had to react. These amendments were introduced by Act XXXI of 2003, which, *inter alia*, led to the Competition Act designating the GVH as the national competition authority with EU law functions, and Chapter XIV was added to the Competition Act, regulating the termination of proceedings of the national competition authority in the Commission-GVH relationship as a result of the Commission's proceedings, along with the obligation to send the preliminary position of the Competition Council to the Commission in order to ensure uniform application of the law, and the regulation of the *amicus curiae* procedure to support the courts.[5]

1 The Agreement was promulgated by Act I of 1994.

2 The Communication on subcontracting agreements, the Communication on cross-border transfers, the Communication on transport projects, the Communication on relevant market definition, the Guidelines on vertical restraints and the Guidelines on horizontal cooperation.

3 Tóth Tihamér: Uniós és magyar versenyjog. Wolters Kluwer Hungary, Budapest, 2020. 61.

4 Sárai József: EU csatlakozás és jogharmonizáció a GVH szemszögéből. Versenytükör, 2015 Special edition 48.

5 Ibid. 53.

Although the requirement for legal harmonisation under the EA ceased to exist with Hungary's accession to the EU, the Hungarian legislator continued to adopt EU solutions, either voluntarily[6] or mandatory, by the nature of Community legislation.

3. Post-association period

3.1. EU legal sources

3.1.1. Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union does not contain rules specifically relating to competition law,[7] but it should nevertheless be mentioned among the sources of law, as it contains a number of procedural rules and safeguards that can be invoked in competition proceedings and are binding on the authorities. These include, for example, the right of access to documents, the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of the defence, the principles of *nullum crimen* and *nulla poena sine lege*, *ne bis in idem*.[8]

3.1.2. Sources of antitrust law

The mandatory, direct and general secondary sources of antitrust law include the Council and Commission Regulations, which indicate the desire to define this area of law by having uniform rules applied uniformly within the Community.[9] In connection with this, reference should be made to Articles 103-104 of the Treaty on the Functioning of the European Union (TFEU), which contain procedural provisions relating to legislation at EU level, intended to ensure the direct effect of Articles 101 and 102.

3.1.2.1. TFEU

At present, the most important rules of EU competition law after the Lisbon Treaty are Articles 101 and 102 TFEU. The uniform rules of Community competition law

6 See Tóth Tihamér (2020a) (footnote 3).

7 OJ C 326, 26.10.2012, p. 391.

8 See Tóth Tihamér (2020a) (footnote 3) 504.

9 Ibid. 90.

were introduced decades before Hungary's accession to the EU, following the entry into force of Regulation No. 17 on 13 March 1962, with direct effect, except for the specific exemption rules in Article 85(3) of the EEC Treaty / Article 81(3) TEC. Article 81(3) TEC [replaced by Article 101(3) TFEU] became directly applicable only after the procedural reform of 1 May 2004 mentioned above, until then only the Commission could apply it in exemption procedures initiated on request.[10] This amendment required a change in Hungary as well, and the legislator removed the possibility of individual exemption procedure from the Competition Act by Act LXVIII of 2005.[11]

EU competition law focuses only on a specific element of market competition under Articles 101 and 102 TFEU, as it only applies where there is an effect on trade between Member States as a result of an agreement restricting competition or an abuse of a dominant position.[12]

3.1.2.2. Regulation (EC) No. 1/2003 and its detailed rules

Regulation (EC) No. 1/2003,[13] previously mentioned as a flagship for decentralisation, which entered into force on 1 May 2004, deals with the application of Articles 101 and 102 TFEU and is significant, inter alia, as it replaced the previous sector-specific procedural regulations, which were thus repealed. An important element of the reform was the definition of applicable law (national or Community, where trade between Member States is affected), in addition to Article 101(3) TFEU no longer being an exemption but an exception to the prohibition, the creation of the European Competition Network (ECN), and the binding force of Commission decisions on national competition authorities and courts.[14] Details of the procedures are set out in Commission Regulation (EC) No. 773/2004.[15]

3.1.2.3. Block exemption regulations

Block exemption regulations are designed, in line with the EU's competition policy, to exempt certain types of agreements from sanctions for the infringement of the pro-

10 Ibid. 88.

11 See Sárai (footnote 4) 54.

12 See Tóth Tihamér (2020a) (footnote 3) 122.

13 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

14 See Tóth Tihamér (2020a) (footnote 3) 487.

15 Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

hibition of Article 101(1) TFEU.

The Commission has adopted both sector-specific (for the agricultural / food, motor vehicle and insurance sectors) and sector-neutral (for horizontal agreements, vertical agreements and technology transfer) block exemption regulations:

- Agreements on the production of and trade in agricultural products, as an essential part of the organisation of national markets, were already excluded from the scope of Article 85(1) of the EEC Treaty by Council Regulation No. 26,[16] an exception which is currently covered by Regulation (EC) No. 1184/2006.[17]
- On 1 May 2004, Regulation (EC) No. 358/2003 was already in force for the insurance sector,[18] and exemption therein was maintained by Regulation (EU) No. 267/2010[19] for some types of agreements (cost aggregation, mortality tables, risk assessments), but after its expiry on 31 March 2017, the Commission did not adopt a new block exemption regulation for the insurance sector.
- Regulation (EC) No. 2659/2000 on research and development agreements[20] was in force on 1 May 2004 and it was replaced by Regulation (EU) No. 1217/2010,[21] extending the scope of the block exemption for research and development agreements to include paid research and development and its exploitation.
- Regulation (EC) No. 2658/2000 on specialisation agreements[22] was in force on 1 May 2004 and it was replaced by Regulation (EU) No. 1218/2010[23] with minimal changes (definition of joint distribution and its placement in the structure of the regulation).

16 Regulation No. 26 applying certain rules of competition to production of and trade in agricultural products, OJ 62, 20.4.1962, p. 993.

17 Council Regulation (EC) No. 1184/2006 of 24 July 2006 applying certain rules of competition to production of and trade in agricultural products, OJ L 214, 4.8.2006, p. 7.

18 Commission Regulation (EC) No. 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 53, 28.2.2003, p. 8.

19 Commission Regulation (EU) No. 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 83, 30.3.2010, p. 1.

20 Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L 304, 5.12.2000, p. 7.

21 Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335, 18.12.2010, p. 36.

22 Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ 304, 5.12.2000, p. 3.

23 Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43.

- Regulation (EC) No. 2790/1999 on vertical agreements[24] was in force on 1 May 2004 and it was replaced in 2010 by Regulation (EU) No. 330/2010[25] without any substantive amendment.
- Regulation (EC) No. 772/2004 on technology transfer agreements[26] entered into force on 1 May 2004, which was replaced by Regulation (EU) No. 316/2014[27] with essentially the same content.

It should be noted that the Commission adopted the new vertical block exemption regulation 2022/720/EU in May 2022,[28] and the new horizontal (research & development and specialisation) block exemption regulations in June 2023.[29]

It is worth mentioning that on 1 May 2004, the block exemption regulation for the motor vehicle sector was still in force,[30] which was introduced because the Commission considered that stricter rules than the general vertical block exemption regulation were justified for this sector (e.g., a clause covering more than 30% of the total supply already constituted a non-compete obligation). This regulation still applied to both the sale of new motor vehicles and the sale of spare parts and after-sales services. In 2010, the Commission decided to revert to the general vertical block exemption regulation for new motor vehicle sales after 1 June 2013, while maintaining a separate block exemption regulation for aftermarket activities (sale of spare parts and repair/maintenance services).[31]

Finally, although no block exemption regulation has been adopted, the Commis-

24 Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

25 Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.

26 Commission Regulation (EC) No. 772/2004 of 7 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.4.2004, p. 11.

27 Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17. The regulation expires on 30 April 2026, its review is pending.

28 Gál Gábor: Az új vertikális csoportmentességi rendelet és iránymutatás – a fő változások bemutatása. Versenytükör 2022/1.

29 Váczi Nóra: A horizontális korlátozásokra vonatkozó európai szabályozás felülvizsgálata. Versenytükör 2023/2.

30 Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002, p. 30.

31 Commission Regulation (EU) No. 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129, 28.5.2010, p. 52.

sion has introduced specific antitrust rules for the postal, the telecommunications and the air transport sectors through various non-binding instruments.[32]

3.1.2.4. Commission notices

The Commission's antitrust notices can be divided into two broad categories:

- substantive notices, typically accompanying a block exemption regulation, such as the Horizontal Guidelines,[33] the Vertical Guidelines,[34] the Technology Transfer Guidelines[35] and the Motor Vehicle Aftermarket Guidelines;[36] and
- procedural notices, such as the Leniency Notice,[37] the De Minimis Notice,[38] the Settlement Notice[39] and the Guidelines of Fines.[40]

It is also worth mentioning the Article 102 TFEU Guidance, as a notice of substan-

32 Postal: Notice from the Commission on the application of competition rules to the postal sector and the assessment of certain State measures relating to postal services, OJ C 39, 6.2.1998, p. 2. Telecommunication: Guidelines on market analysis and the definition of significant market power under the EU regulatory framework for electronic communications networks and services, OJ C 159, 7.5.2018, p. 1; and Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 295, 11.10.2014, p. 79. Air transport: currently, no block exemption regulation is in force, however, Council Regulation (EC) No. 487/2009 creating the legal basis for such a regulation is still in effect.

33 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (previous version: OJ C 11, 4.1.2011, p. 1; current version: OJ C 259, 21.7.2023, p. 1).

34 Guidelines on Vertical Restraints (previous version: OJ C 130, 19.5.2010, p. 1; current version: OJ C 248, 30.6.2022, p. 1).

35 Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014, p. 3.

36 Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (previous version: OJ C 138, 28.5.2010, p. 16; current version: OJ C 133, 17.4.2023, p. 1).

37 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

38 Notice on agreements of minor importance which do not appreciably restrict competition (de minimis) under Article 101(1) of the Treaty on the Functioning of the European Union, OJ C 291, 30.8.2014, p. 1.

39 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167, 2.7.2008, p. 1.

40 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No. 1/2003, OJ C 210, 1.9.2006, p. 2.

tive nature.[41] Although the notice was primarily intended to set out the Commission's enforcement priorities, it provides substantive guidance on a number of issues (such as the assessment of conditional rebates and the analysis of objective necessity and efficiency gains).

3.1.3. Sources of merger law

3.1.3.1. Regulations

Decentralisation does not apply to mergers between undertakings. Under Regulation (EC) No. 139/2004 on the control of concentrations with a Community dimension[42] and its implementing regulation[43] there is a strict delimitation of jurisdiction.[44] The regime set out in the 2004 Merger Regulation, which is also linked to the enlargement with Eastern European countries, is essentially based on the previous regime, the main changes being the broadening of EU jurisdiction, the application of the SIEC test for assessing concentrations and the clarification of procedural rules.[45] Precisely defined turnover thresholds define the scope of EU and national competition law, and the relationship between the two is thus complementary.

3.1.3.2. Notices

The Commission has adopted a number of non-binding instruments on merger

41 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7. We note that the Commission has on the one hand, amended the guidance with respect to the definitions of anticompetitive foreclosure, as efficient competitor and margin squeeze (OJ C 116, 31.3.2023, p. 1), and on the other hand, launched a consultation for the purposes of adopting a new (substantive) guidance on exclusionary abuses.

42 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

43 Previously Commission Regulation (EC) No. 802/2004 of 21 April 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1); currently, Commission Implementing Regulation (EU) No. 2023/914 of 20 April 2023 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No. 802/2004, OJ L 119, 5.5.2023, p. 22.

44 Tóth András: Versenyjog és határterületei, A versenyszabályozás jogági kapcsolatai. HVG-Orac Kiadó, Budapest, 2016. 19.

45 See Tóth Tihamér (2020a) (footnote 3) 681.

control. Although formally intended to address jurisdictional issues, the Jurisdictional Notice[46] provides guidance on a number of substantive merger issues, such as what types of change of control constitute a merger, how to notify several related transactions, and how to establish the turnover to assess thresholds (in connection with the latter, a separate chapter deals with the relevant turnover of financial institutions).

In addition, the Commission has issued notices on non-horizontal mergers,[47] horizontal mergers,[48] the market definition,[49] remedies,[50] and ancillary restrictions.[51] An important procedural notice is the Notice on Case Referral,[52] which sets out the cases where a merger notified to a national competition authority can be assessed by the Commission.

3.1.4. Directives

In competition law, directly applicable EU rules exist instead of harmonisation directives.[53] The two most important directives are the Antitrust Damages Directive[54] and the ECN+ Directive.[55]

46 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1.

47 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6.

48 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5.

49 Current version: Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C/2024/1645, 22.2.2024.

50 Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1.

51 Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, p. 24.

52 Current version: Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113, 31.3.2021, p. 1.

53 See Tóth Tihamér (2020a) (footnote 3) 91.

54 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

55 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3.

3.2. Harmonisation and the development of Hungarian competition law

Following the EU accession, the harmonisation obligation in the EA ceased to apply, but Hungary, like all EU Member States, is subject to general EU harmonisation obligations. There are no EU directives on substantive law, but two important directives on procedural law have been adopted in the last decade, mentioned above but described later in this chapter. After 2004, we can state that the elements of the pre-association era have been preserved in some respects, and that there is voluntary approximation of law alongside mandatory harmonisation.[56]

3.2.1. Compatibility with the Charter of Fundamental Rights

Even before the adoption of the Charter of Fundamental Rights, the Competition Act already contained the procedural guarantees mentioned in Chapter 3.1.1. above.

Section 55 of the Competition Act governed the parties' right to inspect, copy and make a note of documents from the outset. The current legislation was introduced on 1 July 2014.

From the outset, the right to an effective remedy against the GVH's decision has been ensured in the form of administrative litigation. It is worth mentioning that the rules on administrative litigation have changed significantly: on 1 April 2020, multi-instance administrative litigation,[57] and the possibility to have the decision of the GVH overturned by the court of first instance were abolished,[58] and only a narrow judicial review of the first instance decision is still available.[59] The question of the compatibility of these amendments with the Charter of Fundamental Rights has not yet arisen.

The right to a fair trial has been examined by the Hungarian court system in several

56 Tóth Tihamér: Jogharmonizáció a magyar versenyjog elmúlt harminc évében, Állam-és Jogtudomány, LXI. évf. 2020. 2. szám. 73.

57 Section 99(2) of the Administrative Litigation Act provides that an appeal against a first instance judgment may be lodged in the case of a dispute specified by law, but there is no such statutory provision in relation to the review of GVH decisions.

58 According to Article 90(1)(b) of the Administrative Litigation Act, in the case of a single-instance administrative act, changing the administrative act by the court is only possible if the law allows it, but there is no such legal provision in relation to GVH decisions. We note that this is presumably a codification error: at the time of the entry into force of the Competition Act, Section 83(4) of the Competition Act, which allowed for the court to change the GVH decision, was repealed, as the text of the Administrative Litigation Act in force before 1 April 2020 did not restrict such changes and allowed it also for GVH decisions; however, no similar provision was reintroduced into the Competition Act at the same time as the amendment of the Administrative Litigation Act, eliminating the general possibility to change the administrative act, on 1 April 2020.

59 Section 115(1) of the Administrative Litigation Act.

aspects and at several levels, however, the decisions have been more concerned with the practice of the GVH in its procedures than with the adequacy of the legal regulation. Accordingly, indications can be found in court decisions on the right to an effective remedy,[60] the presumption of innocence (in the context of the difference between criminal proceedings and competition proceedings),[61] the right of defence (see more in Chapter III.2.b) below),[62] and the *ne bis in idem* principle.[63] Several cases addressed the issue of the administrative deadline set out in Section 63 of the Competition Act and the principle of dealing with cases within a reasonable time.[64]

3.2.2. Compatibility with Regulation 1/2003 (right of defence)

Two aspects of Regulation (EC) No. 1/2003 are worth mentioning: the rules on on-site inspections and the protection of legal professional privilege (LPP).

There is an interesting story behind the introduction of the rules on on-site inspections: the GVH became aware that the Commission was considering the possibility of dawn raids, which led to the decision that it was worth introducing this legal instrument in our national law.[65] Thus, before the entry into force of Regulation (EC) No. 1/2003, the possibility of on-site inspections in antitrust cases was already introduced into the Competition Act on 1 February 2001. The Commission's rules on on-site inspections have not changed substantially since 1 May 2004. While the Commission mainly addresses the challenges posed by technological developments through its explanatory note,[66] the Commission's on-site inspection still consists of examining documents and files and making copies of the documents and files relevant to the case. However, the possibility for the GVH to make a forensic image of a data carrier has been available since 1 November 2005, which has led to a significant difference between the two on-site procedural acts: the GVH has the possibility to make

60 See Constitutional Court's decision No. 7/2013. (III. 1.) AB, Constitutional Court's decision No. 36/2013. (XII. 5.) AB, Constitutional Court's order No. 3202/2017. (VII. 21.) AB and Supreme Court's judgment No. Kfv.II.37.814/2020/12.

61 See Constitutional Court's decision No. 30/2014. (IX. 30.) AB and Supreme Court's judgment No. Kfv.III.37.582/2016/16.

62 See Supreme Court's judgment No. Kfv.II.37.959/2018/14. and Supreme Court's judgment No. Kfv.I.37.452/2023/3.

63 See Supreme Court's judgment No. Kfv.VI.37.026/2022/8. and Supreme Court's decision No. Kfv. III.37.366/2023/7.

64 See Constitutional Court's order No. 3458/2020. (XII. 14.) AB, Constitutional Court's decision No. 2/2017. (II.10.) AB and Supreme Court's judgment No. Kfv.VI.37.026/2022/8.

65 See Sárai (footnote 4) 51.

66 Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation (EC) No 1/2003.

an electronic copy of the entire data carrier, even without examination, and sort its content subsequently. [67]

There is also a difference regarding LPP. The protection of LPP is not codified in EU procedural rules. The case law of the Court of Justice of the European Union (CJEU)[68] created the protection of written communications (and related notes, working documents and summaries) between an independent lawyer registered in the EU and the lawyer's client for the purpose of exercising the rights of defence. A corresponding rule was already introduced in the Competition Act on 1 November 2005. It is also worth mentioning that since the entry into force of the Act on Legal Practice on 1 January 2018, communications with in-house counsel registered with the bar association are also protected (although presumably only in GVH proceedings). The CJEU has recently ruled[69] - albeit in the context of a tax procedure - that not only the exercise of the rights of defence, but also legal advice is protected under the Charter of Fundamental Rights.

3.2.3. TFEU

The substantive rules of Hungarian competition law are set out in the Competition Act. These rules are largely in line with the substantive rules of EU competition law. There are only a few minor differences. For example, compared to Article 101(3) TFEU, Section 17(1)(a) of the Competition Act included from the outset contribution to the improvement of the environmental situation as a specific benefit on which an individual exemption could be based. It is also worth mentioning that the Act on Trade contains a codified - non-discretionary - rule on what constitutes economic dominance on the retail grocery market since 1 January 2016.

As an interesting note, it is worth pointing out a difference - rather apparent resulting from the legislative solution - in the context of the TFEU, existing to this day, that Hungarian competition law does not explicitly include the public service exception contained in Article 106(2) TFEU. The difference is only apparent because the Competition Act resolves this problem, which potentially affects the rules on abuse of dominance, without any other specific rule, in the scope of the Act, when it states

67 The main reason for this is that the Commission is bound by the subject-matter of the investigation during the on-site inspection, while the GVH - also since 1 November 2005 - can obtain an *ex post* judicial warrant for evidence not related to the subject-matter of the investigation.

68 Case 155/79 *AM & S Europe Ltd v Commission* (ECLI:EU:C:1982:157), Case 85/87 *Dow Benelux NV v Commission* (ECLI:EU:C:1989:379), *Case* T-30/89 *Hilti v Commission (*ECLI:EU:C:1989:379), *Case* T-30/89 *Hilti v Commission (*ECLI:EU:C:1990:379). Case C-254/99 P *LVM and Others v Commission* (ECLI:EU:C:2002:582), Case T-125/03 *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v Commission* (ECLI:EU:T:2007:287).

69 Judgment of 8 December 2022 in Case C-694/20 *Orde van Vlaamse Balies* (ECLI:EU:C:2022:963).

that the Competition Act does not apply to conduct *"otherwise provided for by law"*.[70]

3.2.4. Compatibility with the block exemption regulations

The practical relevance of the Hungarian block exemption regulations is limited due to the EU block exemption regulations.[71]

The Hungarian block exemption rules, following the EU model, have been issued in the form of government decrees, but unlike the EU block exemption regulations, the government decrees were not created for a limited period of time, and did not contain an expiration date:

70 See Tóth Tihamér (2020b) (footnote 56) 88.

71 See Tóth Tihamér (2020a) (footnote 3) 95.

Insurance	Government Decree No. 14/2004 (II. 13.), which entered into force on 1 May 2004, fully complied with EU legislation	Government Decree No. 203/2011 (X. 7.), which entered into force on 22 October 2011, has followed the change in EU legislation (narrowing the scope of agreements covered by the block exemption)	As of 1 January 2018, Government Decree No. 203/2011 (X. 7.) was repealed and not replaced by a new regulation similar to the EU regulation
Research and development	Government Decree No. 54/2002 (III. 26.), which entered into force on 10 April 2002, differed slightly from the EU rules (e.g., the duration of the exemption for joint use was shorter, only 5 years, the market share threshold was higher at 30%)	Government Decree No. 206/2011 (X. 7.), which entered into force on 22 October 2011, fully complied with EU legislation	Government Decree No. 456/2023 (X. 5.), which entered into force on 15 October 2023, fully complied with the new EU legislation[72]
Specialisation	Government Decree No. 54/2002 (III. 26.), which entered into force on 10 April 2002, differed slightly from the EU rules (e.g., the market share threshold was higher at 30%)	Government Decree No. 202/2011 (X. 7.), which entered into force on 22 October 2011, fully complied with EU legislation	Government Decree No. 467/2023 (X. 12.), which entered into force on 15 October 2023, fully complied with the new EU legislation[73]
Vertical	Government Decree No. 55/2002 (III. 26.), which entered into force on 10 April 2002, fully complied with EU legislation	Government Decree No. 205/2011 (X. 7.), which entered into force on 22 October 2011, fully complied with the new EU legislation	Government Decree No. 306/2022 (VIII. 11.), which entered into force on 2 September 2022, fully complied with the new EU legislation
Technology transfer	Government Decree No. 86/1999 (VI. 11), which entered into force on 26 June 1999, reflects the EU regime prior to 1 May 2004 (e.g., it does not include the market share thresholds set by Regulation (EC) No. 772/2004 and Regulation (EU) No. 316/2014) and has not been replaced by new legislation		
Motor vehicles	Government Decree No. 19/2004 (II. 13.), which entered into force on 1 May 2004, fully complied with EU legislation (Regulation (EC) No. 1400/2002)	Government Decree No. 204/2011 (X. 7.), which entered into force on 22 October 2011, followed the change in EU legislation [Government Decree No. 19/2004 (II. 13.) was maintained in force for the sale of new motor vehicles until 1 June 2013, after which only aftermarket activities were subject to a separate block exemption regulation in the form of Government Decree No. 204/2011 (X. 7.)]	

72 Commission Regulation (EU) No. 2023/1066/EU of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 143, 2.6.2023, p. 9.

73 Commission Regulation (EU) No. 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 143, 2.6.2023, p. 20.

It is worth mentioning the agricultural sector: the exemption of agreements on agricultural products was regulated by law on 28 November 2012,[74] and was moved to the Competition Act on 1 November 2015. The exception for the conduct of professional representative bodies has also been regulated by law since 2 August 2009.[75]

3.2.5. Mandatory harmonisation

3.2.5.1. Directive 2014/104/EU

In some respects, the Antitrust Damages Directive did not bring anything new to the domestic regulation of antitrust damages (e.g., everyone is entitled to damages).[76] However, the special rules on the taking of evidence, the obligation to comply with a foreign competition authority's decision, and the regulation of the passing-on of damages appeared as new institutions in our law. In addition, it should be noted that the retention of the 10% overcharge presumption in Hungarian law exceeded the harmonisation imperative.[77]

Even before the Antitrust Damages Directive, the Competition Act contained provisions of importance for private enforcement. Since 1 November 2005, the Competition Act has provided that civil courts are bound by the decision of the GVH. Since 1 June 2009, the Competition Act has provided that the effect of a cartel on the price level (i.e., the overcharge) must be considered to be 10% (rebuttable presumption). The Directive only provided for a presumption of damage in the case of cartels. From 1 June 2009 until the transposition of the Directive, the Competition Act provided that a successful leniency applicant, obtaining immunity, may refuse to pay damages until the claim can be recovered from another cartelist. This was a concession that went beyond the rules of the Directive as regards the liability of leniency applicants.[78] Indeed, before the Directive, a leniency applicant's own direct or indirect purchasers

74 Act CXXVIII of 2012 on interbranch organisations and certain issues of agricultural market regulation.

75 It was first regulated by Act XVI of 2003 on the Regulation of Agricultural Markets, then by Act CXXVIII of 2012 on interprofessional organisations and certain issues of agricultural market regulation, and now by Act XCVII of 2015 on certain issues of the organisation of agricultural product markets, producer and interprofessional organisations.

76 Zavodnyik József: Egyensúlyemelés. A versenyjogi kártérítési irányelv átültetésének egyes kérdései, Versenytükör 2016/2 Special edition 64.

77 Tóth András: Kortárs magyar versenyjog. Ludovika Egyetemi Kiadó. Budapest, 2022. 93.

78 Hegymegi-Barakonyi Zoltán–Horányi Márton: A Bizottság versenyjogi jogsértéseken alapuló kártérítési perekre vonatkozó irányelvtervezete. In: Versenytükör, 2013/2. (volume IX, issue no. 2), 14-15.

or suppliers could only claim compensation from the leniency applicant if it was not possible to recover it from the other parties to the infringement. It should be noted that the pre-Directive rules of the Competition Act also did not prohibit rejoinder actions against the leniency applicant, but only provided for a fallback order within the enforcement procedure.

The Hungarian legislator has not only gone beyond the Directive with regard to cartel overcharge. For example, the court may request the GVH's involvement in the calculation of damages on a slightly broader basis. Similarly to some Member States, the Hungarian transposition of the Directive not only regulated claims based on an infringement of EU antitrust law, but also claims based on domestic antitrust law. It is also worth mentioning that, at the same time as the Directive was transposed, rules independent of the Directive were also introduced into the Competition Act with regard to compensation for damages under competition law. One example is the exclusive jurisdiction of tribunals (törvényszék) for antitrust damages actions.

3.2.5.2. Directive 2019/1

The other mandatory harmonisation relates to the ECN+ Directive, which Hungary was the first to transpose in the EU. The Hungarian rules were already mostly in line with the requirements of the Directive,[79] so its impact was mostly technical.[80]

The most important changes concerned fines, the collection of fines and leniency.[81]

As a result of the amendment, it is no longer necessary to wait for enforcement to be ineffective before the members of the group of undertakings named in the decision can be held jointly and severally liable for the payment of the fine,[82] and a multi-stage procedure has been established for the payment of fines imposed on associations of undertakings,[83] noting that no payment can be demanded from a member undertaking which proves that it did not implement the unlawful decision, was unaware of its existence or distances itself from the unlawful decision.[84]

In the context of leniency, the possibility has been created to submit a non-final

79 Nagy Krisztina – Orbán Szilvia: A felkészülés jegyében – az ECN+ irányelvet átültető rendelkezések ismertetése, Versenytükör, 2020. évi I. szám, 46.; Sárai József – Szilágyi Gabriella: Mit érdemes tudni az „ECN+" irányelvjavaslatról?, Versenytükör, 2017/1., 48.

80 Horányi Márton – Mezei Péter: Implementation of the ECN+ directive in Hungary: New rules on Leniency and Secret Recordings as Evidence? CoRe, 3/2021, 267.

81 See Tóth András (footnote 77) 94.

82 See NAGY – ORBÁN (footnote 74), SÁRAI – SZILÁGYI (footnote 74) 50.

83 Ibid.

84 Section 78(7) of the Competition Act.

marker application for fine reduction,[85] and the requirements for leniency applicants, such as the availability of the applicant's undertaking and its staff, and the prohibition of destruction or falsification of evidence and information, have been transposed into law.[86]

In the context of the ECN+ Directive, it is also worth highlighting the amendments regulating the way and circumstances in which certain evidence may be used,[87] which concern hidden recordings and evidence obtained unlawfully by a public authority,[88] and the fact that the Directive sets a general minimum of ten percent for the maximum amount of fine for a competition infringement.[89] The latter rule was crucial when the amendment to the Competition Act entered into force on 1 September 2023, increasing the maximum fine that the GVH can impose to 13% of the net turnover achieved in the business year preceding the year in which the decision imposing the fine was adopted, in order to increase the deterrent effect.

3.2.6. Voluntary approximation of law

The GVH has been reserved in issuing substantive legal guidance compared to the Commission.[90] Although the GVH has not published any substantive notices in the antitrust field similar to the Horizontal or Vertical Guidelines, the Competition Council of the GVH publishes the most significant decisions each year, which partly fulfil a similar function.

3.2.6.1. Leniency

Prior to the ECN+ Directive, there had been no mandatory harmonisation in this area. One of the best examples of cooperation on approximation of legislation at Community level is the jointly developed model programme intending to approximate the rules on leniency.[91]

In Hungary, before the EU accession, leniency policy was regulated by soft law, No-

85 Section 78/B(4) of the Competition Act.

86 Section 78/A(7) of the Competition Act.

87 See Tóth András (footnote 72) 96.

88 Section 64/A(1) of the Competition Act.

89 Article 15 of the ECN+ Directive.

90 Tóth Tihamér: The reception and application of EU competition rules in Hungary: an organic evolution, Pázmány Law Working Papers 2013/17, 31.

91 See Tóth Tihamér (2020b) (footnote 56) 81.

tice No. 3/2003, which was modelled on the Commission's leniency notice of the same period,[92] but it did not achieve similar success.[93] The choice of soft law was interesting at the time because a notice could in principle only reflect the previous case law of the GVH.[94] Perhaps for this reason, legislation on this issue came into force on 1 June 2009. Soft law was re-introduced in parallel with Notice No. 2/2016, issued on 7 June 2016. It is worth mentioning that, since Notice No. 2/2016, in Hungary - and some other Member States in the EU,[95] but unlike both the Commission's current Leniency Notice and the ECN Model Leniency Programme - there has been a possibility to apply for leniency in the case of vertical agreements.[96]

3.2.6.2. De minimis

There has been an expedient, voluntary approximation in Hungarian legislation regarding agreements of minor importance. The Competition Act included a provision to this effect from the outset, with a 10% market share threshold. However, the Commission's previous de minimis notice[97] set different thresholds for agreements between competitors (combined 10%) and non-competitors (15% separately). This derogation survived several voluntary harmonisation legislative amendments.[98] Finally, the Hungarian legislator adapted the relevant provision of the Competition Act to the EU regulation as of 1 January 2018.

3.2.6.3. Settlement procedure

The Commission's settlement procedure,[99] introduced in 2008 to speed up antitrust cases, was transposed by regulating the settlement procedure in the Competition Act,

92 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 45, 19.2.2002, p. 3.

93 Szilágyi Pál: Hungarian Competition Policy as a Model-Child, Competition Law Research Centre, Competition Law Working Papers Nr. 2008/1., 13.

94 See Tóth Tihamér (2013) (footnote 90) 23.

95 For example, besides our country, this includes Sweden, Austria, Poland.

96 See Tóth Tihamér (2020b) (footnote 56) 90.

97 Commission Notice on agreements of minor importance which do not appreciably restrict competition (de minimis) under Article 81(1) of the Treaty establishing the European Community, OJ C 368, 22.12.2001, p. 13.

98 See Tóth Tihamér (2013) (footnote 90) 7.

99 Not only by issuing a Settlement Notice, but also by amending Commission Regulation (EC) No. 773/2004.

which entered into force on 1 July 2014. The statutory regulation was accompanied by soft law, as in the case of leniency, in the form of Notice No. 3/2015. A difference compared to EU rules is that in Hungary, a reduction of up to 30% of the fine is available for a settlement statement waiving certain procedural rights. Although we originally adopted the 10% reduction of fines, due to the amendment of Notice No. 5/2017, a higher reduction of fines is available as of 15 January 2017. Another important difference is that the right to appeal to the courts must be waived in the settlement statement.[100]

3.2.6.4. Fines

The GVH issued its first Notice on Fines on 15 December 2003 (No. 2/2003) and its significance was that it was not a simple copy of the Commission's Guidelines on Fines in force on 1 May 2004.[101] Differences could be observed, such as the fact that the Commission's guidelines set the basic amount of the fine at 30% of the relevant turnover (depending on the gravity and duration of the infringement), whereas Notice No. 2/2003 started from 10% of the relevant turnover. It is also worth noting that Notice No. 2/2003 established a score system for determining the basic amount (including forward-looking criteria such as active reparation). Notice No. 2/2003 was withdrawn by the GVH on 18 May 2009, but Notice No. 1/2012, issued on 25 January 2012, set out broadly the same rules, with a much more detailed score system and specific rules for public procurement (the basic amount of the fine being three times the value of the tender). A major change - and a departure from EU rules - was the adoption of Notice No. 11/2017, issued on 19 December 2017, which recognised compliance efforts as a fine reducing factor (compliance credit). The currently applicable Notice No. 1/2020, issued on 18 December 2020, taking into consideration the notices on fines of other EU Member States, as well as the guidelines of the Commission, removed the detailed description regarding deliberation criteria and the score system, without determining the percentage of the relevant turnover, which should be regarded as the basic amount of the fine.

3.2.7. Mergers: prenotification, notification system

The rules on merger control in the Competition Act remained basically unchanged until the early 2010s, but two major changes were made afterwards: the stand-still ob-

100 See Tóth Tihamér (2020b) (footnote 56) 90.

101 See Tóth Tihamér (2013) (footnote 90) 25.

ligation was introduced with effect from 1 July 2014, [102] and the application system was replaced by a notification system from 15 January 2017.[103]

The development of the GVH's merger procedures was motivated by the need to reduce the burden on businesses, improve the predictability and transparency of merger procedures and shorten the turnaround time of procedures, while preserving data credibility.[104]

The essence of the notification system that replaces the application system is that, unlike in the past, not all merger notifications are subject to competition proceedings, but only if there is a possibility of a significant lessening of competition (in which case a so-called full merger procedure will be initiated) or if the merger form submitted does not contain all the information necessary for a preliminary assessment of the competitive effects (in which case a so-called simplified merger procedure will be initiated). Where the information required for preliminary assessment is provided to the GVH in the form, and the merger does not raise any clear competition concerns, the GVH acknowledges the notification by means of an official certificate. With the introduction of the notification system, the organisational aspects of merger management have also changed, as case handlers can now only decide to issue an official certificate,[105] or initiate proceedings with the consent of the designated acting Competition Council, while the Merger Unit has been placed under the authority of the Chairman of the Competition Council.[106]

An example of a legislative amendment transposing the spirit of EU rules into domestic law in the field of mergers is the creation of the possibility of prior coordination of mergers (prenotification), after Act CLXI of 2016 codified the earlier prenotification practice.

It was considered interesting that the GVH's notices on the criteria for differentiating between simplified and full merger clearance (No. 1/2003 and No. 3/2009), in contrast to the Commission's notice on non-horizontal mergers, distinguished between portfolio and conglomerate effects.[107] This was removed by Notice No. 1/2014, issued on 19 June 2014.

In the context of mergers, it is also worth noting that the Jurisdictional Notices (No. 6/2017, No. 1/2019, No. 2/2020, No. 3/2021 and No. 2/2023) consistently indicate how they differ from the Commission's Jurisdictional Notice. In particular, there are some divergences in relation to joint control (transformation of joint control into sole control, indirect acquisition of joint control).

102 Section 11 of Act CCI of 2013.

103 Act CLXI of 2016.

104 Bodócsi András et al.: Vállalati fúziók engedélyezése Magyarországon, Pénzügyi Szemle, 2021/2., 271.

105 See Section 43/N(1)(b) and (cd), Section 67(4)-(5a) and (7) and Section 69 of the Competition Act.

106 See Tóth András (footnote 77) 23-24.

107 See Szilágyi (footnote 93) 12.

4. Conclusions

In the light of the above, it can be said that the harmonisation of Hungarian competition law with EU law has been a successful and useful process, which is still ongoing and is expected to continue in the coming years. On the one hand, harmonisation with Community competition law was a prerequisite for Hungary's accession to the EU; on the other hand, it has contributed to the creation and maintenance of fair competition conditions necessary for the establishment and development of the Hungarian market economy. This has greatly helped to gain the confidence of foreign investors in the Hungarian market and to strengthen domestic enterprises in fair competition, thereby increasing their international competitiveness. It is also clear that neither the Hungarian legislator nor the GVH has been afraid to ensure the enforcement of competition rules in Hungary in certain cases by means of minor or major deviations from EU law, sometimes with particularly innovative solutions.

Dávid Ujhelyi

What's in the (tool)box? The transposition of the ECN+ Directive in Hungary[1]

1. Introduction

Regulation 1/2003/EC,[2] which introduced vital changes in the enforcement of competition law,[3] came into force on 1 May, 2004; on the exact day Hungary joined the European Union. These changes included enacting parallel competences between the European Commission ('Commission'), national competition authorities ('NCAs') and courts[4] to enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU').[5] In the course of thirteen years, between

1 The views expressed in this chapter do not necessarily reflect the views of the institutions with which the author is affiliated. In this paper, sources referred to in hyperlink were uniformly last accessed on 15 March, 2024.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, 1–25. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003R0001.

3 Cseres J. Katalin: The Implementation of the ECN+ Directive in Hungary and Lessons beyond, Yearbook of Antitrust and Regulatory Studies, Vol. 20, No. 12, 2019, 58.

4 Dalla Valentina, Giacomo: Competition Law Enforcement in Italy after the ECN+ Directive: The Difficult Balance between Effectiveness and over-Enforcement, Yearbook of Antitrust and Regulatory Studies, Vol. 20, No. 12, 2019, 93.

5 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

2004 and 2017, 85% of the enforcement decisions taken in connection with Articles 101 and 102 of the TFEU were the result of the work of NCAs.[6] Based on this, it is not a stretch to say that – in quantitative terms – Members States, through their NCAs, have become the primary enforcers of EU competition law.[7]

It is therefore no surprise that a significant part of the weight of uniform and effective application and enforcement of the EU competition acquis rests with the NCAs. This uniformity depends largely on the legal status, independence, resources, enforcement toolbox and framework of cooperation available for NCAs, provided by national legal regimes. In May 2017, after careful consideration and based on the experiences and years of soft law harmonization through recommendations in the European Competition Network ('ECN'),[8] the Commission published its proposal[9] that aimed[10] to level the playing field between NCAs, to utilize their untapped potential, and ultimately achieve a more effective enforcement system.[11]

The ECN+ Directive's[12] trilogue compromise was reached on 30 May, 2018,[13] and political agreement was made on 20 June, 2018.[14] Following the signing on 11 December,

6 Massa, Claudia: New CPC Regulation and ECN+ Directive: The Powers of National Authorities in the Fields of Consumer Protection and Antitrust, Market and Competition Law Review, Vol. 4, No. 2, 2020, 129 and Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ('ECN+ Proposal'), COM/2017/0142 final - 2017/063 (COD), Chapter 1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52017PC0142.

7 Wils, Wouter P. J.: Independence of Competition Authorities: The Example of the EU and Its Member States, World Competition, Vol. 42, No. 2, 2019, 151.

8 Sárai József – Szilágyi Gabriella: Mit érdemes tudni az "ECN+" irányelvjavaslatról? (The ECN+ Directive proposal in a nutshell), Versenytükör, 2017/1, 43. Available at: https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytukor/lapszamok/Versenytukor_2017_1&inline=true.

9 ECN+ Proposal (footnote 5).

10 On the centralising nature of the ECN+ Directive, see: McIntyre, Ruairi: Decentralisation and Recentralisation: An Institutional Analysis of EU Competition Law and the Digital Markets Act, LSE Law Review, Vol. 8, No. 3, 2023, 271.

11 Paukste, Rita: 2019 in Review: Enforcement and Sanctioning Trends in Antitrust, European Competition and Regulatory Law Review, Vol. 4, No. 3, 2020, 209.

12 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, 3–33. Available at: https://eur-lex.europa.eu/eli/dir/2019/1/oj,

13 Tóth András: Overview of the National Enforcement of EU Competition Law, European Competition and Regulatory Law Review, Vol. 2, No. 4, 2018, 266.

14 Klotz, Robert: ECN+ Ante Portas, European Competition and Regulatory Law Review, Vol. 2, No. 2, 2018, 71.

2018[15] and publication in the EU's Official Journal on 14 January 2019, the ECN+ Directive – at the end of a relatively swift legislative procedure –[16] came into force on 3 February, 2019.[17] In close cooperation with the Hungarian Competition Authority (Gazdasági Versenyhivatal, 'GVH'), the Ministry of Justice of Hungary – as the competent ministry for the preparation of competition law legislation – started to work on its transposition in spring 2019,[18] which resulted in the very first full transposition of the ECN+ Directive among Member States.[19] The amendment[20] of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Hungarian Competition Act, 'HCA') came into force on 1 January, 2021. This paper, after providing a general overview of Member States' transposition efforts regarding the ECN+ Directive, aims to present the specific difficulties and legislative tasks faced by the Hungarian legislator in achieving EU law compliance.

2. General Remarks on the ECN+ Directive and its Transposition

With the ECN+ Directive, the Commission's goal was to address several practical problems that arose since the adaptation of Regulation 1/2003/EC. These problems include a lack of independence from public authorities in applying EU law by some NCAs', an absence, ineffectiveness or divergence[21] in the toolbox to detect and deal effectively with competition law infringements, an inability of some NCAs' to impose effective fines, significant differences in Member States' leniency programmes, and finally, the insufficiency of mutual assistance means among NCAs.[22] The uniform and effective application and enforcement of Articles 101 and 102 of the TFEU requires at least a level playing field to be provided for NCAs, which is achieved by the ECN+ Directive through addressing the

15 Stawicki, Aleksander – Feliszewski, Tomasz: The ECN+ Directive and Far Reaching Changes to Polish Competition Law: Implementation a la Polonaise, European Competition and Regulatory Law Review, Vol. 5, No. 2, 2021, 146.

16 Klotz (footnote 13) 71.

17 Massa (footnote 5) 114.

18 Ripszám Dóra: Use of Evidence in Competition Supervision Proceedings in Hungary – Evidence from Secret Information Gathering, Versenytükör, Special Edition, 2023, 70. Available at: https://epa.oszk.hu/04900/04915/00053/pdf/EPA04915_versenytukor_2023_ksz_VIII_67-75.pdf.

19 Horanyi, Marton – Mezei, Peter: Implementation of the ECN+ Directive in Hungary: New Rules on Leniency and Secret Recordings as Evidence?, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 263.

20 Act XIX of 2020 on Amending Certain Acts in Connection with the Entry Into Force of Act CVII of 2019 on Bodies with Special Status and for the Purpose of Harmonisation ('Amending Act').

21 Massa (footnote 5) 129.

22 Jurkowska-Gomulka, Agata: Mind the Gap! ECN+ Directive Proposal on Its Way to Eliminate Deficiencies of Regulation 1/2003: Polish Perspective, Market and Competition Law Review, Vol. 2, No. 2, 2018, 144–145.

aforementioned problems.[23]

The fragmentation rooted in the divergence in Member States' legal solutions was reflected in the ECN+ Directive's transposition efforts. While several researchers examining the transposition of Member States – including Hungary's –[24], noted that some of the national regulations had been largely in line with the ECN+ Directive even before the transposition,[25] others identified the need of sporadic but not very significant changes in Member States' legal frameworks.[26] On the other end of the spectrum, there were researchers who reported need for very serious amendments: a paper from Finland referred to the transposition as the most notable development of the Finnish competition law in several years,[27] another from Ireland saw the transposition as "the most significant to impact upon Irish competition law in twenty years."[28] Slovakia codified and enacted an entirely new

23 Kozak, Malgorzata: Mutual Trust as a Backbone of EU Antitrust Law, Market and Competition Law Review, Vol. 4, No. 1, 2020, 129, 139.

24 Horányi – Mezei (footnote 18) 267. ("[…] the overall structure of Hungarian competition law was largely already in line with the requirements of the Directive").

25 Marjancic, Ana: Implementation of the ECN+ Directive in Croatia: Competition Authority Gets Wider Powers to Combat Antitrust Violations but Will It Be Enough?, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 229. ("The Croatian legal framework was to a large extent compliant with the requirements of the ECN+ Directive"); Petr, Michal: Implementation of the ECN+ Directive in the Czech Republic: Missed Opportunity to Enhance Independence and Powers, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 238. ("Competition Act was to a large extent in line with the European Commission's procedure"); Nobileau, Melissa: Implementation of the ECN+ Directive in France: Implementation of the ECN+ Directive by the Ordinance of 26 May 2021, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 253. ("Many provisions of the ECN+ Directive were already part of French positive law."); Merwin, Liga: Implementation of the ECN+ Directive in Latvia: Still a Long Way to Go, European Competition and Regulatory Law Review. Vol. 5, No. 3, 2021, 275. ("The law enforcement system in Latvia in general is not too far off from what the Directive sets forth"); de Groes, Karlijn – Raats, Tim: Implementation of the ECN+ Directive in the Netherlands: Strengthening Cooperation with National Competition Authorities, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 294. ("ECN+ Directive has not required fundamental changes to the legislation"); Andersson, Helene: Implementation of the ECN+ Directive in Sweden: Extended Powers for the Competition Authority, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 329. ("The Swedish enforcement system complied with many of the Directive's requirements already prior to the transposition").

26 Autio, Riina: Harmonising Dawn Raids in a Global Village: The ECN+ Directive and Negotiating Legal Certainty within Fragmented European Administrative Procedure, Market and Competition Law Review, Vol. 6, No. 2, 2022, 136.

27 Kauranen, Satu-Anneli: Implementation of the ECN+ Directive in Finland: Delayed Implementation Finally Entered into Force, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 251.

28 Dunne, Ronan – Hanrahan, Daniel: Implementation of the ECN+ Directive in Ireland: An Overhaul of the Domestic Competition Law Regime, European Competition and Regulatory Law Review, Vol. 6, No. 2, 2022, 136.

competition act based on the transposition efforts.[29] In Luxembourg, the NCA's (Conseil de la Concurrence) legal status was altered; after the transposition it operates as an independent administrative authority.[30] Other papers noted that divergences between the dogmatic structure of national competition law and EU law – mostly but not exclusively regarding the punitive nature of fines and separate procedures – made the transposition difficult.[31]

The Member States' diverging legal frameworks resulted in rather diverse transposition achievements: only five Member States – Germany, Lithuania, Sweden, the Netherlands and Hungary – were able to meet the transposition deadline, and six months after the deadline, only half of the Member States – 13, to be precise – could show a full transposition.[32] This lead the Commission to open infringement proceedings against 22 Member States on 18 March, 2021.[33]

29 Patakyová, Mária T. – Patakyová, Mária: Implementation of the ECN+ Directive in the Slovak Republic: Will the New APC Improve the Enforcement of Competition Law?, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 314.

30 Hornkohl, Lena: Implementation of the ECN+ Directive in Luxembourg: A New Competition Law and Institutional Framework, European Competition and Regulatory Law Review, Vo. 5, No. 3, 2021, 280.

31 Kjoer-Hansen, Erik: Implementation of the ECN+ Directive in Denmark: Introduction of Civil Fines and Alignment of Procedures, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 242. ("[…] the requirement that national competition authorities may impose fines or request fines to be imposed during non-criminal judicial proceedings breaks with Danish legal tradition"); Maesalu, Martin – Gerretz, Kevin: Implementation of the ECN+ Directive in Estonia: An Uncertain Work in Progress, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 243. Göhsl, Jan-Frederick: Implementation of the ECN+ Directive in Germany: Revolution Postponed but the Devil Is in the Details, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 262. ("[…] separation between administrative and regulatory offence proceedings and the need to comply with the prerequisites of the Directive has led to a complex system of two parallel enforcement regimes which are only partially synchronised"); Zahra, Sylvann Aquilina: Implementation of the ECN+ Directive in Malta: The Journey towards Effective Enforcement - Where Does Malta Stand?, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 287.

32 Poulladou, Eleana: Implementation of the ECN+ Directive in Cyprus: Draft Bill Setting the Foundations for a New Era of Competition Law Enforcement?, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 230.; Misic, Tine: Implementation of the ECN+ Directive in Slovenia: Watchdog Not Entirely Happy with Proposed Draft Bill amidst Tardy Implementation, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 315.; Maillo, Jerónimo: Implementation of the ECN+ Directive in Spain: A First Assessment, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 324 and Dewispelaere, Jeroen – Heinen, Victoria: Implementation of the ECN+ Directive in Belgium: Codification, Clarification and Enhanced Cooperation Are Overshadowed by New Merger Filing Fees, European Competition and Regulatory Law Review, Vol. 6, No. 2, 2022, 129.

33 Van Rompuy, Ben: Implementation of the ECN+ Directive in 23 Member States: An Introductory Overview, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 211, 215 and Hornkohl (footnote 29) 280.

While the ECN+ Directive itself is not above criticism,[34] the present paper's research found only very few critics[35] of national transpositions: a paper noted that the Austrian Government did not introduce any changes that address the NCA's lack of autonomy in terms of resources,[36] and similar problems were reported from Bulgaria[37] and Poland[38] as well.

3. The Hungarian Transposition of the ECN+ Directive

While Hungary joins the long line of Member States where the competition law framework – regulated in the HCA – mostly complied[39] with the ECN+ Directive's regulations even before any amendment, this does not mean that there was no need for adopting modifications. This paper will present the relevant provisions of the HCA, following the logic of the ECN+ Directive.

1. Resources and independence. Chapter III of the ECN+ Directive calls for Member States to provide for the political and practical independence of NCAs, having focus on impartiality and accountability.[40] The GVH's independence and sufficient availability of resources was

34 Szot, Patrycja: The Polish Leniency Programme and the Implementation of the ECN+ Directive Leniency-Related Standards in Poland, Yearbook of Antitrust and Regulatory Studies, Vol. 20, No. 12, 2019, 47–48. ("[…] the most severe criticism of the ECN+ Directive in the context of leniency (and perhaps in general) is that it failed to introduce a one-stop-shop system […] the failure to harmonise the approach towards leniency applications relating to non-cartel infringements is an important drawback").

35 A paper from Lithuania reported an expressly natural standpoint in the country: Paukste, Rita: Implementation of the ECN+ Directive in Lithuania: Investigative and Sanctioning Powers of the Lithuanian Competition Council - Making a Strong NCA Even Stronger?, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 276.

36 Kühnert, Heinrich – König, Elisabeth: Implementation of the ECN+ Directive in Austria: A Missed Opportunity for Fundamental Rights, but (Finally) Changes to the Merger Thresholds, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 217.

37 Papazova, Mariya: Implementation of the ECN+ Directive in Bulgaria: A Hope for Proactive Antitrust Enforcement, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 225. ("[…] amendments do not reach entirely the aim to guarantee full independence").

38 Feliszewski, Tomasz – Musielak, Mateusz: Implementation of the ECN+ Directive in Poland: Broader Scope of Liability for Antitrust Violations, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, 299. ("some of these amendments do not appear entirely in line with the underlying rationale of the ECN+ Directive").

39 Sárai – Szilágyi (footnote 7) 48; Horányi – Mezei (footnote 18) 267, and Szilágyi Gabriella: Az ECN+ irányelv és várható hatása a Magyar versenyszabályozásra (The ECN+ Directive and Its Expected Effects on the Hungarian Competition Law), Versenytükör, 2019/1, 53. Available at: https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytukor/lapszamok/Versenytukor_2019_01&inline=true.

40 ECN+ Directive Art. 4-5.

above question[41] even before the transposition: the GVH is an autonomous public administration body with its own chapter in the state budget; it is also fully independent from the government and is only held accountable to the Hungarian Parliament.[42] The HCA has a new regulation in Art. 33(5) – based on Art. 4(5) of the ECN+ Directive – that expressly gives the freedom to the GVH to set its priorities. This amendment is seen only as a reinforcement of the previous practice, where the GVH could consider public interest (or lack of it) before even starting an infringement procedure.[43] The most significant changes in this regard are the new and strict conflict of interest rules in Art. 42/D of the HCA.[44] The scope of the provision is limited to cases in which the members of the Competition Council and investigators were formerly involved, and therefore it does not constitute a general prohibition. This provision does not apply to the members of staff who act in specific cases and who issue decisions, but covers a wider range of persons, including all those who have a direct or indirect influence on the conduct of the case. The Hungarian legislator has not transposed the requirement of a reasonable period of time – Art. 4(2)c of the ECN+ Directive – by defining an exact period of time, but has provided for a prohibition until the case is settled, which should be understood to mean not only the final conclusion of the competition proceedings but also the final conclusion of other related proceedings.[45]

2. Powers. One of the most important parts of the ECN+ Directive is Chapter IV, which calls for Members States to provide the powers necessary to identify and address anticompetitive behaviour.[46] Articles 6-12, as minimum harmonization,[47] regulate powers to inspect business and other premises (also known as dawn raids), request information, conduct interviews, determine and terminate infringements, issue interim measures and secure commitments.[48]

While the GVH had potent powers even before the transposition of the ECN+ Directive, the new legal standards gave the opportunity to further extend these powers. Even though

41 Tóth András: Kortárs magyar versenyjog, Ludovika Egyetemi Kiadó, 2022, 94.

42 Cseres (footnote 2) 75–76.

43 Nagy Krisztina – Orbán Szilvia: A felkészülés jegyében – Az ECN+ irányelvet átültető rendelkezések ismertetése (In terms of preparation – Overview of the legal rules transposing the ECN+ Directive), Versenytükör, 2020/1, 47. Available at: https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytukor/lapszamok/versenytukor_2020_1&inline=true.

44 Horányi – Mezei (footnote 18) 263.

45 Nagy – Orbán (footnote 42) 48.

46 Surblyte-Namaviciene, Gintare: Implementing the ECN+ Directive in Lithuania: Towards an over-Enforcement of Competition Law?, Yearbook of Antitrust and Regulatory Studies, Vol. 20, No. 12, 2019, 174.

47 Kaminski, Marcin: Rejection of Complaints: Lessons for National Competition Authorities on the Eve of the Implementation of ECN+ Directive, Forum Prawnicze, No. 6, 2021, 64. and Cseres (footnote 2) 57.

48 Kopácsi István: Bizonyítékok felhasználhatósága versenyfelügyeleti eljárásban (The admissability of evidences in competition proceedings), Versenytükör, 2018/2, 21. Available at: https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytukor/lapszamok/Versenytukor_2018_02&inline=true.

the provisions of the ECN+ Directive cover only the enforcement of Articles 101 and 102 of the TFEU (the EU dimension of competition law), the Hungarian legislator chose to extend the scope of the newly ingrained powers to the national dimension of competition law as well.[49] For example, as a result of the transposition, the on-site inspection of private property,[50] vehicles and data is no longer limited to the undertaking subject to the procedure, nor is the inspection dependent on a prior inspection of business premises.[51] However, the amendment does not change the practice that on-site inspections could only be carried out with prior judicial authorisation. To this end, the GVH must still establish in its application to the court that no other investigative act would lead to a sufficient result and that there are reasonable grounds to believe that evidence of the infringement under investigation can be found at the premises concerned and that evidence would not be made available voluntarily or would be rendered unusable otherwise. The court may also authorise the requested search only partially, specifying against whom, what and where the investigative act may be carried out.[52]

After the transposition, the new regulation covers the use of secret recordings not made by the competition authority. The ECN+ Directive recognized[53] that the proliferation of digital recording technologies, combined with the public policy objective of increasing the enforcement effectiveness of competition authorities, requires regulation of the use of secret recordings. This provision is essential because, in the digital age, competition authorities may obtain facts and data during on-site inspections that could not be used under the previous rules. The HCA clarifies[54] that secret recordings should be taken into account as evidence if they are not the sole evidence of an infringement. The provision thus strikes a balance between the competition authority's interest in obtaining evidence and the parties' right to a fair process, ensuring that the GVH continues to investigate the cases thoroughly.[55]

3. Fines. The provisions of Chapter V of the ECN+ Directive, regulating fines and periodic penalty payments, did not have a major effect on the Hungarian competition law regime. However, in order to comply with the ECN+ Directive, a provision[56] has been introduced to maximise the liability of the members of the associations of undertakings so that the maxi-

49 Nagy – Orbán (footnote 42) 46.

50 HCA Art. 65/A(2).

51 Nagy – Orbán (footnote 42) 49.

52 See the explanatory memorandum to Art. 18 of the Amending Act.

53 See recital (73) of the ECN+ Directive ("[…] *NCAs should be able to consider relevant evidence, irrespective of whether it is written, oral, or in an electronic or recorded form. This should include the ability to consider covert recordings made by natural or legal persons which are not public authorities, provided those recordings are not the sole source of evidence. This should be without prejudice to the right to be heard and without prejudice to the admissibility of any recordings made or obtained by public authorities.* […]").

54 HCA Art. 64/A(1).

55 See the explanatory memorandum to Art. 16 of the Amending Act.

56 Art. 78(1b) of the HCA.

mum fine imposed takes into account the performance of each member of the undertaking, without prejudice to the existing rules on joint liability. Also, in the context of compliance with the ECN+ Directive, unlike in the past, the GVH does not have to wait for enforcement to be ineffective in the case of an association of undertakings before it can impose a joint fine on the members of the undertaking named in the decision.[57]

In the case of associations of undertakings, a new provision strengthens the powers of the GVH: the multi-stage system[58] set out in the ECN+ Directive aims to ensure the possibility of collecting fines by allowing a widening range of possibilities to impose fines on other members of the undertaking linked to the infringing member. The new provisions significantly extend the powers of the GVH and allow it to intervene in the autonomy of undertakings to recover fines in the same way as the Commission.[59]

4. Leniency. Chapter VI of the ECN+ Directive regulating leniency, considered a key tool for detecting secret cartels,[60] had the most significant impact on the HCA's provisions.[61] The ECN+ Directive aims to encourage the companies subject to infringement procedures to cooperate with the competition authorities.[62] The obligations related to the acceptance of a leniency application are strengthened in the HCA: the rules on cooperative behaviour to be followed after the submission of a leniency application are set out in detail, and the fact of submission of a leniency application will have to be kept secret not only until the preliminary position is sent, but also until the GVH authorises its disclosure. In considering whether to file a leniency application, the undertaking applying for leniency should refrain from destroying evidence or disclosing the application to non-competition authorities. This is a significant

57 Nagy – Orbán (footnote 42) 50 and Tóth (footnote 40) 95.

58 See recital (47) of the ECN+ Directive („[…] *Accordingly, NCAs should have the possibility to increase the fine to be imposed on an undertaking or association of undertakings where the Commission or an NCA has previously taken a decision finding that that undertaking or association of undertakings has infringed Article 101 or 102 TFEU and that undertaking or association of undertakings continues to commit the same infringement or commits a similar infringement.* […]").

59 See the explanatory memorandum to Art. 25 of the Amending Act. and Horányi – Mezei (footnote 18) 265.

60 See recital (50) if the ECN+ Directive („*Leniency programmes are a key tool for the detection of secret cartels, and thus contribute to the efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. However, there are currently marked differences between the leniency programmes applicable in the Member States. Those differences lead to legal uncertainty on the part of infringing undertakings concerning the conditions under which they are able to apply for leniency, as well as uncertainty about their immunity status under the respective leniency programmes. Such uncertainty might weaken incentives for potential leniency applicants to apply for leniency. This in turn can lead to less effective competition enforcement in the Union, as fewer secret cartels are uncovered*").

61 On leniency's relevance on damages, see: Gyebrovszki Zsolt Dániel: Versenyjogi kártérítési perek – A közjog és magánjog határmezsgyéjén. Külügyi Műhely, 2023/1-2, 36–65. Available at: https://real.mtak.hu/171175/7/2023_1-2_szam_2_cikk.pdf.

62 Szilágyi (footnote 38) 55.

change compared to the previous obligation, which only required undertakings to keep evidence unchanged under the duty to cooperate after the leniency application had been made. The GVH can now order confidentiality of the fact of leniency application not only until the preliminary position is sent, but also until a later date.

At the same time, however, a new possibility for undertakings subject to proceedings to reduce fines has been introduced:[63] In addition to applications for immunity from fines, reduction of fines, and applications for non-final immunity, a new application has been introduced, which has opened the possibility to submit incomplete leniency applications (marker applications, or non-final reduction applications under the terms of the HCA) also in the case of applications for reduction of fines.[64] The HCA has so far only allowed the submission of markers in the case of immunity applications, in line with the practice of the Commission. The ECN+ Directive provides an optional opportunity[65] for Member States to introduce the possibility of a non-final application for fine reduction, i.e. competition authorities may accept applications for fine reduction where undertakings agree to provide supporting evidence within a time limit set by the competition authority.[66]

The systemic approach to leniency policy[67] was also strengthened: if an undertaking subject to proceedings submits a leniency application to the Commission or another competition authority, enforcement will be ensured in all cases. In line with the ECN+ Directive, the HCA reinforces the protection of information provided to the GVH, which is often highly sensitive in a commercial sense. Thus, evidence obtained in the course of accessing files in a leniency application may only be used for the purpose of exercising the rights of defence and only in proceedings before a court related to the competition procedure in which access to the files was granted. The HCA states that the GVH may only share a leniency application with another competition authority with the consent of the applicant or if the applicant has already submitted a leniency application to another competition authority in the same case.[68]

5. Mutual assistance. Finally, Chapter VII of the ECN+ Directive deals with cooperation

63 Horányi – Mezei (footnote 18) 265.

64 Tóth (footnote 40) 96.

65 Art. 21(5) of the ECN+ Directive.

66 Nagy – Orbán (footnote 42) 51.

67 See also: Márk Lili: Az engedékenységi politika hatásai és alkalmazása, In: Valentiny Pál – Kiss Ferenc László – Nagy Csongor István – Berezvai Zombor: Verseny és szabályozás, MTA KRTK Közgazdaság-tudományi Intézet, 2017, 191–226. Available at: https://kti.krtk.hu/wp-content/uploads/2018/04/Vesz2017_teljes.pdf.

68 See the explanatory memorandum to Art. 26 of the Amending Act.

and mutual assistance between NCAs.[69] Given that the HCA had not previously stated that the GVH was a member of the ECN, it was necessary to reflect this fact at the level of law. The ECN+ Directive has intensified cooperation between national competition authorities in the framework of the ECN. To this end, the HCA has been amended with detailed rules on the enforcement of procedural acts and enforceable decisions ordered by other competition authorities. Under this cooperation, national competition authorities may not only request each other for legal assistance[70] in order to take certain procedural measures, but may also request the service of documents generated in the course of proceedings in the territory of another Member State and the enforcement of fines and procedural penalties imposed in their decisions.[71]

Under the new provisions of the HCA, the enforcement of procedural acts is subject to the rules of the competition procedure, instead of the initiation of a competition proceeding, thus clarifying that the purpose of the special legal assistance procedure is not to clarify an alleged competition law infringement, but to enforce a procedural act. As a consequence, the subject of the procedure enjoys all the rights that he would enjoy in a competition procedure according to his legal status. The system for cooperation between competition authorities, institutionalised by the ECN+ Directive,[72] is based on the so-called uniform instrument, which has been transposed into the HCA by means of uniform request for cooperation. This uniform instrument can be used to request and implement, for example, the collection of fines, the conduct of on-site inspection and the notification of members of Hungarian undertakings subject to proceedings by other competition authorities in a simple and efficient manner. For this particular procedure, the HCA's regulations explicitly provide for specific remedies, making it clear that in the case of a procedural act taken at the request of another competition authority, procedural objection can be lodged with the GVH, while remedy should be sought with the requesting authority.[73]

69 Potocnik-Manzouri, Corinna: The ECN+ Direcitve: An Example of Decentralised Cooperation to Enforce Competiton Law, European Papers, Vol. 6, No. 2, 2021, 998. See recital (68) of the ECN+ Directive. („In a system in which the Commission and NCAs have parallel powers to apply Articles 101 and 102 TFEU, close cooperation is required among NCAs and between NCAs and the Commission. In particular when an NCA carries out an inspection or an interview under its national law on behalf of another NCA […] the presence and assistance of the officials from the applicant authority should be enabled to enhance the effectiveness of such inspections and interviews by providing additional resources, knowledge and technical expertise. NCAs should also be empowered to ask other NCAs to assist in establishing whether undertakings or associations of undertakings have failed to comply with investigative measures and decisions taken by the applicant NCAs.").

70 Rizzuto, Francesco: The ECN Plus Directive: Empowering National Competition Authorities to Be More Effective Enforcers of EU Competition Law, European Competition and Regulatory Law Review, Vol. 3, No. 2, 2019, 93.

71 Horányi – Mezei (footnote 18) 267.

72 Szilágyi (footnote 38) 56.

73 Nagy – Orbán (footnote 42) 51 and see the explanatory memorandum to the Amending Act.

4. Conclusion

In the wake of Regulation 1/2003/EC, NCAs have emerged as the primary enforcers of EU competition law. The rise in infringement procedures before the NCAs created a need for minimum standards[74] that could provide a uniform toolbox, level playing field, and effective enforcement of EU competition law.[75] This prompted the ECN+ Directive, which sought to enhance NCA independence, resources, and cooperation, and standardize enforcement procedures. While the ECN+ Directive did not aim to make significant changes at the frontend of competition law, in many Member States, it made a significant impact on the backend side of the competition framework.[76]

As we have seen, every Member State faced a unique challenge during the transposition of the ECN+ Directive. Hungary's transposition highlighted several key areas of focus, including NCA independence, powers, leniency policies, and mutual assistance. Notably, the GVH demonstrated significant autonomy and resources prior to the Directive. The amendments made to the HCA further solidified the GVH's position, emphasizing independence and strict conflict of interest rules. Hungary's approach to leniency provisions mirrored the ECN+ Directive, emphasizing confidentiality and leniency.[77] Additionally, the HCA aligned itself with the ECN+ Directive in terms of enforcing procedural acts and cooperating with other NCAs. The transposition process faced a number of challenges, including divergences between national competition laws and the ECN+ Directive, and the need for legislative amendments to align with EU standards.[78] Despite these challenges, Hungary successfully transposed the ECN+ Directive, demonstrating its commitment to effective competition law enforcement.

Hungary's transposition of the ECN+ Directive represents a significant step towards enhancing the enforcement of EU competition law. The alignment of Hungary's competition law framework with EU standards will contribute to a more balanced playing field across Member States, ultimately benefiting consumers and promoting fair competition in the European market.

74 Tóth (footnote 12) 270.

75 Hoyng, Anne-Claire – Chappatte, Philippe – de Morant, Sarah: Achieving Consistent Outcomes in Digital Markets: European Merger Reviews vs. Antitrust Investigations, Antitrust, Vol. 33, No. 3, 2019, 67.

76 Kopácsi István: Informátori díj alkalmazása versenyügyekben (Informant reward scheme in competition cases), Versenytükör, 2021/2, 22. Available at: https://epa.oszk.hu/04900/04915/00050/pdf/EPA04915_versenytukor_2021_2.pdf.

77 Horányi – Mezei (footnote 18) 264.

78 Rizzuto (footnote 67) 82.

József Zavodnyik

Private enforcement and public enforcement: the ordered pair or the unordered pair? Implementation of the rules on private enforcement of competition law in Hungary

1. Introduction

Almost a decade ago, Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter: the Directive) was adopted.

The ordered pair and the unordered pair are mathematical concepts applied to the combination of two things: in the case of an ordered pair, the order of the two things is important, while in the case of an unordered pair, only the fact that the elements belong to the same pair is important, but not which element is first and which is second. The dominant vision of the Directive and the Hungarian legislation transposing it was to strengthen the importance of private enforcement. This legislation made the relationship between private and public enforcement of competition law infringements a central issue. The present study does not aim to provide a detailed presentation of the Directive, the Hungarian legislation and the transposition process, but it seeks to answer the question whether the EU and Hungarian legislations have served the expectations and whether they have kept the possibility of a real change in the practice of enforcing damages under competition law hidden and, in particular, that private enforcement might succeed in becoming self-sustaining, and that the dominance of public enforcement, the quality of an ordered pair, might cease to exist.

In 2020, the European Commission considered that even then

there was limited experience with the legislation.[1] In 2023, Wolfgang Wurmnest still considered that the assessment of damages awarded in antitrust cartel damages actions in Europe was in its infancy.[2] This will be no different in 2024: in my view, there is still not enough experience to allow a meaningful and full evaluation of the competition damages regime, the Directive, the Hungarian provisions, and the transposition itself.

However, the time that has elapsed does allow an assessment to be made as to whether the regime has lived up to expectations, whether private damages litigation has gained momentum and, if not, how private enforcement can be strengthened.

2. The Directive

The Directive was adopted by the European Parliament and the Council on 26 November 2014 to lay down the rules necessary to ensure that persons who have suffered damage as a result of a competition law infringement can effectively enforce their right to full compensation for the damage suffered against the infringer.

As the European Commission has pointed out, the Directive has two objectives: first, to facilitate the enforcement of antitrust damages actions in the European Union, allowing anyone to claim full compensation for the harm suffered as a result of a competition infringement, and second, to fine-tune the interaction between public and private enforcement of EU antitrust law.[3]

Over the past ten years, a number of studies have presented and analysed the provisions of the Directive. I will highlight here only one element of the legislation, the attempt to harmonise private and public enforcement, so that private and public enforcement do not hinder each other and, as far as possible, support each other.

As regards the relationship between private and public enforcement, Recital 5 of

1 Commission staff working document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 12.2020 SWD(2020) 338 final, 3, available at: https://edz.bib.uni-mannheim.de/edz/pdf/swd/2020/swd-2020-0338-en.pdf.Hereinafter: Commission (2020).

2 Wurmnest, Wolfgang: Assessing Antitrust Damages in Follow-On Actions Against Cartels, Cambridge Yearbook of European Legal Studies, Published online by Cambridge University Press, 2023, 1, available at: https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/assessing-antitrust-damages-in-followon-actions-against-cartels/CD7F8AC68CEED165A34209B3A03B0FD3.

3 See Commission (2020) (footnote 1) 1., 2. and 5. It cannot be ignored that, as Recital 5 of the Directive points out, damages actions are only one element of an effective system of private enforcement in the event of competition law infringements, and are accompanied by alternative means of enforcement, such as voluntary settlement and public enforcement orders to induce the parties to pay damages. These are not addressed in this study.

the Directive states that "to ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities."

This interplay is reflected, inter alia, in the fact that public enforcement, which seeks to achieve the objective of prevention more vigorously than private enforcement, supports private enforcement, which is primarily aimed at reparation (e.g. a private enforcement court is bound by the decision finding an infringement), while private enforcement supports public enforcement (e.g. as reflected in the Directive, the assumption is that the two types of enforcement increase each other's effectiveness, for example, by making the rules of evidence more favourable to injured parties in private enforcement following competition proceedings[4]).

3. Transposition of the Directive. History of the regulation in Hungary

According to Article 21(1) of the Directive, "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016".

In Hungary, the Directive was transposed by Act CLXI of 2016 amending Act LVII of 1996 on the prohibition of unfair and restrictive market practices and Act XLVII of 2008 on the prohibition of unfair commercial practices against consumers, following professional consultations. The provisions transposing the Directive entered into force on 15 January 2017.

I note that private enforcement was already possible under the general tort liability rules of Act IV of 1959 on the Civil Code, as was the case, for example, with the National Infrastructure Development Ltd. in August 2002, following a decision of the Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter: GVH) of 18 February 2003, which found that the companies concerned had allocated the execution of the motorway works tendered for in a manner that restricted competition.[5]

Subsequently, Act LXVIII of 2005 amending Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restrictions of Competition of 1 November 2005 con-

4 See e.g. Gyebrovszki Zsolt Dániel: Versenyjogi kártérítési perek – a közjog és a magánjog határmezsgyéjén, Külügyi Műhely, 2023 (1-2) 47-48.

5 The history of the case and the issues raised are presented in Osztovits András: A magánjogi jogérvényesítés gyakorlata a közbeszerzési kartellekkel okozott károk kapcsán, Közbeszerzés és Versenyjog (ed.: Tóth András), Gazdasági Versenyhivatal, Budapest, 2022, 203-205; Act CLXIV of 2005 on Commerce.

firmed, in order to facilitate private enforcement, that the GVH's proceedings do not preclude direct civil actions before the courts and established specific procedural rules on certain issues.

4. Evaluation of the transposition of the Directive

The European Commission has not raised any objections to the Hungarian transposition of the Directive, so it can be said that formally the transposition has been properly completed. However, this also means that the transposition has incorporated into Hungarian law the problems identified in the Directive.

The Hungarian legislation transposing the Directive has not yet been tested in practice. No competition damages actions have been brought in sufficient numbers to allow a meaningful assessment of the legislation. In view of this, I would like to draw attention to only two issues in the context of the regulation of compensation for damages under competition law.

4.1. Some shortcomings of the Directive and Hungarian legislation

Already after the adoption of the Directive, there were a number of criticisms, for example that it did not introduce punitive damages and that it did not provide for any relief for plaintiffs in cases of infringement. These objections were also raised against the Hungarian legislation.

Other criticisms can also be made. According to Article 9(1) of the Directive, "Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law". The Directive does not, however, provide for the consequences o private enforcement of a finding of non-infringement by a national competition authority or by a review court in a final decision.

This has not been addressed by the Hungarian legislation either. Hungarian jurisprudence recognized already before the Directive that Act LVII of 1996 on the prohibition of unfair and restrictive market practices (hereinafter: Tpvt.) due to behaviour that conflicts with Article 11 or 21, a claim for compensation can be asserted according to the general rules of civil law, but the assessment of the illegality of behavior belongs to the GVH. According to the case-law, if the GVH did not find the infringement of Article 11 or Article 21 in its proceedings, the conduct was lawful, and the civil court could not, by virtue of the prohibition of diversion of powers, find that the conduct which the GVH, acting within its jurisdiction, had declared lawful was unlawful. The admissibility of a claim for damages before the court therefore depends on

the outcome of the proceedings before the GVH and the subsequent administrative proceedings, the court held.[6]

In transposing the Directive, the Hungarian legislator has only gone beyond the provisions required by the Directive to a limited extent. Meanwhile, as the Commission points out, other Member States have made use of this possibility, for example in Germany and Portugal, by extending the rules to other actions for infringement of competition law (declaratory actions, actions for an injunction and interim measures).[7]

4.2. Presumption as to the price effect of infringing cartels

One of the obstacles to competition damages litigation is due to the assessment of the extent of the harm caused.

Article 88/C of the Tpvt., which entered into force on 1 June 2009, stipulates that the assessment of the impact of the Tpvt. on the competition rules is limited to the amount of the damages. In any civil action against a party to an agreement between competitors restricting competition by directly or indirectly fixing selling prices, allocating markets, or fixing production or sales quotas contrary to Article 11 of the Tpvt. or Article 81 of the EC Treaty, the effect of the infringement on the level of the price charged by the infringer shall be presumed to have been 10 per cent of the price, unless proved otherwise.

While the difficulties of determining the extent of the damage remained after the Directive,[8] the European legislator did not establish such a presumption, but Latvia and Romania adopted this approach in transposing the Directive and provided for a presumption of 10 % and 20 %, respectively.[9] Wolfgang Wurmnest points out that the presumption should not be overestimated and that the defendant can rebut it.[10]

Following the transposition of the Directive, Article 88/G (6) of the Tpvt. provides that in the case of a competition infringement caused by a cartel, it should be presumed, until the contrary is proved, that the competition infringement has affected the price charged by the infringing undertaking by up to ten per cent. Article 13 (3) of the Tpvt. defines "cartel" as an agreement or concerted practice between competitors which has as its object or effect the restriction, prevention or distortion of competition, in particular by directly or indirectly fixing purchase or selling prices or other trading conditions, limiting production or distribution, sharing the market, including collusion in the competitive process, or restricting imports or exports. The Tpvt. therefore introduces the presumption only for the most serious infringements, the so-called hardcore cartels.

6 BH 2004. 151. (Szegedi Ítélőtábla Gf.I.30.351/2003.).

7 See Commission (2020) (footnote 1) 5.

8 This is pointed out e.g. by Wurmnest. see Wurmnest (footnote 2) 8.

9 See Commission (2020) (footnote 1) 9.

10 See Wurmnest (footnote 2) 7.

5. The ordered pair or the unordered pair?

With regard to the relationship between public and private enforcement, a distinction is made between follow-on and stand-alone actions: while the filing of a follow-on action is preceded by public enforcement, i.e. the decision of the competition authority, a stand-alone action has no such precedent, as it is not preceded by the proceedings and decision of the competition authority.

5.1. The regulation's answer to the question

The Directive does not establish a hierarchy between public and private enforcement, and private enforcement does not have to precede the decision of the competition authority. The Directive seeks to promote the success of private enforcement, for example through provisions on disclosure of evidence, on the basis that "national courts should be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures, to order the disclosure of specified items of evidence or categories of evidence upon request of a party."[11] These efforts are, however, limited where the competition authority initiates proceedings, since, for example, according to the Directive „in order to ensure the effective protection of the right to compensation, it is not necessary that every document relating to proceedings under Article 101 or 102 TFEU be disclosed to a claimant merely on the grounds of the claimant's intended action for damages since it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to those proceedings,"[12] which would result in "an exemption being applied to any disclosure the authorisation of which would unduly hinder an ongoing investigation by a competition authority into an infringement of EU or national competition law".[13] The preamble to the Directive states that "the use of evidence obtained through access to the file of a competition authority shall not unduly prejudice the effective enforcement of competition law by the competition authority".[14]

The Hungarian legislation transposing the Directive was aligned with the EU provisions.

Under the legislation, public and private enforcement cannot run in parallel, and public enforcement takes precedence. This is ensured even if private enforcement comes first. According to the Tpvt., the court should immediately notify the GVH if a case is brought under Article 11 or 21 of the Tpvt. If, at any stage of the proceedings,

11 Recital 16 of the Directive.

12 Recital 22 of the Directive.

13 Recital 25 of the Directive.

14 Recital 132 of the Directive.

the GVH informs the court that it has initiated competition proceedings in the case concerned, the court suspends the proceedings until the expiry of the time limit for bringing an action against the decision of the GVH or, in the case of an action, until the court proceedings have been finally terminated and, after the GVH has issued its decision, the court is bound by the part of the GVH's decision not challenged in the action or, if the decision has been challenged, by the part of the court's decision finding an infringement.[15] The regulation therefore provides that, depending on the decision of the GVH, the original stand-alone action becomes a follow-on action.[16] The result is that, in the event of a subsequent action by the GVH, the plaintiff in an earlier action will have to wait until the end of the competition proceedings, which may last several years, or the court proceedings (which may also last several years) against the GVH's decision.[17]

The regulation of the coordination of public and private enforcement may therefore result in limited use of instruments supporting private enforcement, or in some cases in their marginalisation or their uncertain application in time.

On the other hand, it could be argued that the position of the injured party of private enforcement is strengthened if his action is preceded by proceedings before a competition authority, since the Directive provides, for example, that "Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law".[18]

In my view, the overall conclusion is that the legislation is not capable of bringing about a substantive change in the relationship between private and public enforcement, creating a genuine independence of private enforcement from public enforcement. The regulation has preserved the status of an ordered pair of private and public enforcement.

5.2. The practice's answer to the question

There are no complete and reliable data available on the number of competition damages actions brought in the EU Member States and Hungary following the trans-

15 Article 88/B (1), (7) and (8) of the Tpvt.

16 Points to this Teleki Lóránt: A versenyjogi jogsértésekkel kapcsolatos magánjogi jogérvényesítés uniós és hazai tapasztalatai, in: Valentiny Pál – Antal-Pomázi Krisztina – Nagy Csongor István – Berezvai Zombor (ed.): Verseny és szabályozás 2021, KRTK Közgazdaság-tudományi Intézet, Budapest, 2021, 68.

17 Szűcs Márk – Teleki Lóránt: A magánjogi jogérvényesítés uniós és hazai tapasztalatai a versenyjogi kártérítési irányelv átültetését követően, Budapest, 2019, 26.

18 Article 9 (1) of the Directive.

position of the Directive. The frequently cited data of Jean-François Laborde[19] make us confront the reality of the relationship between private and public enforcement, even if the data are incomplete, including non-appealable judgments, cases that have been settled out of court, and cases where the claim was dismissed on formal grounds (e.g. according to figures published by Laborde in 2021, by the end of 2020, 58 damages awards had been made in 299 cartels in 30 European countries, 93 liability cases had been established, 134 cases had been dismissed and 14 were pending. The cases were from 14 countries, with Germany (177 cases) and France (52 cases) the most numerous, and Hungary in 4th place with 8 cases. Of the 299 cases, 57% followed a decision by a national competition authority, 40% followed a decision by the European Commission, only 2% were stand-alone and there was one case in Italy following a decision by a competition authority in another Member State. Regarding the success rate of the cases, Laborde explained that there was an improving trend until 2017/2018, followed by a decrease (2017: 76%, 2018: 79%, 2019: 64%, 2020: 46%).

Laborde's data expose the reality of the relationship between private and public enforcement, even if it only covers cartel damages actions, i.e. it does not include actions for damages caused by infringements of the prohibition of abuse of dominant position or by agreements not constituting a cartel but which infringe the prohibition of restrictive agreements between undertakings. At European level, the Directive and the national regulations have not allowed private enforcement to play a meaningful role in competition damages actions.

The answer to the question (the ordered pair or the unordered pair?) is that the EU and Hungarian regulations have preserved the quality of the ordered pair in private and public enforcement, and practice has not been able to change this.

6. The revenge of private enforcement: the impact on leniency policy

The primacy of public enforcement in practice does not mean that the possibility of private enforcement does not have an impact on public enforcement. However, this effect is not the most favourable and regulation has not been able to prevent this.

An important element of public enforcement is the leniency policy, which allows undertakings to voluntarily notify an infringement and at the same time provide evidence of the infringement to benefit from a reduction of or even a full immunity from fines in the competition proceedings. Leniency applications are an important tool in helping to detect infringements, to initiate proceedings and to bring them to a successful conclusion.

There is an overlap between the objectives of bringing competition damages actions and the objectives of promoting a leniency policy through regulation in that both

19 Laborde, Jean-François: Cartel damages actions in Europe: How courts have assessed cartel overcharges, Concurrences 2021 (3).

objectives include deterring undertakings from committing competition law infringements. In this respect, the promotion of competition damages actions and leniency policy have a strong, yet not entirely positive, interaction.[20] The Directive and the Tpvt. have sought to reconcile these diverging interests.

Already in 2015, the OECD indicated that private enforcement could work against leniency policy.[21] In 2022, the OECD reported that there had been a decrease in the number of leniency applications between 2015 and 2020. In Europe, the number of leniency applications has been steadily decreasing, with 70.5% fewer leniency applications in 2020 than in 2015. There are various explanations for this decrease, with the OECD suggesting that leniency may be one of the reasons, as applicants may be exempted from paying fines but run the risk of being ordered to pay damages by the courts and, as they may be subject to a decision finding an infringement sooner than companies that do not participate in the leniency policy and appeal the decision, they may be more easily targeted by damages actions.[22] The German competition authority has also considered that the downward trend in leniency applications can be explained in particular by the discouragement of potential leniency applicants from making subsequent claims for damages.[23]

The number of leniency applications in Hungary is also decreasing or stagnating at a low level, with 10 leniency applications in 2017, 5 in 2018, 4 in 2019, 5 in 2020 and 3 in 2022.[24]

The interaction between private enforcement and leniency policy can take several forms. In the light of the above figures, it could be that the possibility of private enforcement discourages companies from filing leniency applications, and if there are fewer applications, there are fewer competition authority proceedings finding infringements, so there may be fewer follow-on actions, or, as the pressure of the risk of public and private enforcement is reduced, the number of cartels increases.

In reviewing the legislation, it will certainly be necessary to reassess the impact of private enforcement on leniency policy, possibly by amending the Directive and the transposing national legislation.

20 See Teleki (footnote 16) 75.

21 Relationship between Public and Private Enforcement, DAF/COMP/WP3(2015)14. p. 24, and Organisation for Economic Co-operation and Development: Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, DAF/COMP/WP3(2018)1, 27.04.2018., 9.

22 OECD (2023), The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, OECD Competition Policy Roundtable Background Note, 15, available at: www.oecd.org/daf/competition/the-future-of-effective-leniency-programmes-2023.pdf, and OECD Competition Trends 2022, 46-47, available at: https://www.oecd.org/competition/oecd-competition-trends.htm.

23 See Gyebrovszki (footnote 4) 56.

24 See Gyebrovszki (footnote 4) 57.

7. Strengthening private enforcement

If the impact of the Directive and the Hungarian national legislation transposing it is to be summarised briefly, it can be said that, according to the knowledge available so far, the Directive and its transposition have not actually promoted private enforcement in Hungary, the legislator has adopted legislation which favours public enforcement, leaving enforcement primarily to public bodies. The Directive does not elevate private enforcement to the level of public enforcement but continues to maintain a kind of dependency relationship. It is therefore not surprising that in Hungary, too, there is little evidence of a widespread practice of private enforcement based on the legislation transposing the Directive.

A more detailed analysis of legislative changes would be needed to increase the number of competition damages actions. I highlight below some of the necessary conditions for this.

7.1. Injured parties who are known to have suffered harm caused by an infringement of competition law

Although the number of proceedings before the GVH and the number (or lack thereof) of competition damages actions before the courts does not show this, there is no reason to assume that there are no infringements relevant for competition damages in Hungary. Several authorities may have a role to play in uncovering them (in particular the GVH, the Integrity Authority, and the Public Procurement Authority), but others, such as professional associations, consumer organisations and above all the press, may also have a role to play in uncovering competition damages or at least in raising concerns about market conduct and in raising awareness for further investigation. This condition is linked to the condition relating to legal culture, the wider awareness of competition law infringements and private enforcement.

If we accept that there is a high probability of infringements giving rise to claim for damages under competition law, it also means that there are injured parties. It is, however, questionable whether it is or can become known to the injured parties that they have suffered damage, and that damage has been caused by a competition infringement. In order to identify the damage (and thus to formulate a claim for compensation), the organisations representing the interests of the injured parties (consumer organisations, trade associations, etc.), but also legal representatives with knowledge of competition law, can play an important role.

In view of their specific situation, it is necessary to identify at least the contracting authorities and consumers affected by the infringement. The latter distinction may be relevant in several respects in the context of enforcement, as for example Julian Nowag and Liisa Tarkkila pointed out that companies often use contractual clauses that may create obstacles to the recovery of damages, for example by means of clauses on juris-

diction, mandatory arbitration and clauses preventing participation in class actions.[25] EU and national legislation pays particular attention to the protection of consumers' interests in several areas, which may allow action to be taken in the context of unfairness of contractual clauses restricting the enforcement of competition damages claims.

7.2. Legislation supporting small claims solutions

In view of the specific situation of the injured parties, it would be worth considering singling out consumers, in line with the European Union's general policy of consumer protection.[26]

There are several factors that may deter consumers from pursuing a competition claim, such as the lack of (economic) knowledge to quantify the damage and the consequent fees of experts, but also the small amount of the damage itself[27] - while the overall amount of damage for many consumers can be significant.

Even before the adoption of the Directive, it was clear that one of the central problems in a significant proportion of private actions is the large number of injured parties who suffer small individual losses.[28] The small amount of damage does not encourage the injured party to take action to recover the costs of the damage. This highlights the importance of collective redress in private enforcement, but there is still a lack of regulation in this area, preventing individual injured parties of small damages from taking collective action against infringing businesses.

Among the domestic precedents, it is also worth mentioning Bill T/11332 of December 2009 amending Act III of 1952 on the Code of Civil Procedure, which attempted to regulate the procedure in the case of collective actions, expanding the possibility

25 Nowag, Julian – Tarkkila, Liisa: How much effectiveness for the EU Damages Directive? Contractual Clauses and Antitrust Damages Actions, Common Market Law Review, 2020, (57/2) 433. The authors explain that in recent US lawsuits against Uber and Ryanair, for example, the claim was rejected because of clauses in the general terms and conditions.

26 Consumer discrimination in the enforcement of claims can be relevant in several respects, as Julian Nowag and Liisa Tarkkila, for example, pointed out that businesses often use contractual clauses that can create obstacles to obtaining compensation, for example through clauses on jurisdiction, mandatory arbitration and clauses preventing participation in class actions. See Nowag –Tarkkila (footnote 25) 433.

27 See Gaudin, Germain – Weber, Franziska, Antitrust Damages, Consumer Harm, and Consumer Collective Redress, Journal of European Competition Law & Practice, 2020, 3, available at: https://ssrn.com/abstract=3761016.

28 See Nagy Csongor István: Versenyjogsértés és kártérítés: a magánjogi jogérvényesítés meghonosításának lehetőségei a magyar jogban. A tételes jogi keretekben rejlő lehetőségek és a rendelkezésre álló jogalkotási alternatívák, Budapest, 2007, 5, available at: https://www.gvh.hu/data/cms1024131/gvh_vkk_palyazat_tamogatas_adatok_tanulmany_nagy_csongor_istvan_m.pdf.

of collective enforcement. The bill was not adopted.[29]

Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: Pp.) regulates class actions as a form of collective redress. The rules of collective litigation allow for a broader scope of collective enforcement of individual claims, offering the efficiency advantage of collective adjudication due to the large number and similarity of claims. However, the Pp. only allows collective actions in three cases: for the enforcement of claims arising from consumer contracts, in labour disputes, and in claims for damage to health or property arising from unforeseeable damage to the environment caused directly by human acts or omissions.[30] Co-placing is not a solution for private enforcement in the field of competition damages. As stated by Dorina Juhász (still in the context of the previous legislation, but also in the context of the Pp.), the institution of party association is only suitable for the enforcement of claims by small groups of injured parties and is not suitable for the enforcement of claims by a large number of injured parties.[31]

The Pp. recognises the institution of partnership, including compulsory partnership and partnership of convenience. In the latter case, several plaintiffs may sue together or several defendants may be sued together if, for example, the claims in the action arise out of the same legal relationship or if the claims in the action have a similar factual and legal basis and the same court has jurisdiction over all the defendants without applying the special jurisdiction provisions governing the partnership.[32]

On 25 June 2023, the legislation transposing the provisions of Directive 2020/1828/EC of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of consumers' collective interests and repealing Directive 2009/22/EC entered into force. The introduction of representative actions by qualified entities is intended to ensure that an efficient and effective procedural mechanism is available to qualified entities to bring collective actions to redress mass consumer harm and represent collective consumer interests. Pursuant to Act CLV of 1997 on Consumer Protection (hereinafter: "Act on Consumer Protection"), which primarily transposes the rules on representative actions, representative actions may be brought for infringements by undertakings of the provisions of EU law listed in Annex I to Directive 2020/1828/EC of the European Parliament and of the Council, including the legislative provisions transposing it, which adversely or allegedly adversely affect

29 See Horváth András: Versenyjogi kártérítési igények egyes kérdéseiről, kitekintéssel az iratokhoz való hozzáférésre, doktori értekezés, Budapest, 2015, 136-37.

30 Article 585 (2) of Act CXXX of 2016 on the Code of Civil Procedure.

31 Ruszthiné Juhász Dorina: A kártérítési igény előterjesztője, avagy ki jogosult bírósághoz fordulni, Versenyjogi jogsértések esetén érvényesíthető magánjogi igények (ed.: Boytha Györgyné), HVG Orac, Budapest, 2008, 278.

32 Article 37 of Act CXXX of 2016 on the Code of Civil Procedure.

the collective interests of consumers.[33]

According to the Annex, no representative action for damages under competition law can be brought. However, the list in the Annex can be extended, as was the case for Regulation (EU) 2022/1925 of the European Parliament and of the Council on competitive and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Marketplaces Act), which sets out obligations for gatekeepers that will rely heavily on private enforcement.[34] Article 42 of Regulation (EU) 2022/1925 of the European Parliament and of the Council states, in relation to representative actions, that Directive 2020/1828 of the European Parliament and of the Council on representative actions for the protection of consumers' collective interests and repealing Directive 2009/22/EC applies to representative actions brought for infringements of the provisions of Regulation (EU) 2022/1925 by gatekeepers which harm or are likely to harm the collective interests of consumers.

As pointed out by Sándor Udvary, the efficiency gains from collective redress can only be realised if it allows for the mass settlement of linkable cases.[35] It would certainly be worthwhile to examine how collective redress could be used to facilitate the mass enforcement of interrelated competition claims.

7.3. Accelerating public enforcement, with cautious use of commitments

Zsolt Boda finds that, ideally, the expected cost of non-compliance (which can be interpreted as the product of the size of the penalty and the probability of being caught) is greater than the expected benefit of non-compliance, and empirical studies generally conclude that it is not so much the size of the penalty as the probability of being caught that may affect infringements.[36] While it can be seen that public enforcement is currently of decisive importance for private enforcement, in recent years few cases of infringement of the prohibition of agreement between undertakings or abuse

33 Article 1. (3) of Act CLV of 1997 on Consumer Protection.

34 Szirbik Miklós – Bernáth Sára: A Digital Markets Act és a Digital Services Act várható hatásai a német jogrendszerben a magyar gyakorlat szempontjából, In Medias Res, 2023, (2) 172.

35 Udvary Sándor: A közérdekű és társult perek a polgári perrendtartásban, Jogtudományi Közlöny, 2018, (5) 225.

36 Boda Zsolt: Legitimitás, bizalom, együttműködés. Kollektív cselekvés a politikában, Argumentum Kiadó, Budapest, 2013, 24, 26.

of dominant position have been closed by the GVH.[37] This also reduces the possibility of follow-on actions.

Private enforcement would also require that public enforcement is completed quickly. However, in its 2020 report, the European Commission pointed out that follow-on actions can take a long time from the purchase of the product or service to the conclusion of the case, with studies suggesting that a case can take up to 13 years.[38] If we look at the cases closed by the GVH in 2022, we see that the year of initiation of proceedings was 2021 in one case, while two proceedings were initiated in 2018 and one in 2016, and one case in which fines were (re)imposed as a result of a judicial review in a competition case initiated in 2011 (the first decision of the GVH in this case was taken in 2013) - and only after this date will administrative proceedings to review GVH decisions begin, after which private enforcement would be possible. In any case, it is necessary to examine in the future how the legislation could speed up the enforcement of public law.

Already when the rules came into force, it was recognised that the GVH should refrain from accepting commitments without justification. In such a case, the GVH, without finding in its decision that an infringement has been committed or not committed, will make binding in its decision the undertaking's commitment to bring its conduct into conformity with the applicable legal provisions in respect of the conduct under investigation, and the public interest can be effectively protected in this way.[39] This is one of the issues that may reveal conflicts of interest between the GVH and the injured parties, for example in the assessment of the admissibility and content of a commitment statement, which may have an impact on private claims in several respects, since the acceptance of a commitment statement may not lead to a finding of infringement, thus making it more difficult for the injured party to successfully pur-

37 According to the GVH's parliamentary reports (available at: https://gvh.hu/gvh/orszaggyulesi_beszamolok/2321_hu_orszaggyulesi_beszamolok) the GVH did not take any decisions in proceedings for abuse of dominant position (Article 21 of the Tpvt., Article 102 of TFEU) in 2020, 2021 and 2022 (1 case in 2020 and 2 in 2022 concerning violations of the Trade Act). In 2018, 1 procedure ended with a commitment and 2 cases were followed up. In 2019, 1 procedure ended with a commitment and 1 case was followed up with a request for amendment of the obligations imposed by a decision in a competition procedure. The following decisions have been taken in recent years in cases of infringement of Article 11 of the Tpvt. and Article 101 of TFEU: in 2018, the GVH found 3 cases of infringement (2 of which were related to public procurement procedures), 1 decision closed the procedure with a commitment, 1 decision terminated the procedure, while 4 decisions were taken following a review and 1 decision was taken following a court judgment in a retrial procedure; in 2019, 7 cases of infringement were found (3 of which were related to public procurement procedures or tenders), 1 case was terminated by the GVH, and 1 case was related to the verification of the fulfilment of commitments made binding in a decision taken in a competition supervision procedure; In 2020, 2 decisions were taken (one of which concerned a merger).

38 See Commission (2020) (footnote 1) 2-3.

39 See Article 75 (1) of Tpvt.

sue a competition damages action, or the commitment itself may contain reparation elements. This shows that the GVH, in its procedures and decisions, may also need to consider the implications for competition damages claims.[40] The review of the regulation should also address the question of how to prevent the dominance of competition authority interest in a favourable outcome of the proceedings, which is not contested by the undertaking, over the possibility of private enforcement.

7.4. The possibility of financing private enforcement

Regulation (EC) 261/2004 of the European Parliament and of the Council on establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) No 295/91 set out common rules on compensation to passenger in the event of denied boarding and of cancellation or long delay of flights. Daniel R. Kelemen pointed out that "a niche industry of passenger compensation-claim legal advisors has sprung up to assist passengers with claims. Firms … advertise widely on the Web, soliciting clients to bring compensation claims against airlines." The firms work on a "no cure, no pay" (no win, no fee) basis and they maintain offices in airports, where passengers can stop by to make claims.[41]

An infrastructure has therefore been put in place to compensate air passengers, with professionals to help injured parties and without hindering the practice of law.[42] Such an infrastructure would also be needed in competition law compensation cases, such as legal representatives on the side of the injured party with sufficient expertise and economic support.

The issue of funding for the enforcement of claims is also linked to the infrastructure, but also to the legal framework supporting small claims solutions.

At present, the legislation does not address the issue of collective action for small damages, the creation of a professional framework and the costs of lengthy litigation, while examples of regulation of this issue at EU and Member State level can be found in the case of representative actions mentioned above.

40 Zavodnyik József: Egyensúlyemelés. A versenyjogi kártérítési irányelv átültetésének egyes kérdései, Versenytükör, 2016, (IV) 66.

41 Kelemen, Daniel R.: Eurolegalism: The transformation of law and regulation in the European Union, Harvard University Press, Cambridge, MA, 2011, 3-4.

42 E. g. the Court of Justice of the European Union held in its judgment of 29 February 2024, *Eventmedia Soluciones,* C-11/23, ECLI:EU:C:2024:194, that Article 15 of Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 must be interpreted as precluding the inclusion, in a contract of carriage, of a clause that prohibits the transfer of rights enjoyed by air passengers against the operating air carrier by virtue of the provisions of that regulation.

The Hungarian legislation provides that where a representative action for the adoption of measures to remedy an infringement of rights is financed by a third party, it must be ensured that financing by a third party with an economic interest in the institution of representative action for the adoption of measures to remedy the infringement of rights or in the outcome of the proceedings instituted by the representative action does not affect the proceedings in a way which is different from the protection of the collective interests of consumers. The issue of financing is covered by several provisions.[43]

Solutions that can support the financing of private enforcement can emerge in the absence of specific regulation, as exemplified by the aforementioned companies entering the market for air passenger compensation.

Exploring this issue is essential, as private enforcement must be profitable, taking into account both the costs incurred and the time involved.

It should be noted that in September 2022 the European Parliament adopted a resolution proposing a directive on responsible private funding of litigation.[44] The resolution points out that commercial third party litigation funding is a growing practice whereby private investors (litigation funders) who are not a party to a dispute invest for profit in legal proceedings and pay legal and other expenses, in exchange for a share of any eventual award. Collective redress is only one type of litigation in which third party litigation funding is currently used, with other examples being arbitration, insolvency proceedings, investment recovery, anti-trust claims and others.

7.5. Promoting the development of a legal culture supportive of private enforcement

In 2020, the European Commission considered that the Directive had raised awareness among injured parties of infringements of EU competition law of their right to effective compensation for the harm suffered as a result of such infringements.[45]

I do not share this optimism with regard to Hungary, but rather agree with the view that Hungary will not see an increase in damages actions based on competition law infringements following the implementation of the Directive, due to the lack of the necessary legal culture.[46]

The level of awareness on the side of tortfeasors (thanks to various compliance

43 See Article 38 (3) e) and f) and Article 38/E of Act CLV of 1997 on Consumer Protection.

44 European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), OJ C 125, 5.4.2023, 2–22.

45 See Commission (2020) (footnote 1) 3.

46 Székely Zsófia: A magánjogi jogérvényesítés néhány aktuális kérdése, Miskolci Jogi Szemle, 2017, (1) 166.

activities) has probably increased (at least among larger enterprises rather than SMEs), but there is no evidence of an increase in awareness among the injured parties as regards the possibility and importance of private enforcement of competition law infringements.

In the case of (potential) injured parties, awareness-raising could be done primarily in relation to specific cases that are already in the press, explaining who has suffered damage from the infringement and what redress is available to injured parties.

An example of targeted information is the previously mentioned case of air passenger compensation, where EU sponsored posters were displayed at airports informing passengers of their right to compensation. This is likely to have contributed to the significant increase in the number of claims against airlines following the adoption of the EU Regulation, with twenty-two thousand claims filed in the first eight months.[47]

8. Summary

Although it is not possible to carry out a substantive evaluation of the Directive and the Hungarian legislation transposing its provisions due to the lack of case law (and a formal comparison between the provisions of the Directive and those of the Tpvt. does not appear to be justified, also in view of the fact that the European Commission has considered the transposition of the Directive to be appropriate), it can be seen that the dominance of public law enforcement over private law enforcement, and the dependence of private law enforcement on public law enforcement has been preserved, the reasons for which can be explored not only in competition law and tort law, but also, for example, in consumer protection law (e.g. it is also important to note that it cannot be ruled out that, in relation to public enforcement, the regulation (and the possibility of private enforcement) may have contributed to the reduction in the number of leniency applications in some Member States.) However, this is not borne out by the fact that in Hungary, the reduction in the number of competition proceedings has also reduced the threat of private enforcement as a risk.

At present, private enforcement cannot be considered a realistic alternative to public enforcement, to bureaucratic state enforcement. On the whole, I agree with the views that criticise the Directive (and thus indirectly the Hungarian legislation), stating that it has reinforced the dominant role of public enforcement. As Chase Foster explains in his series of objections to the Directive, the Directive remains too restrictive to meaningfully shift the relative roles of public and private actors in the imple-

47 See Kelemen (footnote 41) 1.

mentation process.[48]

The Hungarian regulation strove to properly transpose the Directive, and basically fulfilled this objective. At the same time, this also resulted in the fact that the Hungarian regulations were not and could not be freed from the errors of the Directive, which must be dealt with in the coming years, either by creating regulations that substantially support private law enforcement, breaking out of the limitations of the current regulations, or by making corrections to the current regulation, which proved to be insufficient. In the meantime, the legislators of the Member States will have the opportunity to examine what tools are available to them in order to support private law enforcement by taking advantage of the movement defined by the Directive.

48 Foster, Chase: Legalism Without Adversarialism: Public and Private Enforcement in the European Union, June 2020 (working paper), 24, available at: https://www.chasefoster.com/_files/ugd/892c68_aa88b2708dda4160b59edffb197b0ce6.pdf?index=true.

Gábor Fejes

Interaction between European and Hungarian (competition) law through voluntary harmonisation and takeover: the curlicued journey of legal professional privilege in(to) Hungarian law[1]

1. Introduction

EU competition law has been a source of inspiration for the legislator in Hungary ever since the economic and political changes of the late 1980's and early 1990's. Other contributions in this book explore the influence of EU competition law on the basic substantive law pillars of the domestic antitrust regime as well as on some fundamental procedural tools for the purposes of enforcement of domestic, and after accession: also EU, competition law.

Where substantive and procedural provisions of EU law have, after Hungary's 2004 accession, been adopted, this has taken place on a non-compulsory basis (except where directives had to be implemented). The present chapter explores the voluntary taking over of a concept which has evolved far over the spectrum originally foreseen: legal professional privilege (LPP). LPP seems, as will be seen in more detail below, to have been "donated" to the entire body of Hungarian law by EU competition law and practice. The adoption by way of intermediation by competition law may look odd because the concept of LPP must have been broader in both systems and should perhaps have been conceived and applied more broadly, at a more fundamental, constitutional law level. Be it as it may, the notion grew its routes into the soil of Hungarian law far beyond the realm of just competition law. The adoption process is thus of interest and may also stand as an illuminating example of voluntary harmonization

1 The views and opinions expressed in this chapter are those of the author and do not necessarily reflect the views or positions of any of the organizations the author belongs to.

starting in a specific field of domestic law but ending up, through a series of random or only loosely related legislative and judicial events, spilling over across the entire body of domestic law.

2. The origins: legal professional privilege under EU competition law

„In a civilised society, a man is entitled to feel that what passes between him and his lawyer is secure from disclosure"[2]: the words from Advocate General Warner in the seminal AM & S case properly mirror the very essence of what constitutes legal professional privilege in the traditional sense of the concept. This is all the more true for fields of law which operate with broad and flexible concepts, such as those under competition law which may evolve over time in the jurisprudence. And all the more so, if some of those rules, their enforcement mechanisms and the sanctions pertaining to them have a quasi "criminal character"[3].

With a view to enforce the rules pertaining to the competition law regime, the European Commission has had the power to conduct unannounced on the spot investigations (commonly called: dawn raids) from as early as the entry into force of Regulation 17[4]. Once the Commission indeed started to make use of this power it was only a question of time when the critical question would arise whether the Commission was entitled to seize and inspect, or even possibly use as evidence, documents which contained exchanges between the party to the proceedings and its legal counsel.

Normative instruments of European law did not, at the time, contain provisions on LPP. As in many other instances, it was the task of the European Court of Justice (CJEU) to establish and define the scope of legal professional privilege first in 1982 in the American Mining & Smelting Europe Ltd. (AM & S) case[5]. The case centred

2 Opinion of Advocate General Warner delivered on 20 January 1981, *AM & S Europe Ltd. v. Commission*, C-155/79, ECLI:EU:C:1981:9, p. 1638.

3 Under Hungarian law: Decision 30/2014. (IX. 30.) of the Constitutional Court of Hungary, paragraphs 60-67. Under EU law, see: Opinion of Advocate General Kokott delivered on 3 July 2007, ETI and Others, C280/06, ECLI:EU:C:2007:404, paragraph 71.; Opinion of Advocate General Kokott delivered on 18 April 2013, Schindler Holding Ltd and Others v European Commission, C-501/11 P, ECLI:EU:C:2013:248, paragraph 18. including the cites references there. In A. Menarini Diagnostics S.R.L. v. Italy, App. no. 43509/08 (27 September 2011), the European Court of Human Rights found that a fine imposed by the Italian competition authority in cartel proceedings could be regarded as criminal within the meaning of Article 6(1) ECHR (paragraphs 38 to 45). The EFTA Court took a similar approach in its judgment in E15/10 Posten Norge v EFTA Surveillance Authority of 18 April 2012, at paragraphs 87 and 88 with regard of a fine imposed in cartel proceedings by the EFTA Surveillance Authority.

4 EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13, 21.02.1962, p. 204 – 211.

5 Case no. COMP/ 157/79 (AM & S Europe Ltd. v. Commission).

around an alleged price fixing and market sharing cartel and the Commission carried out repeated dawn-raids at the premises of AM & S and thereby sought access to documents which AM & S claimed to have been covered by legal professional privilege.

For the first time, the CJEU had the chance to hold that written communication between a lawyer and his client was worthy of protection. The CJEU found certain common characteristics of the laws of the then member states. First, although some member states did not protect communications with in-house counsels, all member states recognised that communication with *independent lawyers,* that is to say, lawyers that were not bound to the client by relationship of employment should be protected. Second, as for the nature of the documents deserving protection, all member states recognised that communications made *„for the purposes and in the interest of the clients' right of defence should be privileged"*[6].

The CJEU therefore concluded that LPP, as *part of EU law*, protected communications between the party and its independent lawyer provided that those communications occurred in the interest of the party's rights of defence. The Court of Justice also noted that the protection may be extended to earlier communications which have a relationship with the subject matter of the proceedings in question[7].

The concept was further polished in 1990 in the Hilti case[8]. The General Court agreed with Hilti that documents originally drafted by the company's staff reporting on legal advice received earlier from independent lawyers was itself also covered by LPP. The General Court declared that the principle of the protection of the lawyer-client communication should not be frustrated on the rather formalistic ground that the contents of those communications and the legal advice were reported in documents internal to the undertaking. If the legal advice originally stemming from independent outside counsel is transformed into internal communication within the undertaking, the content remains to be protected[9]. In other words, the content of the document takes precedence over its form.

The CJEU had two further occasions to decide on whether the personal or material scope of legal professional privilege should be extended. In Akzo Nobel[10], the CJEU was called upon to rule whether in-house counsel, that is to say, a legal advisor being in an employment relationship with the party to the proceedings should be included into the personal scope of the attorney-client privilege. The CJEU, ruling as a Grand Chamber, found that an employed in-house counsel was not an "independent attorney" for the purposes of the EU law LPP notion. The requirement of independence,

6 Ibid., paragraph 21.

7 Ibid., paragraph 23.

8 Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, ECLI:EU:T:1991:70.

9 Ibid., paragraph 18.

10 Judgment of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, ECLI:EU:C:2010:512.

the CJEU stressed, „*is based on the concept of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interest of the cause, legal assistance to the client. An in-house lawyer does not enjoy the same degree of independence from his or her employer as an external counsel even if he or she is member of the bar or law society*"[11]. The CJEU did not agree with Akzo Nobel on the argument that the development of EU competition law may warrant the extension of the scope of protection necessary. Quite to the contrary, the CJEU deducted from Regulation 1/2003/EC (see Recitals 25 and 26) that the Commission should not unnecessarily be hindered in uncovering evidence in an environment in which the detection of infringements was growing even more difficult. Neither did the CJEU agree with the argument of Akzo according to which the exclusion of in-house counsels from the legal professional privilege effectively diminishes the level of fundamental protection enjoyed by parties in terms of the right of defence.

In Vlaamse Balies[12], a case involving a dispute regarding the validity of certain provisions of Council Directive 2011/16/EU of 15 February 2011 on the administrative cooperation in the field of taxation, the CJEU, again in its composition as Grand Chamber, made important general observations regarding LPP.

The CJEU recalled for the first time in relation to LPP that the case law of the European Court of Human Rights (ECtHR) under Article 8(1) of the European Convention of Human Rights (ECHR) *"protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients*"[13]. Also for the first time regarding the notion of LPP, the Charter of Fundamental Rights[14] (the Charter) was mentioned. Citing the case law of the ECtHR, in particular in Michaud v. France of 6 December 2012[15], the CJEU noted that, similar to Article 8(1) ECHR, „*the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of the legal consultation, both with regards to its content and to its existence. […]. Therefore, other than the exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone without their consent that they are consulting him or her*". According to the CJEU, Article 7 of the Charter and Article 8(1) ECHR recognise "*[…] that lawyers are assigned fundamental role in a democratic society, that of defending litigants*" and that *"any person must be able without constraint to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal*

11 Ibid., paragraph 45.

12 Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, ECLI:EU:C:2022:963.

13 Ibid., paragraph 27.

14 Charter of Fundamental Rights of the European Union [2000] OJ 2000 C 364, 18.12.2000, p. 1.

15 *Michaud v France*, Application no. 12323/11 (6 December 2012).

advice to all those in need of it […]" (emphasis added).[16]

With Vlaamse Balies, it has therefore become clear that LPP „*covers not only the activity of defence but also legal advice" that is to say, exchanges on any specific legal issue between the client and "a lawyer whose profession encompasses by its very nature, the giving of independent legal advice to all those in need of it".* The material scope of LPP is therefore clearly not confined to the subject matter of the proceedings in which the given document or data is sought to be used by the given authority, but all legal advice whether related or unrelated to the proceedings, whether prepared irrespective, or for the purposes, of defence in the given proceedings. Read in conjunction with the Hilti judgment which protects this legal advice once it enters the corporate realm of the party, the protection indeed seems to be quite comprehensive under EU law.

It is also remarkable to note that the CJEU invoked Article 7 of the Charter (which corresponds to Article 8(1) ECHR) on the right to respect for one' private and family life, home and communications (privacy) and not the provisions on Article 6 ECHR and Article 47 of the Charter on the right to an effective remedy and fair trial.

One may note that the term "lawyer" is being used in the English version of the judgment, but this is consistent with Directive 98/5/EC of 16 February 1998[17] and is to be understood as referring in a narrow sense to attorneys (solicitors and barristers under the English system). (The other language versions of Vlaamse Balies use the classical terms: "Avocat" in French, whilst the Hungarian version refers to "ügyvéd"[18]). Vlaamse Balies does therefore not change the personal scope of protection under the LPP doctrine as it currently stands under EU law. The case remains to be as determined by the Akzo Nobel judgment, that is: in-house counsels, even if members to the bar association and even if being bound by obligations similar to those of an independent attorney also member of the same bar association, are not accorded the protection of legal professional privilege in terms of their communication with their employer[19].

16 Footnote 12. paragraphs 27. and 28. In paragraph 28 of this judgment, the Court of Justice specifically refers to paragraph 18 of the AM & S Europe Judgment.

17 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L 077, 14.03.1998, p. 36 – 43.

18 See also the German version: "Rechtsanwalt", Dutch version: "Advocaat", Spanish version: "Abogado", Italian version: „Avvocato", just like under Directive 98/5/EC.

19 For an assessment of whether this position is appropriate see e.g. the convincing arguments by Prof. Wouter Wills in his paper: Wouter P. J. WILLS: Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure, World Competition: Law and Economics Review, 2019., Vol. 42 No. 1, pp. 21-42.

3. LPP in Hungary: the first steps (2001-2005)

The Hungarian Competition Authority (Gazdasági Versenyhivatal - GVH) has had the power to conduct unannounced on-the-spot inspections as of 1 April 2001. It is from this moment in time that our national competition authority was in a position to collect larger sets of hard copy or electronic documents without them being first filtered and submitted by the undertaking and its legal counsels. Soon after the first dawn-raids, the Hungarian practise realised that attorney-client communication may be exposed to being seized, copied and reviewed by the GVH.

The opinions articulated in legal literature were diverging regarding the availability of LPP under Hungarian law prior to 2005. Major commentaries described the powers of the GVH to request the submission of original documents and to conduct unannounced on-the-spot investigations without even considering the issue of the protection of communications between the legal counsel and the undertaking being investigated[20]. It is remarkable that some commentaries noted the existence of protection against self-incrimination as a fundamental underlying principle of procedural law, whilst this notion was also not yet explicitly codified in the Hungarian Competition Act (Act 57 of 1996).

Other commentators suggested that LPP was available under Hungarian law as „a fundamental principle of the whole legal system", they nonetheless advocated the view that the Hungarian Competition Act should be amended so as to encapsulate the exact personal and material scope of the privilege in competition cases[21].

If one looks at the Hungarian legal landscape in the years 2001-2005, the notion of legal professional privilege was not specifically mentioned in any of the major procedural codes. The Criminal Procedural Code, which would have been an obvious place to invoke this notion, approached the attorney-client relationship from the perspective of the defence attorney and provided for the possibility for attorneys to deny providing testimonies regarding matters covered by their secrecy obligations[22]. Article 149 of the Criminal Procedural Code contained specific provisions for searches in attorney's offices, however the provisions did not specifically state whether the roots of the specific provisions on the additional protection provided to the premises of lawyers originated in the fundamental principle of legal professional privilege. The Civil

20 See: BOYTHA Györgyné - BODÓCSI András - KASZAINÉ MEZEY Katalin - Sárközy Tamás: Versenyjog, HVG ORAC, Budapest, 2001, p. 292.; KASZAINÉ MEZEY Katalin - MISKOLCZI Bodnár Péter: Kézikönyv a versenyjogról, HVG ORAC, Budapest, 1997, p. 356.; VÖRÖS Imre: A verseny, kartell, ár, törvények magyarázata, Triorg Kft., Budapest, 1991, p. 186, providing a commentary to Articles 36 and 37 of the 1991 Competition Act which contained, in terms of the powers of the GVH to request the submission of documents or indeed seize original copies, rules similar to the ones in the 1997 Hungarian Competition Act.

21 See: BÉRCESI Zoltán - KECSKÉS László: A bizalmas kommunikáció privilégiuma a versenyfelügyeleti eljárásokban, Európai Jog, 2005., 4., p. 11-26.

22 See: Article 81 (1), Point b) of Act XIX of 1998 on Criminal Proceedings.

Procedural Code then applicable[23] followed a similar approach. The then applicable Administrative Procedural Code[24] also only contained provisions on whether attorneys were entitled to reject acting as a witness on facts covered by legal secrecy (see Articles 31 (3) and 29 (3) point b)).

The accession of Hungary to the EU, on 1 May 2004, meant that the GVH was now empowered, under Regulation 1/2003/EC, to directly enforce Articles 101 and 102 in accordance with the procedural rules laid down by the Hungarian Competition Act. As of this day, the GVH had the right to conduct dawn raids and collect (or impose obligations on undertakings to submit) documents in cases in which the GVH was also enforcing (and thus implementing) EU law. These actions of the GVH have been covered by the Charter as implementation of EU law.

It is thus probably not by chance that the Hungarian legislator saw it necessary to address LPP with specific normative provisions. It seems to have been a conscious policy choice not to leave this question to jurisprudence, even though the matter was open for being dealt with through invoking the Charter and the case law of the CJEU on LPP (or the case law of the ECtHR[25]), for instance arguing that LPP was a fundamental right inherent under the right to fair trial or the right to privacy. Recalling how cumbersome it was sometimes for the notions of general EU law to gain a foothold in the Hungarian judicial practice, it appears, in hindsight, to have been the right choice to cover LPP by explicit provisions of the Hungarian Competition Act.

4. The 2005 novella and the codification of LPP

The first comprehensive *novella* to the Hungarian Competition Act after Hungary's accession was Act 68 of 2005. It was Article 33 of this Act which inserted Article 65/B into the Hungarian Competition Act on LPP. The new provision (which came right after Article 65/A covering dawn raids) determined the scope of legal professional privilege by codifying an exception from under the overarching powers of the GVH to seize and collect/copy, during dawn raids, any document relevant for the purposes of fact finding in the given case. According to Article 65/B *„a document which has been created (i) for the purposes of exercising the client's rights of defence or in the context of exercising such rights,* [and has been produced] (ii) *in the course of a communication between the client and his attorney or for the purposes of being used in such communication, or which records what was said in the course of such communication,* (iii) *provided in each case that the said character is directly apparent from the document itself, shall not be admissible as evidence in competition proceedings or be examined or seized, and*

23 Act III of 1952 on the Code of Civil Procedure.

24 Act IV of 1957 on the General Rules of the Administrative Procedure.

25 Such as *Kopp v Switzerland*, no. 13/1997/797/1000 (25 March 1998).

the holder shall not be required to produce such document during an inspection, unless otherwise provided for [by law]. *This protection may be waived by the client.*" (structuring added). The rules introduced a classical yellow-envelope-procedure if there was a dispute on whether the given documents qualify for LPP protection.

The Ministerial Reasoning to Act 68 of 2005 noted specifically that „*in EU competition law, the protection of communications between a lawyer and his client ("legal privilege") is recognised as a fundamental principle requirement to be applied and enforced in competition proceedings.* […]." Then it went on to claim, quite rightly, that a "*gap had to be filled*" under Hungarian law, since the documents containing attorney-client communications were not accorded any protection, *as long as they were with the client*.

The Ministerial Reasoning found it important to caution against the misuse of LPP and thereby justify the proposedly narrow material scope: "[…] *if the protection were to extend to all documents" exchanged between a lawyer and his client, „it would make it very easy to conceal evidence, since all that would be required would be to include, in a lawyer's deed, all information relating to the infringement (e.g. the cartel agreement itself). It is therefore necessary that the protection of the document be limited to a narrower scope, namely documents relating to the exercise of the right of defence.*" In addition to this rather unrealistic projection of lawyers abusing LPP with a view to conceal cartels, there was another manifestly erroneous premiss underlying the whole legislative concept, namely that *"the client is naturally aware of whether an infringement has been committed"* [emphasis added]. This idea, which seems to have guided the drafters towards a narrow material scope for LPP, can only hold for the worst types of cartels.

Whilst the rules explicitly related only to dawn raids, the GVH properly recognised from the beginning that LPP limits not only its powers during dawn raids but in a more general sense: what cannot be seized and taken during inspections, can naturally also not be the subject to an order for submission or a request for information. When the GVH saw the time right to publish a Notice on its policy on the setting of procedural fines in relation to requests for information (in 2016), it took this opportunity to openly state that LPP is one of the legitimate reasons for the refusal of the submission of documents in which case no procedural fines can be imposed[26].

In hindsight, one cannot but praise the 2005 novella in that it imported, in a not very invasive manner, a fundamental legal concept into Hungarian competition law. As will be seen, Article 65/B of the Hungarian Competition Act was the first seed in the soil of not just domestic antitrust law, but Hungarian law at large. But before gaining more ground, the concept had to withstand the first judicial test which came not long after the entry into force.

26 Notice 1/2016 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority, paragraphs 16. and 17.

5. The first judicial test of the new concept: the Chamber of Pharmacists case (2007)

The new rules were soon put up for the test in the Pharmacist Chambers case (Vj-33/2007). The GVH initiated competition proceedings in June 2007 to investigate how and with what purpose the Chamber of Pharmacists, a self-governing professional organisation, had made certain price recommendations for its members regarding non-prescription drugs. The GVH started the proceedings with a dawn raid at the premises of the Chamber of Pharmacists. During that raid the GVH seized certain documents from May 2003, August and September 2005 and also from 2006 and 2007. Those documents contained communication between the Chamber of Pharmacies and its legal advisor, a law firm specialising in competition matters. Indeed, the Chamber of Pharmacists had sought legal advice from a highly reputed law firm with deep competition law expertise in relation to the determination of prices of non-prescription drugs, the availability of block exemptions, the publication of non-binding recommended prices for non-prescription drugs and generally the assessment of the competitive landscape on the pharmaceutical market following the partial liberalisation of drug prices.

The Chamber of Pharmacists invoked legal professional privilege and requested the GVH not to seize or copy those documents during the dawn raid. The GVH disagreed and the file landed at the first instance court (Fővárosi Törvényszék), as foreseen by the procedural rules by the Hungarian Competition Act. The Fővárosi Törvényszék sided with the GVH noting that documents prepared years before the initiation of the GVH's proceedings could, by definition, not be documents *prepared for the purposes of defence* in the given proceedings. On appeal, the second instance court (Fővárosi Ítélőtábla) reversed the first instance judgment and ordered the documents to be handed back to the Chamber of Pharmacists. The Fővárosi Ítélőtábla agreed with the arguments of the Chamber of Pharmacists according to which the decisive factor for the availability of LPP regarding any given document is not the date of the inception of the document, but its content. If, in terms of its content, the document relates to the defence of the interests of the given client, LPP is available even if the proceedings of the GVH, in which such defence becomes then necessary, occurs at a later stage. The Fővárosi Ítélőtábla noted that the Hungarian Competition Act did not exclude documents from LPP simply on the basis that they were produced prior to the initiation of the GVH's proceedings. Indeed, if documents created before such proceedings were ab ovo not covered by LPP, the protection would, to a large extent, become non-existent.

The GVH submitted an application for legal revision, on points of law, to the Kúria (Hungary's Supreme Court). The GVH argued that the objective of legal professional privilege was to safeguard the right of defence as part of fair trial. However, the right of defence does not encompass the ability to involve legal assistance to illegal conduct or indeed to the planning or preparation of such conduct. The GVH noted that the documents, created years prior to the GVH's proceedings, related to the subject mat-

ter of those proceedings but were general communications between the Chamber of Pharmacists and the law firm: the Chamber of Pharmacists sought legal advice with a view to determine its own future market conduct. According to the GVH's view, attorney-client communication does not by and of itself benefit of legal professional privilege and it is not the content of those communications that matters primarily. A document may only benefit from LPP if it was prepared with the objective to exercise the right of defence in a specific case. The GVH argued that documents that contained solely abstract legal explanations and which related to facts, which facts had, at the time of the creation of the document, not yet been the subject matter of administrative proceedings, cannot benefit from the protection. A legal opinion regarding the conduct of the Chamber of Pharmacists could only be protected, claimed the GVH, to the extent if it contained final and materialised facts relating to an infringement.

The GVH's strict position (echoing the pessimistic tone of the Ministerial Reasoning on the menace of lawyers abusing LPP) did not convince the Kúria. Quoting Akzo Nobel and AM & S Europe, the Kúria noted that the communication between an attorney and his client must be confidential with a view for the client to be able to fully exercise the right of defence and to be able to communicate totally openly. Having reviewed the content of the relevant documents, the Kúria came to the conclusion that each of them related to the subject matter of the investigation by the GVH. The Kúria agreed with the court of second instance: it was not the date of the creation of the document, but the content that mattered. If the documents contained attorney-client communication in relation to the subject matter of the GVH's proceedings (which proceedings started years after the production of the documents), the documents should still be viewed as *prepared for the purposes of defence* and thus benefiting from LPP. Even a draft cooperation agreement which was sent to the law firm for comments was found to have been covered by LPP.

Commentators found the verdicts by the second instance court and by the Kúria a welcome development, even if the judgments naturally left a number of questions unanswered.[27] With the Kúria's judgment one was in a position to argue that LPP henceforth must be understood to cover, under Hungarian law, both possible aspects: the so-called l*egal advice privilege* (the confidentiality of *bona fide* legal advice communications between attorneys and clients) and *litigation privilege* (confidential communications made between an attorney and his/her client in connection with, or in contemplation of, legal proceedings).[28]

27 HORVÁTH András: Magyar versenyjogi fejlemények – informátori díj, legal privilege és csoportos per, Magyar Jog, 2010., 9., p. 534-544.

28 For an illuminating description of these concepts see: Gavin MURPHY: CFI signals possible extension of professional privilege to in-house lawyers, European Competition Law Review, 2004., Issue 7, p. 447-454.

6. The rise and proliferation of the concept: codification in other acts and judgments of the Constitutional Court (2009–2015)

The concept, having been firmly embodied in the Hungarian Competition Act and having received the attention of the highest judicial body, grew apparently strong enough to influence some forthcoming legislative initiatives.

Act 98 of 2006 on the General Provisions Relating to the Reliable and Economically Feasible Supply of Medicinal Products and Medical Aids and on the Distribution of Medicinal Products (with the Hungarian abbreviation: Gyftv.), entering into force on 1 January 2007, was the first such piece. The Gyftv. codified, in its Article 20 (5), an LPP rule essentially mirroring the disposition under the Hungarian Competition Act.

The to-be-applauded mindfulness of the drafters of the Gyftv. resulted in another benefit for the LPP conquest: it gave birth to the first Hungarian Constitutional Court judgment on the subject matter. Indeed, not long after the adoption of the Gyftv., applicants challenged several of its provisions in front of the Constitutional Court (CC). One of the applicants alleged that Article 20 (5) was unconstitutional in that it provided no judicial remedy, were a dispute to arise as between the client and the authority on whether a given document was or was not protected by LPP. The CC, in its judgment 192/2010 (XI.18.) AB agreed. It first looked at the provisions of the Gyftv and compared them with those of the Hungarian Competition Act: not surprisingly, it recognised the parallels. It went on to analyse the investigative powers of the GVH and the health authorities and again found that their respective purpose and procedural toolkit were very similar. Then the CC quoted from the Ministerial Reasoning of the 2005 Novella (introducing LPP into the Hungarian Competition Act). It is in this quote from the Ministerial Reasoning of the 2005 Novella where the text of the CC's judgment made a mention of LPP, describing it as being part of EU law[29]. The CC then came to the, again not very surprising, conclusion that the absence of the possibility of escalating an LPP related dispute to courts prior to the health authorities actually learning the content of those documents, would jeopardise the very essence of LPP and thus would be to defy the legislative purpose of Article 20(5) Gyftv. As a result, the CC found the absence of effective remedies to be unconstitutional and ordered the legislator to make the appropriate measures. (The proper remedies were later indeed introduced into the Gyftv. by Act 173 of 2010.)

This first LPP related CC pronouncement was short (less than a page in a lengthier judgment dealing with a number of other issues) and it did not (have to) investigate the notion of LPP in any deeper sense, as the absence of proper judicial remedies were so blatantly contrary to the very concept. Yet it is remarkable that the CC made no observations whatsoever on whether LPP was part of the Hungarian constitutional tradition, either as a stand alone value protected by the Constitution, or as a derivative

29 More precisely: "EU competition law" („*az EU versenyjogában az ügyvéd és ügyfele közötti kommunikáció védettsége*").

of one of the fundamental principles, such as the right of defence, the right of fair trial, the right to legal counsel etc.

Intuition suggests that new legislative instruments introducing broad powers for regulatory authorities for on-the-spot inspections or other forms of data collections provide for a fertile ground for LPP related rule-making (or disputes in the absence of such rule making). This appears to have been the case in relation to the 2010 Hungarian Media Act (Act 185 of 2010 on Media Services and on the Mass Media – with the Hungarian abbreviation: Mttv.). The Mttv. created a new regulatory authority, the National Media and Infocommunications Authority (NMHH) for the media sector. Article 155 Mttv. granted the NMHH very broad powers to *„inspect, examine and make duplicates and extracts of any and all medium containing data, document and deeds - even if containing secrets protected by law - related to media services, publication of press products and/or broadcasting"*. The Mttv. entered into force on 1 January 2011 and was right upon adoption the subject matter of multiple challenges in front of the CC. One of these challenges again related to LPP and resulted in the second CC judgment on the subject: judgment 165/2011 (XII.20.) AB.

Like in the Gyftv-case, the CC held that the omission of the legislator in that it had not provided for LPP rules in the Mttv. despite the broad powers of the NMHH was unconstitutional. Perhaps because of the public attention in media matters, the CC was however this time a bit more specific regarding the reasons.

First, it recalled criminal law related CC judgments (e.g. judgment 169/2010. (IX. 23.) AB) in which the absolute secrecy of the communication between the person under criminal charges and his legal counsel had been established by the CC *„as serving the implementation of the principle of fair trial and the right to defence"*. It is for this reason, emphasised the CC, that a defence counsel could never be obliged to make witness statements on his communication with his client.

The CC then recalled the Gyftv-case and noted that in that judgment it had found that *„under European Union and domestic competition law, the protection of confidential communications between a client and his lawyer ("legal privilege") is a fundamental principle, which the Constitutional Court extended* [sic!] *to other administrative proceedings"*. From this it followed that the procedural rules of other "administrative proceedings" such as the one in front of the NMHH must be designed and adopted by the legislator in a way to provide proper protection to attorney-client communication. By omitting to insert the appropriate safeguards, the legislator acted unconstitutionally, infringing the right to fair trial and to judicial protection.

Whilst one can clearly agree with the CC's position on LPP[30], it remains to be astonishing why the CC did not (i) refer more extensively to the case law of the CJEU on LPP, but most importantly (ii) why it had not at all consider the ECtHR case law

30 Commentators were divided on many aspects of the judgment, but the LPP related ones remained practically unnoticed - see e.g. KOLTAY András - POLYÁK Gábor: Az Alkotmánybíróság határozata a médiaszabályozás egyes kérdéseiről, Jogesetek Magyarázata, 2012., 1.

on the same[31]. Hungary has been a member state to the ECHR since 1993 (the ECHR was promulgated into Hungarian law by Act 31 of 1993). The provisions of the ECHR overlapped to a large extent with the rules of the Hungarian Constitution as regards fundamental rights and the CC traditionally never held back to draw on, and quote, the case law of the ECtHR under the ECHR whenever useful to support its own reasoning. And it is also strange that the CC saw itself as the source of LPP having been extended to all fields of administrative law. One cannot but speculate that the CC simply did not recognise the deep significance of LPP as an important corollary to the right of defence and the right to fair trial.

The legislator amended the Mttv. in 2012 (by Act 66 of 2012) and introduced, in the new Article 155 (7) Mttv, normative LPP provisions with a wording based on the model of the Hungarian Competition Act. This time the legislator paid attention to the detail and also introduced procedural guarantees.

Another example of normative LPP rules can be found in Article 157 of Act 85 of 2015 amending Act 139 of 2013 (with the Hungarian abbreviation: MNBTv.) on the Hungarian National Bank (MNB). This act, whilst providing dawn raid powers to the National Bank, codified the right of the regulated private parties to invoke LPP as a limitation to the inspections or requests for information.

7. The climax: generalization of the concept under Hungarian law by way of Article 13 of the Act on Attorneys in 2017

As can be seen, by the early to mid 2010's, the LPP concept grew its routes into Hungarian law also outside the boundaries of the original recipient field, competition law, but was still fragmented in separate provisions of sectoral administrative acts (relating, respectively, to pharmaceuticals, media products and financial services), as a limitation to the powers of public authorities. The legislative approach seemed to be random: in some cases LPP was codified, in other similar situations not. Both the Kúria and the Constitutional Court handed down judgments on LPP, but the fundamental and overarching nature of the protection was not yet made clear.

The situation changed dramatically with the adoption of the new Hungarian Act on Attorneys (Act 78 of 2017 – with the Hungarian abbreviation: Ügyvtv.), which entered into force on 1 January 2018. The provisions of the Ügyvtv. are applicable in relation to all procedures and legal fields in relation to which attorneys (or registered inhouse counsel) may be active. The Ügyvtv. was in a sense a unique opportunity to introduce, on a normative and general level (over-arching fields of law and sectors regulated), the concept of LPP into Hungarian law. The drafters, much to their credit, seized the moment.

31 For an enumeration of recent cases under the ECHR see: ECHR: Factsheet – Legal professional privilege, European Court of Human Rights, 2021.

The Ügyvtv. uses the term "*documents prepared for the purposes of defence*" ("*védekezés céljából készült irat*") to define the material scope of the attorney-client privilege. More specifically, Article 13 (3) Ügyvtv. provides that documents prepared for the purposes of defence are documents „*created for the purposes of defence in procedures of public enforcement*" ("*közhatalmi eljárások*")[32]. Article 13 (2) Ügyvtv. stipulates that such documents „*may not be used as evidence in proceedings before authorities, courts or in other public enforcement proceedings and* […] *may not be examined, seized or copied by public authorities*" and the client has the right to refuse „*to produce, hand-over or give access*" to such documents.

An important novelty of the Ügyvtv. was to elevate the protection of communications with inhouse counsel to the same level as those with "independent attorneys". Inhouse counsel registered with the Bar Association ("*kamarai jogtanácsos*") are within the personal scope of the Ügyvtv.'s LPP rules. With the Ügyvtv., Hungarian law therefore consciously joined the club of EU and non-EU jurisdictions[33] in which domestic law provides the same level of protection for the communication between a client and his legal advisor, irrespective of whether that advisor is an attorney being member to the Bar Association or an in-house counsel being equally member to the Bar Association and being equally bound by the ethical and disciplinary rules as applied and enforced by the Bar Association as a self-governing public body.

Under Article 13 (4) Ügyvtv., the authority is entitled to inspect the document „*to produce, hand-over or give access*" whether the LPP claim „*is not manifestly unfounded*".

It is remarkable to note that the Ministerial Reasoning to the Ügyvtv. refers to a to-be-filled gap in the system of fundamental protections almost literally the same way as was done 12 years earlier by the 2005 Novella to the Hungarian Competition Act. This time, the gap is recognised generally, as being an issue of fundamental law throughout the Hungarian legal system: „*the* [Ügyvtv.] […] *incorporates the rules of the so-called legal professional privilege (LPP).* […] *This rule is necessary in order to allow the client to freely disclose to his lawyer his knowledge of the facts relating to the alleged infringement and thus enable his defence. Thus, this rule has a fundamental rights basis, the right of defence.*" (emphasis added).

32 „A document drawn up for the purpose of a defence is a document or part of a document which has been produced in the course of, or in the context of, a communication between a lawyer and his client in the exercise of his rights of defence in public proceedings, or which records what has been said in the course of such communication, and which is clear from the document itself. A document which is not in the possession of the client or of the legal practitioner shall not be regarded as a document drawn up for the purposes of the defence unless it is proved that the document was unlawfully or unlawfully obtained from him in the course of criminal proceedings."

33 In 2018, 19 OECD Members were reported to extend legal privilege to communications with in-house lawyers. These were: outside the EEA: the UK, U.S.A, Canada, Australia, New Zealand, Chile, Mexico, Israel; from EFTA: Iceland and Norway and from within the EU: Belgium, Greece, Hungary, Ireland, Latvia, the Netherlands, Poland, Portugal and Spain. See: OECD: Treatment of Legally Privileged Information in Competition Proceedings Background Paper by the Secretariat, 2018., p. 11., footnote 3.

The new rules of the Ügyvtv. promted the legislator to slightly amend the LPP rules in the Hungarian Competition Act. Act 129 of 2017, reforming a large number of individual provisions in the Competition Act, essentially copied over Article 13 (3) Ügyvtv. into Article 65/C (2) of the Competition Act. The legislator made no mention of the LPP rule of the Hungarian Competition Act being l*ex specialis* to the Ügyvtv.

The Ministerial Reasoning to the 2017 *novella* to the Competition Act gave rise to concerns among practitioners by using some retrograde language when claiming: „*The Act adapts the rules on* [LPP] *in light of the provisions introduced by Article 13* [of the Ügyvtv.]. *However, it should be stressed in this connection that the scope* [of LPP] *does not cover all legal advice or advice by attorneys – such as advice on the interpretation and correct application of the law - but only covers legal activities which are specifically aimed at avoiding a legal sanction in the context of public enforcement proceedings started by an authority in respect of an infringement or which can be specifically linked to such proceedings.*" (emphasis added) This interpretation seemed to be in contradiction to the 2008 judgment of the Kúria in the Chamber of Pharmacists case and appeared on its face to be yet another attack against LPP gaining more territory. One can, in the extreme, understand this text to call in question legal advice privilege.

8. Another set of judicial reviews: testing the new rules (2018-2021)

In 2018, the GVH conducted unannounced on the spot investigations with large corporations having internal legal departments. The GVH copied vast amounts of electronic data (server contents, email boxes etc), including the email boxes (containing email correspondence for years) of inhouse counsels. The undertakings concerned objected and claimed LPP for the complete email boxes of those inhouse counsels. The GVH disagreed and the parties found themselves in LPP related litigation in front of the Fővárosi Törvényszék, as court of first instance and then the Kúria[34] (as the forum adjudicating the legal revisions).

Some fundamental questions arose. First, the courts had to decide whether the correspondence of registered inhouse counsel prior to 1 January 2018 fell within the ambit of LPP protection. In other words: the question was whether it was the current personal status of the lawyer (after 1 January 2018: being within the personal scope of LPP) or the date of the creation of the document (if prior to 1 January 2018: being outside of the material scope of LPP) that was relevant to decide whether the given communication was protected by LPP and was immune to being seized and reviewed by authorities. Both the Fővárosi Törvényszék[35] and Kúria found that the correspondence between an inhouse counsel and his/her employer prior to 1 Jaunary 2018 was

34 Decision Kfv.IV.37.319/2019/18 of the Kúria.

35 Decision 19.Kpk.720.099/2018/10 of the Fővárosi Törvényszék.

not covered by LPP under Hungarian law.[36]

Second, the courts had to decide whether the principle lex specialis derogat lege generali applied in the relationship between (Article 65/C of) the Hungarian Competition Act and (Article 13 of) the Ügyvtv. The GVH argued that the Hungarian Competition Act was overwriting the general rule in the sense that it required "competition law relevance" for the given documents to qualify, in competition proceedings, for LPP protection. If the document was not related to competition law issues, it could not have been drawn up "for the purposes of the defence" in competition proceedings and thus was not within the material scope of the protection under the Hungarian Competition Act. The Fővárosi Törvényszék sided with the GVH and dismissed the point of the undertakings according to which such limitation of the LPP in competition proceedings meant that the GVH could collect and review documents which had nothing to do with competition matters, but could give rise to legal repercussions in other fields of public law (e.g. tax law, criminal law, data protection etc) in that the GVH as a public authority was under a duty to signalise to other authorities (including the criminal law enforcement agencies) when detecting a possible infringement, the prosecution of which fell to their competence. The Fővárosi Törvényszék stated that the documents would still maintain their LPP status in those separate proceedings under Article 13 Ügyvtv. This finding seems to have missed the rule under which a document loses the LPP status when leaving the possession of the party and it is hard to dispute that a document in the file of the GVH is not anymore in the possession of the party. Whereas the Kúria could have avoided to decide the point, as it squashed the order of the Fővárosi Törvényszék on grounds of procedural irregularities, it nonetheless found it important to formulate a position. The Kúria first recalled that the LPP provision under the Hungarian Competition Act provided "sectoral protection"[37] compared to the general protection afforded by the Ügyvtv. The sectoral protection, the Kúria recalled, cannot diminish the level of general protection: it can only increase it. If the LPP protection under the Hungarian Competition Act only covers documents with competition law relevance (*"versenyjogi érintettségű iratok"*), all other LPP documents must be considered to be covered by Article 13 Ügyvtv. With some tricky reasoning, the Kúria thus made sure that all client-counsel communication relevant in public proceedings should receive LPP protection in front of the GVH.

Third and most importantly, the courts had to decide on the very difficult question on who should bear the onus of proving the LPP or non-LPP nature of documents under the specific factual circumstances. As opposed to the 2007 Chamber of Pharmacist case, which involved maybe a dozen or so paper based documents, the 2018 cases

36 The Kúria specifically referred to the CJEU's Akzo Nobel judgment, underlining the point that the concept should not be broadened without clear legislative basis (paragraph 39.).

37 In Hungarian: *„az Üttv. az általános jogvédelem szintjét határozza meg. A Tpvt. pedig az ún. „szektorális jogvédelmet". A szektorális jogvédelem nem ronthatja le az általános jogvédelmet, viszont annál magasabb szintet biztosíthat"* (paragraph 41.).

involved tens of thousands of emails and other document items (word file attachments, ppts, pdfs, excels, images etc) for which, at least initially, the undertakings made LPP claims.

The GVH fought hard to convince the courts that it was the duty of the undertakings, claiming such LPP, to make a reasoned request in relation to each individual (!) document in front of the GVH. The reasoning by the undertakings should extend to every condition of LPP protection that is (i) the person involved must be an attorney or (after 1 January 2018) a registered inhouse counsel, (ii) the document must have competition law relevance, (iii) the document must have been prepared for the purposes of defence and (iv) the LPP character must be directly apparent from the document.[38] The GVH then made a policy argument: the conditions for LPP must be interpreted narrowly, as an extensive interpretation would give rise to an abusive application of the concept.[39] (This policy argument seems to draw on the Ministerial Reasoning to the 2017 *novella*.)

The undertakings concerned offered search terms and the grouping of the documents on that basis, but maintained that it was sufficient for them to claim, generally, LPP in the underlying competition proceedings, whereas it was the obligation (and the burden) of the GVH, as applicant in the judicial proceedings, to put forward to the court a reasoned request for the documents to which the undertakings as defendants may then put forward their position, if need be, on a document to document basis.

The Fővárosi Törvényszék sided with the undertakings concerned and noted that their obligation in the competition proceedings is only to (i) put forward their LPP claim and (ii) they are expected to support such a claim only to the extent that it becomes clear that their LPP request is *"not manifestly ill-founded"* (*"nem nyílvánvalóan alaptalan"*). Once this is done (as was the case according to the Fővárosi Törvényszék), the GVH must exercise its right of "cursory look" with a view to assess whether the claim is "manifestly ill-founded". The Fővárosi Törvényszék was of the view that the GVH omitted this duty and was therefore not anymore in a position to argue in front of the court that the undertakings concerned should have submitted detailed reasoning per each individual document.

In the legal revision proceedings, the Kúria agreed, albeit on different grounds, with the Fővárosi Törvényszék on this point. The Kúria, focusing more on the procedural side of the dispute, held that the GVH should have, in its application, put forward precise factual and legal statements setting out *„regarding the individual documents* [1] *on what the undertakings had relied to argue that those documents or some precisely defined parts of them were to be considered as documents* [covered by LPP], [2] *whether* [the GVH] *had had a cursory look into those documents,* [3] *in light of the eventual cursory look what* [the GVH] *had found and* [4] *on what grounds the GVH*

38 Decision Kpk.23.721.137/2020/14, paragraphs 8-11.

39 Ibid., paragraph 11.

wished to allege that those documents [were not covered by LPP]"[40] (insertions added for the ease of access). According to the Kúria, it is after such an application that the undertakings, as defendants in the LPP proceedings can be called upon *„to make their statements also individually, identifiably relating to the individual documents"*[41]. As an ultimate blow, the Kúria added that the request by the GVH to have documents transferred to it is a bundle of applications[42] regarding each individual document: this means that the procedural requirements under the Administrative Procedural Code[43] must be fulfilled regarding each and every single document requested by the GVH.

It is likely for the above procedural mindset that the Kúria set aside the order of the Fővárosi Törvényszék and instructed it to repeat the first instance proceedings and in such proceedings call upon the GVH to supplement its original application in accordance with the above principles. After the GVH, the undertakings should also be invited to make their statement. Both sides should make submissions document by document.[44]

In the repeated first instance proceedings[45], the Fővárosi Törvényszék acted in accordance with the procedural instructions received from the Kúria. The GVH argued that it was, for objective (technical) reasons which were not imputable to it, not in a position to make, as prescribed by the Kúria, an individual statement regarding each affected document, since those were in a sealed container and it had no access to them[46] (and there were potentially several thousands of such documents in any case). As a result of the statement by the GVH, the Fővárosi Törvényszék found that the application by the GVH *"remained at the level of generalities"*[47] and summarily decided for the undertakings. It noted that in the absence of a detailed and individualised statement by the GVH, there was no reason to invite the undertakings to make their reactive statement. Technical difficulties were, in the eyes of the court, not a reason for not submitting a detailed and properly reasoned application. All documents in the sealed data containers were thus ordered to be retransferred to the undertakings. The GVH, at least according to the publicly available databases, lodged no further remedy against

40 Ibid., paragraph 38.

41 Ibid.

42 In the Hungarian version: „*Több irat minősítése és kiadása iránti kérelem tartalmában több különálló kérelmet jelent, azok egy eljárásban való érvényesítése valós keresethalmazatot eredményez*."

43 Act I of 2017 on the Code of Administrative Court Procedure.

44 Footnote 38., paragraph 45.

45 Kpk.23.721.137/2020/14 and Kpk.23.721.138/2020/15 (the two orders being identical in their content).

46 Footnote 38., paragraphs 25-26.

47 Ibid., paragraph 27.

the order in the repeated proceedings. And, probably after careful considerations, the GVH abstained from conducting another raid to re-collect the same databases and, on that basis, retry the LPP proceedings, this time consciously building up an application in light of the Kúria's position. (At least theoretically, this option would have been possible, since the courts did not hold that the documents were covered by LPP: the finding was merely that the GVH had been, for procedural and not for substantive law reasons(!), unsuccessful in arguing that those documents were not covered by LPP.)

What one may still miss from the above judicial findings is addressing the policy argument and the escalation of the underlying value-choice: is the LPP rule a *procedural exception* which must thus be interpreted narrowly (as essentially argued by the GVH) or, quite to the contrary, is it *the application, in a procedural setting, of a fundamental right,* protected at constitutional law level, in which case any intervention into such right is a restriction of a fundamental right which must be compatible with the requirements under constitutional law (restriction prescribed by law, for public interests, in an appropriate and proportionate manner). What the Kúria held seems to be more in favour of the second alternative, but without any specific statements on these fundamental points, this remains to be the speculation of the observers.

9. Summary: the state of play

The above odyssey of LPP into Hungarian law is very interesting for a number of reasons. First, it is remarkable that the notion had to be adopted instead of it having been found and crystalized by the case law of higher courts or indeed the Constitutional Court, as being a principle and value inherent, if not else, in the very rule of law concept. It is a credit for the strength of competition law that it was this field of law where the practical necessity (due to the dawn raid competences of the GVH), coupled with an already existing EU law based solution, gave birth to the first written LPP provisions under Hungarian law ever.

Second, it is interesting how the adoption with the intermediation of competition law took place and how the concept gradually evolved and gained more territory by way of individual legislative steps and judgments of higher courts: it was a mixture of organic evolution (see the Chamber of Pharmacist case) and (sometimes seemingly: random) legislative interventions.

Third, it is impressive how the concept ultimately reached its appropriate general and overarching status by way of legislation in 2017. What therefore started as a voluntary takeover of a European law notion applicable in competition proceedings, became generally applicable for all authorities and courts in relation to all enforcement forms of public law rules. With the 2017 Ügyvtv. legal professional privilege completed its fully fledged landing into Hungarian law and not only did the concept occupy its justified place as a fundamental right, limiting public intervention and protecting the freedom of communication and the privacy of contact with one's legal counsel, but it

was also to cover registered in-house counsel.

Fourth and finally, the most entertaining is to consider what remained so far open and where the development of law and practice may head to. In terms of Hungarian law, the open questions may include the following ones.

Will the interpretation of the scope of LPP change in light of the findings of the CJEU in *Vlaamse Balies*, at the very least in situations where the GVH or the Hungarian courts apply Article 101 or 102 TFEU and hence implement EU law? In this respect a rather rhetoric question: can the level of LPP protection be lower under domestic law situations than when EU law applies? Will Hungarian case law draw on the CJEU practice pertaining to the Charter of Fundamental Rights and/or that of the ECtHR under the ECHR[48]?

Will the rather conservative approach by the GVH regarding classical legal opinions prevail (i.e. there is no legal advice privilege, that is: LLP would not cover a simple legal opinion for a client on whether a certain contemplated conduct may or may not breach the law)?

What about documents prepared for the purposes of civil litigation? Will they be covered by LPP or will classical civil litigations not be seen as *"public enforcement"* (*"közhatalmi eljárás"*) and hence the documents produced in the attorney-client relationship for the purposes of advocating the plaintiff's or defendant's position will not be seen as documents prepared *"for the purposes of defence"*? (This would be contrary to how LPP is seen in the Anglo-Saxon jurisdictions where the concept has been developed earlier[49].)

Can the term *"in the possession of the client"* under Article 65/C of the Hungarian Competition Act and Article 13 Ügyvtv. still be meaningfully used in the digital era? How must the rule be interpreted according to which the LPP protection applies on condition that the LPP character *"must be evident from the document itself"* (*"e jellege magából az iratból is kitűnik"*)? In the era of electronic/digital searches extending to gigabytes of information, how can this condition be satisfied and verified?

48 In *Michaud v. France*, at paragraphs 118-119. the EuCHR very convincingly recalled: "[…] *lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves. This additional protection conferred by Article 8 on the confidentiality of lawyer-client relations, and the grounds on which it is based, lead the* [European Court of Human Rights] *to find that, from this perspective, legal professional privilege, while primarily imposing certain obligations on lawyers, is specifically protected by that Article."* (emphasis added)

49 For a basic description under US law, see: Working Party No. 3 on Co-operation and Enforcement, Treatment of legally privileged information in competition proceedings – Note by the United States, 21 November 2018, available at the OECD's home page, https://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm (downloaded: 2024.05.05.)

And, very importantly for e-searches, who carries the burden of proof, that is: the onus of making detailed statements and putting forward detailed reasons on the conditions of LPP being (or being not) fulfilled regarding the individual documents? Perhaps it is not an exaggeration to note: when LPP issues affect tens of thousands of documents copied, the allocation of such burden of proof may in and of itself settle the matter. Whoever carries the burden, will lose the case.

The journey of the concept is thus far from being finished. The development of case practice will still have to give responses to a number of exciting questions in the next decades to come in Hungary's membership in the European Union.

András Bodócsi, Judit Buránszki, Attila Dudra

Similarities and differences between Hungarian and EU merger control

Before presenting the most important similarities and differences between Hungarian and EU merger control, it is important to take a quick look at the relationship between EU and Hungarian competition law. Hungarian competition law is influenced by two forms of harmonisation: first, the classic, legislative harmonisation, and second, the so-called spontaneous or voluntary harmonisation, whereby EU solutions are adopted into the Hungarian legal system.[1] In the case of merger control, there is no legal obligation in EU law to harmonize competition law, since subject to the exceptional possibility of case referrals, there is a clear division of jurisdiction between the EU and the Member States, based on the relevant turnover achieved by the parties. Transactions where the parties' turnover exceeds the thresholds[2] laid down in Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("EUMR") are handled by the Europe-

1 See in detail e.g. Tóth Tihamér: Jogharmonizáció a magyar versenyjog elmúlt harminc évében, Állam- és Jogtudomány, 2020., 61(2); Sárai József: EU-csatlakozás és jogharmonizáció a GVH szemszögéből, Versenytükör, 2015., special issue; Tóth András: Kortárs magyar versenyjog, Ludovika Egyetemi Kiadó, Budapest, 2022.

2 Article 1 of the EUMR: As a rule, this is (i) a combined worldwide turnover of all the merging companies of more than €5 billion, and (ii) an EU-wide turnover of each of at least two of the companies of more than €250 million. Transactions are also subject to EU merger control where the merging companies have (i) a worldwide turnover of more than €2.5 billion, (ii) a combined turnover of more than €100 million in each of at least three Member States, (iii) a turnover of more than €25 million for each of at least two of the companies in each of the Member States included under ii, and (iv) an EU-wide turnover for each of at least two of the companies of more than €100 million.

an Commission ("Commission"), and the EUMR explicitly prohibits Member States from applying their national legislation on competition to any concentration that has a Community (Union) dimension.[3] However, below these thresholds, Member States may be responsible for assessing mergers under their national legislation, where they are free to use their own substantive and procedural provisions. Due to this clear allocation of powers, merger control has been influenced by only voluntary harmonisation, since - unlike the rules on restrictive agreements or abuse of dominant position - the Hungarian legislator has no legal obligation to harmonise its national antitrust provisions.

1. Voluntary harmonisation in merger control

Voluntary harmonisation, which Tihamér Tóth calls spontaneous legal approximation[4], has thus played a dominant role in Hungarian merger control law since the end of communism in 1989. Since 1990, Hungarian competition law has adopted numerous solutions from the legal systems of other countries, mainly from EU law. Currently two ways of voluntary harmonisation can be observed: one is the so-called expediency approximation, and the other is the adoption of certain instruments worked well on the EU level which serves to improve the efficiency of procedures. While the main motivation behind the expediency approximation is to create a uniform regulatory environment and thereby promote business compliance, thus it is primarily characteristic in substantive law, the adoption of innovative solutions mainly dominate in procedural law.[5]

The strong influence of EU law on Hungarian merger legislation by voluntary harmonisation is also due to the fact that eliminating differences between EU and national law, or at least reducing them to the minimum required by national interests, has significant benefits for both competition authorities and businesses. The need to avoid different legal solutions being applied to different companies for the same behaviour is a matter of common interest. The fact that the Commission has extensive merger legislation with very detailed soft law documents,[6] which also have an impact on the practice of national competition authorities, cannot be ignored. In addition, they often follow the findings of the Commission, for example in relation to market definition, even though they are not obliged to do so. The obvious aim behind this, beyond the

3 Article 21(3) of EUMR.

4 Tóth T. (footnote 1) 72-73.

5 Tóth A. (footnote 1) 98-99.

6 European Commission: Mergers Notices and Guidelines; Mergers Best Practices, available at: https://competition-policy.ec.europa.eu/mergers/legislation/notices-and-guidelines_en and https://competition-policy.ec.europa.eu/mergers/legislation/best-practices (downloaded: 30.05.2024).

underlying economic and competition policy principles, is to facilitate the assessment of mergers as quickly as possible, and to lead to better decisions by the competition authorities, based on the experience they can draw on. Voluntary harmonisation also has obvious benefits for businesses, as the elimination of differences between EU and national law, not only in the hard law but in the soft law instruments, and in terms of the main principles of practice, can lead to more predictable, convenient and cost-effective procedures.[7] However, in addition to the circumstances that facilitate harmonisation as described above, it should also be borne in mind that the fact that national merger control law may be influenced by national economic or political interests or, in the case of certain transactions, by interests outside competition law, may be a reason for maintaining differences in the national legislation.

In addition, the referral system under the EUMR has also intensified the process of voluntary harmonisation between national law and EU law. The referral system can only work effectively if there is no significant divergence between the jurisdictions involved. The above does not mean, of course, that harmonisation is required, for example, on the concept of concentration (in this respect, for example, there are several differences in Hungarian law, which are discussed in more detail in Chapter 3).

Merger control legislation is complemented by extensive soft law rules at EU level, as mentioned above. Since the beginning of its operations, the Hungarian Competition Authority (Gazdasági Versenyhivatal, "GVH") has made great efforts in its practice to take account of the Commission's practice as reflected in its notices and decisions. For example, the notice published in January 2017 which summarised the GVH practice in issues related to merger control, was heavily inspired by the Commission's Consolidated Jurisdictional Notice[8],. Publishing the Hungarian Jurisdictional Notice on mergers [9] made complete the GVH's long-standing practice (published in the annual publication of the Competition Council's decisions of principle on certain issues) that merger legislation (similar to the EU law) supported by extensive soft law[10] documents as well.

The extensive Hungarian soft law documents do not mean, however, that the GVH

7 In his paper, Dr. John Temple Lang identifies this latter circumstance as the most important reason for merger control. See: John Temple Lang: Harmonizing National Laws, Procedures and Judicial Review of Mergers in the EU and EEA, 18th St. Gallen International Law Forum ICF, 2011.

8 Commission Notice on a uniform application of the law under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C 95, 16.04.2008, p. 1–48 ('EU Consolidated Jurisdictional Notice').

9 Notice 1/2017 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on certain jurisdictional issues relating to merger control proceedings, the current version of which is Notice 2/2023 on the same subject ('Jurisdictional Notice of the GVH' available only in Hungarian).

10 Available (in Hungarian) at: https://gvh.hu/szakmai_felhasznaloknak/osszefonodasok_-_fuziok/6726_hu_osszefonodasok_-_fuziok (downloaded: 30.05.2024).

does not take into account EU soft law. In the decision in case VJ/63/2012, the Competition Council dealt with the question of how the Commission's soft law documents could support the interpretation of the national law. The Competition Council did not rule out the possibility that the Commission's soft law documents interpreting EU merger law could be invoked by the parties to interpret Hungarian merger control law but stressed that "*the European merger rules and the non-binding EU documents issued for their interpretation can only assist the interpretation of Hungarian merger rules in those aspects where the Hungarian and European merger rules are fully consistent. [...] the differences between the two sets of rules will only be taken into account if they affect the choice of law and, at the same time, have an impact on the Hungarian obligation to seek clearance.*"[11] Part 3 of this paper will elaborate on and provide further examples of the influence of the Commission's notices on the GVH's enforcement practice in merger cases.

Following this, the next part of our study presents the main stages of the harmonisation of Hungarian merger control rules through the historical arc of the post-communist period and the current state of harmonisation, then Chapter 3 focuses on the harmonisation of case law and the remaining divergences.

2. Harmonisation steps in legislation

The harmonisation process started with the adoption of the first modern Hungarian competition act in 1990,[12] which entered into force on 1 January 1991, at the same time as the GVH started its operations.

The preparatory work for drafting the 1990 Competition Act, which began in 1985, included a review of solutions of all major European competition acts and EU competition law, since there was a determined effort to take them into account in drafting the merger provisions of the 1990 Competition Act. The result of this process was the introduction of merger control rules into the Hungarian legal system, which at that time was a novelty even in the European Union. It is important to note that, although the first merger regulation in the EU was adopted in 1989,[13] its adoption was preceded by a wide-ranging debate, so the framework of rules was known to the experts involved in the preparatory work. In addition, the knowledge gained from the rulings of the European Court of Justice on the application of Article 81 of the Treaty on the Functioning

11 Case no.Vj-63/2012, paragraph 21.

12 Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices ("1990 Competition Act").

13 Council Regulation No 4064/89 on the control of concentrations between undertakings [1989] OJ L 395, 30.12.1989, p. 1–12 ('EC Merger Regulation').

of the European Community on restrictive agreements,[14] and Article 82 of the EC Treaty on the prohibition of abuse of dominant position[15] to concentrations were used in the drafting process as well. Due to the novelty of the EU merger control law, the merger provisions of the 1990 Competition Act differed from the EC Merger Regulation in several aspects. On the one hand, the 1990 Competition Act contained a market share threshold in addition to the turnover thresholds, unlike the EC Regulation, and on the other hand, the substantive test was different, as the GVH prohibited a concentration if it impeded the emergence, maintenance, or development of competition.

2.1. Harmonisation with the EC Merger Regulation

The Europe Agreement establishing an association between the Republic of Hungary and the European Communities and their Member States was signed in Brussels on 16 December 1991. The Agreement laid down the framework for the harmonisation of competition law. Although, as explained in the introduction, only the rules for restrictive agreements and abuse of dominant position were the subject of the harmonisation requirements, the legislator's aim was also to approximate the Hungarian merger control provisions to EU law. With this in mind, Act LVII of 1996 on the Prohibition of Unfair Market Behaviour and Restriction of Competition ("HCA"), which replaced the 1990 Competition Act and came into force on 1 January 1997, also developed the existing merger control rules in such a way as to bring them as far as possible into line with the EC Merger Regulation.

The harmonisation covered issues such as the types of transactions qualified as concentrations, and the notification criteria, as well as the substantive test according to which mergers are authorized or prohibited. With regard to the types of transactions qualified as concentrations, in addition to the merger (when two or more previously independent companies merge, or one merges into another) and the acquisition of sole control, the acquisition of joint control, the acquisition of part of an undertaking and the creation of a joint venture in which the founders combine their identical or complementary activities (which essentially corresponded to the notion of concentrative joint venture in the EC Merger Regulation), were considered concentrations as well according to the HCA. However, the acquisition of a non-controlling minority shareholding was not included in the merger control concept of the HCA, as it was in the EC Merger Regulation.

As regards the notification criteria in line with the EC Merger Regulation and the

14 See: Judgment of 21 February 1973, Europemballage Corporation and Continental Can Company v Commission, C-6/72, ECLI:EU:C:1973:22.

15 See: Judgment of 17 November 1987, British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities, Joined Cases C-142/84 and 156/84, ECLI:EU:C:1987:490.

practice of most Member States, the HCA only contained turnover thresholds. Approximation to EU law has also been achieved in a way that according to the HCA, obligation for merger authorisation was based on the combination of two turnover thresholds: a cumulative one, which related to the combined turnover of the undertakings concerned by the merger (then: HUF 10 billion), and a significantly lower one, i.e. the turnover of the undertaking being controlled (then: HUF 500 million). However, the HCA still differed from the EC Regulation on one significant question: the lower threshold in the EC Merger Regulation applied not only to the undertaking being controlled but also to the acquiring undertaking. However, there was no difference between the Hungarian and the European merger legislation in that the turnover data for both the acquiring and the controlled undertakings had to take into account the undertakings related to them by virtue of their control relationship (the so-called indirect participants).

The substantive test for assessing mergers was also changed, since in addition to the advantage-disadvantage test set out in the 1990 Competition Act, the HCA introduced the dominance test as well, i.e. that a merger cannot be prohibited if it does not create or strengthen a dominant position.

With all the legislative changes detailed above, the substantive rules in the Hungarian and EU merger control law were more or less the same on the most important issues, but from 1 February 2001[16] further minor changes were introduced. The types of transactions qualified as concentrations were supplemented with de facto control, the dominance test clearly became the main test for merger assessment by replacing the advantage-disadvantage test, and detailed rules were incorporated into the HCA for the authorisation of a merger subject to conditions and obligations. It was also stipulated in the HCA that the authorisation of a merger should cover all the restrictions of competition necessary for the implementation of the merger, and the logic of the calculation of the turnover thresholds was now fully in line with the logic of the EC Regulation.

2.2. Harmonisation with the EUMR

On 20 January 2004, a new merger regulation (the EUMR) was adopted at EU level, which brought changes to the EU merger law in several aspects. These changes were incorporated into the HCA in two steps: in 2005[17] and 2009[18] . The need for these changes was also reinforced by the fact that, as indicated in the introduction, the EUMR allowed for a much wider scope of referrals of merger cases than the EC Merger Regulation.

16 Act CXXXVIII of 2000 amending the HCA.

17 Act LXIII of 2005.

18 Act XIV of 2009.

2.2.1. Changes in 2005

In 2005, the most significant changes related to the creation of joint ventures. On the one hand, the creation of a joint venture (a so-called full-function joint venture) was considered a concentration within a broader scope than a concentrative joint venture in line with the EUMR. On the other hand, it was established that if the creation of a full-function joint venture has the object or effect of restricting competition, then it should not be assessed under the dominance test but under the criteria for exemption from restrictive agreements.

There was a modification with regard to the calculation of the net turnover on which the merger notification obligation is based: the net turnover of the undertakings jointly controlled by a merging party and an independent undertaking(s) is not to be taken into account in full but is to be divided equally between the joint controllers. For financial institutions, the measure to be taken into account instead of the net turnover had been regulated in the same way as in the EUMR. Regulation 1/2003 terminated the exemption system for agreements restricting competition in the EU law, and this change was also transposed into the HCA in 2005. From a merger perspective, in line with the Commission's practice[19], the GVH did not assess the need for restrictions of competition in relation to mergers either, but the undertakings concerned had to decide for themselves from 2005 onwards, for which the GVH provided criteria in its decisions, and later in the Jurisdictional Notice of the GVH.

2.2.2. Changes in 2009

Perhaps the most significant change under the HCA was that the dominance test previously used to assess mergers was replaced by the SIEC (*significant impediment to effective competition)* test at European level in 2004[20] , which, following a more detailed analysis[21], was incorporated into the Hungarian law in 2009. Changing the substantive test for assessing mergers had been made possible for the GVH to prohibit concentrations that do not create or strengthen a dominant position, but significantly reduce competition. This change was particularly significant as it became clear that it was possible to intervene in a merger which did not create a dominant position, yet competition was significantly reduced as a result. It should be noted that prior to 2009 the GVH practice had already converged towards the SIEC test, despite the absence of its

19 Commission Notice on restrictions directly related and necessary to concentrations [2005] OJ C 56, 05.03.2005, p. 24–31.

20 See Tóth Tihamér: Uniós és magyar versenyjog, Wolters Kluwer, Budapest, 2020., 642-643.

21 For more information on this process and the related debate, see Csorba Gergely: A fúziókontroll módszertanáról Dominancia- vagy versenyhatásteszt? in Valentiny Pál - Kiss Ferenc László - Nagy Csongor István: Verseny és szabályozás, MTA KRTK Közgazdaság-tudományi Intézet, 2011.

legal expression in the HCA. Based on the provisions of the HCA, not only one undertaking but also several undertakings jointly may be in a dominant position, which thus created the possibility in principle to intervene in mergers[22] affecting oligopolistic markets even in the absence of a dominant position. Crucially, however, the SIEC test allows for a broader scope of intervention in such cases, because it does not necessarily require proof of a joint dominance position but may also be based on other evidence of a significant lessening of competition (i.e. an increase in individual market power below the dominant position).

Thus, by 2009, all major differences between Hungarian and EU law as regards the substantive merger provisions had been eliminated. The only major difference between the Hungarian and EU merger law, which remained until 2014, was on the issue of standstill obligation, as the HCA did not contain an explicit provision to prohibit the implementation of a concentration before the GVH's decision. Although there was a view in the legal literature that the requirement to obtain the approval of the competition authority under Section 24 (1) of the HCA for mergers meeting certain thresholds could be interpreted as an *ab ovo* prohibition on all stages of the transaction[23], others argued that such an interpretation could not be attributed to the earlier provisions.[24] The 2013 Amendment Act[25] completely removed the controversy in this matter by clarifying that concentrations cannot be implemented until the GVH's decision, but also by creating the possibility that in exceptional cases, the exercise of control rights may take place before a merger is cleared with the permission of the Competition Council.

2.3. Procedural approximation after 2010

As already indicated in the introduction, another way of voluntary harmonisation besides the expediency approach is the development of procedural law, the main tool of which is the adoption of innovative solutions (knowns as convergence). In the 2010s convergence led by inspiration from EU law had a strong influence on Hungarian competition rules and practice. This resulted in a more effective merger control system. One of the main driving forces behind this was the steady increase in the number of merger cases both at Hungarian and EU level[26]. At the same time, it can

22 See Case no. Vj/16/2001.

23 See Pázmándi Kinga (ed.): Magyar Versenyjog, HVG ORAC, Budapest, 2012., 268.

24 Fejes Gábor: Tézisek és javaslatok a végrehajtási tilalom értelmezése kapcsán – jegyzetek egy panelvita margójára, Versenytükör, 2018., special issue, 24.

25 Act CCI of 2013

26 The increase in the number of cases is illustrated by the fact that in 1991, the GVH investigated a total of 5 mergers, while the Commission received 64 notifications, whereas in 2023, the GVH received a total of 52 notifications, while the Commission received 356.

be seen that the vast majority of mergers subject to merger control did not have a competitive dimension. This has been countered by the authorities' efforts to clear notifications that do not raise obvious competition concerns in an increasingly fast-track procedure with reduced administrative burden: the efficiency of merger procedures has been steadily improved by the Commission[27] and the GVH[28] in recent years.

2.3.1. Simplification of merger control procedures

These efforts led to the introduction of a simplified procedure in the Commission's procedures in 2000. The simplified procedure is a special Commission procedure to ensure that cases which do not raise competition concerns can be decided more quickly. Under the simplified procedure, the Commission adopts an abridged decision declaring a concentration compatible with the internal market within 25 working days of notification. For the treatment of simplified procedures, the Commission has published a separate notice setting out the conditions under which, in the absence of special circumstances, a simplified procedure may be applied. The first notice was issued by the Commission in 2000, followed by a further notice in 2005. In 2023, following a multiannual review, the Commission issued a new notice [29] on the treatment of simplified procedures, further extending the scope of cases subject to simplified procedure.

As mentioned above, efforts to increase the efficiency of Hungarian merger procedures have increased since 2010. This process involved revising the notification form, establishing a new dedicated unit, the Merger Section, and adopting the procedural practices of other competition authorities, in particular the Commission, into Hungarian law. The first step in the development of a procedure similar to the Commission's simplified procedure was to allow for a simplified decision without giving reasons in procedural law.[30]The Hungarian legislator sought to reduce the administrative burden on undertakings by introducing pre-notification consultation, which for example made it possible to discuss the depth of information to be provided in the

27 European Commission: Simplification of merger control procedures, available at https://competition-policy.ec.europa.eu/mergers/publications/simplification-merger-control-procedures_en (downloaded: 30.05.2024).

28 For more details on the efficiency measures implemented in 2010, see Rigó Csaba Balázs - Tóth András - Bodócsi András - Buránszki Judit - Dudra Attila: Merger Control in Hungary, Public Finance Quarterly, 2021., 66(2).

29 Commission Notice on simplified treatment of certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2023] OJ C 160, 05.05.2023, p. 1–10.

30 See Case no. Vj/24/2012 and the subsequent Notice 2/2013 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on the use of a simplified decision without statement of reasons and information on remedies in merger clearance proceedings (no longer in force).

case of a merger which was clearly not a matter of concern, and to avoid the need to provide information on deficiencies, which led to a speeding up of the investigation phase of proceedings.

Prior to 2017, all merger applications had been subject to a competition review procedure, and the above simplification efforts ultimately led to a new notification procedure from 15 January 2017. This means that the GVH must decide within eight days whether to clear a merger notification without initiating proceedings and issuing an official certificate (if it contains all the information and is clearly unproblematic), or to initiate competition proceedings on the basis of the notification because it raises a *prima facie* case of a significant lessening of competition or because the notification fails to contain the information necessary for such a consideration. The lack of data typically leads to Phase I proceedings, which have a time limit of 30 days, and Phase II proceedings, which have a time limit of 4 months, and the procedural fees for these proceedings are also higher than for notification. The Commission also operates a notification regime, but the important difference is that while the notification phase in the Hungarian system is separate from the competition proceedings phase (and both are subject to a fee), the Commission system does not have such a formal separation and does not charge a procedural fee.

2.3.2. The institution of pre-notification

Since the 2000s, the GVH has sought to provide an opportunity to discuss merger issues prior to submission of an application. The GVH first provided a framework for these preliminary consultations by issuing a communication document, and then, with an amendment to the HCA that entered into force in July 2014, the HCA now also provides a legal basis for undertakings to initiate preliminary consultations (known as pre-notifications).[31] In developing the framework for this legal instrument, the GVH had taken into account the practice of the Commission (and other national competition authorities). These pre-notification contacts provide an opportunity for the GVH to share its views and comments on the draft notification form, which could significantly reduce the time needed for merger assessment. Pre-notification consultations also require a certain degree of flexibility on the part of the competition authorities in order to be as efficient as possible, as the purpose and focus of the consultations may differ: while in a simpler case the main objective is to avoid competition proceedings, in a merger with potential competition concerns and requiring a more detailed analysis, the discussions may be aimed at subsequent procedures.[32]

31 Article 69 of the HCA amended by Act CCI of 2013 (currently: Article 43/L).

32 Notice 4/2014 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on preliminary consultations in merger proceedings (currently: Notice 4/2023).

2.3.3. Dawn raids in merger cases

Expanding the possibilities of the HCA to conduct dawn raids in merger cases was introduced into Hungarian law relatively late, given that in antitrust cases it was already possible from 2005; and in EU law, the EC Merger Regulation already contained a mandate for the Commission to do so.[33] As of 15 January 2017, the HCA has allowed the GVH to conduct unannounced on-site inspections ("dawn raids") in merger investigations to seek evidence related to a potential infringement (including for infringement of the standstill obligation and for providing false information), in line with the Commission's and other national competition authorities' powers to do so. It is worth pointing out that under Article 13 of the EUMR, the Commission may not conduct dawn raids on non-business premises. This restriction is not included in the HCA.

2.3.4. Recent developments

The adoption of EU practices and solutions can still be observed in the development of Hungarian legislation. The latest example of this was the amendment of the rules on the earliest date of filing a notification. The general conditions for submission of a notification under the HCA (conclusion of agreement, announcement of public bidding, or acquisition of a controlling interest) have been the same as those set out in the first subparagraph of Article 4(1) of the EUMR since the entry into force of the HCA. However, the second subparagraph of the same Article also states that "*Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid* [...]". This possibility has been introduced into Hungarian practice from 1 January 2023,[34] and the GVH has also provided information on practical issues in the Jurisdictional Notice of the GVH, taking into account the practice reflected in the EU Consolidated Jurisdictional Notice.[35]

2.4. Current state of harmonisation

As a result of the harmonisation steps described in detail above, all the provisions of the EUMR relevant to a national competition regime are reflected in the HCA, with the same substance, and the legislator - and the GVH, as will be discussed in the next chapter - has continuously strived for a kind of uniform European approach to the assessment of concentrations. With regard to the Hungarian merger control legislation,

33 Article 13 of the EC Merger Regulation.

34 Section 72. of Act LV of 2022.

35 Jurisdictional Notice of the GVH, 198.

substantive differences can be identified in relation to two issues: one is the consideration of public interest aspects other than competition law, and the other is the review of mergers below the traditional thresholds. In addition to these two aspects, further differences can be identified in the practice, where the Competition Council has deliberately maintained the distinction, which cases are discussed in the next chapter.

2.4.1. Other public interests and competition law

According to Article 24/A of the HCA. in force since 22 November 2013,[36] the Government of Hungary has the possibility to classify (in a decree) a merger as a national strategy merger for reasons of public interest (e.g. protection of jobs, security of supply), in which case the merger does not have to be notified to the GVH.[37] This provision represents the most significant departure from EU law, as EU merger control does not provide the option of such exemption at EU level. This provision aims precisely at ensuring that other aspects which are not discretionary under the HCA, but which could be relevant from a national economic point of view, can be properly taken into account when assessing mergers, and it is a recognition that the protection of this kind of public interest is a matter for governmental bodies, and not the GVH.[38]

Competition law cannot be an end in itself and there is no reason to completely isolate competition policy from other policies and public interest objectives: it is worth considering which other public interest objectives can be enforced or supported by the competition law system, also recognising when competition law is not the best instrument to solve a problem that does not seem to be a competition policy issue at first sight, but when stronger regulation of other kinds (e.g. sectoral regulation) is needed.

However, the fact that the EUMR does not contain a direct provision - similar to the Hungarian one - to deal with the conflict between public interest in competition and other overriding public interests does not mean that this problem would not arise from time to time at European level. Most recently, following the decision to prohibit the Siemens/Alstom merger[39], there has been a growing call for protectionist industrial policy to be applied in competition law, defending the interests of European national champions to be built up against mainly Chinese competitors,[40] but this has not yet led to any change in the relevant European legislation. The general question raised here

36 Act CXCI of 2013.

37 Under the original provision, in such a case, businesses did not need to ask for the authorization of the GVH. The wording of the provision has been amended with the move to a notification system.

38 See Tóth A. (footnote 1) 34.

39 Case no. M.8677 (SIEMENS/ALSTOM), OJ C 300, 05.09.2019.

40 A key element of this was a joint declaration by the French and German governments calling for this.

is whether it is appropriate to integrate into the substantive test of competition law (and thus to refer to the remit of the competition authorities) aspects of public policy objectives that serve public interest but are not related to the protection of competition, such as the aforementioned industrial policy-based protectionism[41] , or aspects of sustainability, which are also frequently raised today. The EUMR itself allows Member States to take appropriate measures to protect other legitimate interests, provided that they are in line with the general principles and other provisions of EU law[42], and similar solutions are not unknown in the laws of other countries. This is not the responsibility of the competition authority of the Member State concerned, but typically of a government body (in some cases with the power to overrule the decision of the competition authority).

The grounds that may qualify as public interest considerations vary from one Member State to another [protection of the stability of the financial system (UK); national security, security of supply (Sweden); media pluralism (Greece); preservation/creation of jobs (France)][43], but they partly cover the range of considerations that the Hungarian Government also takes into account when assessing public interest in connection with mergers concerning national importance. According to critics of the regulation on the treatment of mergers with a national strategic dimension, the main problem with the legal instrument is that, without any judicial control, there is no balancing of interests between competition and other public interest policies, and it is not possible to know what the public interest was in the case of a given transaction that was more important than competition[44]. However, there is also a view that the legal instrument actually reinforces the independence of the GVH, and it can be noted that in a procedure challenging an individual exemption, the Constitutional Court of Hungary [45] did not object to the absence of an explanation and justification of public interest in that decree of the Government.

The debate on public interest beyond competition has taken a new direction with

41 Which could essentially mean changing the consumer welfare standard consistently applied by European merger control to a more ambiguous overall social welfare standard. For more on this, see Csorba Gergely: Meg kell-e változnia az európai versenypolitikának a globális kihívásokra reagálva? Tanulságok a Siemens-Alstrom fúzió és annak visszhangjai nyomán, in Valentiny Pál - Nagy Csongor István - Berezvai Zombor: Verseny és szabályozás, KRTK Közgazdaság-tudományi Intézet, Budapest, 2019., 96-115.

42 Article 21(4). It is interesting to note that the last of the rare cases related to this regulation is a Hungarian case, namely Case no. M.10494 (VIG/AEGON CEE), OJ C, C/2024/578, 04.01.2024.

43 Tóth A. (footnote 1) 35.

44 Tóth T. (footnote 1) 89.

45 Decision 16/2020 (VII.8.) of the Constitutional Court of Hungary.

protectionist regulations on foreign takeovers, both at EU[46] and Hungarian[47] level, which have gained in importance following the pandemic, as several countries feared that weakened domestic firms could be taken over by Chinese state-backed companies.

2.4.2. The issue of mergers below the traditional thresholds

The other regulatory difference between Hungarian and EU law is the voluntary notification system for the treatment of innovative mergers in Hungarian practice, which usually cannot be caught by the traditional merger thresholds. By innovative markets, we can basically mean two types of markets: those with more mature and regulated innovation practices, such as certain segments of the pharmaceutical or chemical industries, and those in the broader technological or digital economy, characterised by rapid and continuous development with less regulated innovation processes. In innovative markets, it is more difficult to assess the real market power of a firm or the degree of competitive pressure it faces than in other markets that are not characterised by rapid change and intense R&D activity. Moreover, innovation may not yet generate revenues, or may not generate revenues nearly as much as its potential. It is therefore easy for transactions of competitive concern to pass through the filter of revenue-based thresholds.

To address this problem, the Hungarian legislator introduced[48] a notification system in 2017 based on a lower turnover threshold and the likelihood of a significant competitive impact. According to the HCA, a merger that is not notifiable on the basis of the generally applicable thresholds must (and from 1 January 2023 may[49]) also be notified if it is not obvious that it does not significantly lessen competition (the so-called "non-obviousness condition" which refers to the *prima facie* possibility of competition concerns). As mergers meeting this threshold are not subject to standstill obligation, this has been a voluntary notification option for companies from the outset, with the possibility for the GVH to initiate proceedings *ex officio* within six months of implementation. If a merger is examined, either on the basis of a notification by the undertakings or *ex officio*, the GVH may apply the same tools as for mergers subject to notification under the traditional thresholds: prohibition if already implemented and subject to prohibition, divestiture or clearance with remedies.

Although the EUMR does not contain a provision similar to the Hungarian one, several Member States have legislation allowing for the examination of mergers below

46 Regulation (EU) No 2019/452 establishing a framework for the screening of foreign direct investment into the EU [2019] OJ L 79I, 21.03.2019, p. 1–14.

47 Act LVII of 2018 on the control of foreign investments damaging Hungary's security interests.

48 Act CLXI of 2016.

49 Act LV of 2022.

the turnover thresholds [e.g. in Germany and Austria, if the transaction value (which is not necessarily the same as the purchase price) exceeds a certain threshold[50], other Member states (e.g. Italy, Ireland) introduced "call-in" options to be able to investigate potentially harmful mergers below revenue-thresholds]. Although the Commission also considered[51] the addition of turnover thresholds and the use of transaction value, the EUMR was not amended. Not disregarding the fact that any modification of the thresholds in the EUMR would certainly have been preceded by several years of debate (the thresholds have remained unchanged since 1998), the Commission finally found a solution in an existing instrument: the referral system, and more specifically Article 22 of the Merger Regulation, which only required a reconsideration of its own previous practice and approach and thus a recalibration of the application of Article 22. The essence of the new approach is that, whereas the Commission previously explicitly did not support Member States initiating referrals under Article 22 even in the absence of national jurisdiction, the Commission will now accept referrals in individual cases without national jurisdiction (i.e. where national thresholds are not met) if the transaction has an effect on trade between Member States and threatens to significantly affect competition in the territory of the requesting Member State(s). As the new approach necessarily raised issues of legal certainty and predictability, the Commission issued guidance in March 2021 on the types of cases that may be suitable for such referrals.[52] In the three years since then, the Commission has so far opened 3 cases in which no referring Member State had jurisdiction to examine concentration. Given that the first such request for referral, in the Illumina/Grail case, has not yet resulted in a final judgment, and that Advocate General Emiliou in his opinion[53] published on 21 March 2024 proposes to set aside the judgment of the General Court on the issue of referral[54] which supported the Commission's interpretation, and to annul the Commission's decisions, the debate is still open as to whether this interpretation of Article 22 of the EUMR is correct and empowers the Commission to review

50 Bundeskartellamt - Bundeswettbewerbsbehörde: Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), available at https://www.bwb.gv.at/fileadmin/user_upload/Guidance_Transaction_Value_Thresholds_January_2022_final.pdf (downloaded: 30.05.2024).

51 In an evaluation paper, which also followed a public consultation carried out by the Commission in 2016, the Commission concluded that the revenue thresholds were basically effective, and that the absence of a transaction value threshold is not a problem in itself, as it does not always capture the competitive potential and introducing a system based on it would increase the costs of the whole merger control system.

52 Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases [2021] OJ C 113, 31.03.2021, p. 1–6., point 19.

53 Opinion of Advocate General Emiliou delivered on 21 March 2024 in Joined Cases C-611/22 P and C-625/22 P, Illumina, Inc v European Commission and Grail LLC v Illumina Inc., ECLI:EU:C:2024:264.

54 Judgment of 13 July 2022, Illumina v Commission, T-227/21, ECLI:EU:T:2022:447.

mergers not meeting the thresholds.

The advantage of the Hungarian legislation from the point of view of legal certainty is that there are limits to the initiation of proceedings, of which the turnover threshold and the time limit are clear for businesses. However, the "non-obviousness condition", which assesses the potential for competitive effects, contains some uncertainty and is more difficult and unpredictable for undertakings to perform, even if it is based on well developed (and well established) case law in the relevant Notice. Indeed, the case law on the interpretation of the condition is already based on the experience of mergers between active companies in the market and includes a provision that a reduction in potential competition may also justify the initiation of proceedings. Such a concern is likely to arise, according to the Notice of initiation, where a group of undertakings with significant effective market power (in principle, the competition authority will consider this likely where the market share is above 40%) acquires control of an undertaking without actual presence, or with only a minimal market share in the relevant market, but where there are verifiable circumstances (e.g. innovation, size of future customer base) that suggest that significant future development (entry, expansion) in the relevant market is realistic. In Hungarian practice, this uncertainty is counterbalanced by the absence of standstill obligation and the possibility to initiate proceedings, which is limited to six months, as well as the possibility of pre-notification consultation.

3. Harmonisation in the practice of the GVH

The coexistence of the EU and national merger authorisation regimes naturally raises the need for Hungarian merger enforcement not to differ from that of the EU, or at least to try to minimise the differences. In the previous chapter, we have described in more detail the steps taken at legislative level to achieve this, and in the following, we will illustrate through examples of practical application that the GVH has adopted a pragmatic and essentially accommodating position on this issue.

Harmonisation at expert level has been facilitated by the possibility for GVH representatives to participate in advisory committee meetings, oral hearings, the European Competition Network's Merger Working Group, and referral discussions on potential merger cases after accession. These fora also act as a catalyst; the experience gained in these fora has been instrumental in the development of Hungarian law.

As mentioned in Chapter I, the structure of Hungarian and European merger regulation is similar: the interpretation and application of the legal framework laid down in regulations and legislation is supported by extensive soft law, among which the Jurisdictional Notice of the GVH with a function similar to the EU Consolidated Jurisdictional Notice, summarising Hungarian legal practice for the first time in 2017 and continuously updated since then, is noteworthy. The GVH's Jurisdictional Notice focuses primarily on the conditions and procedural issues determining the notification obligation. In these areas, too, there is a clear trend towards harmonisation, and

Hungarian case law is basically in line with the EU Consolidated Jurisdictional Notice as regards the concepts of merger control, but has maintained certain differences.

The GVH's desire for harmonisation and predictability in the application of merger rules could be illustrated properly by the adaptation[55] of the judgment of the Court of Justice of the European Union in the Austria Asphalt case[56], as a result of which a change of control over an existing joint venture that is not a full-function joint venture does not constitute a concentration under Hungarian practice either. [57] This is significant because, in the fight against restrictive agreements, parallel jurisdiction is accompanied by the requirement of a uniform, consistent application of Article 101 TFEU, while both legal systems distinguish between concentrations and restrictive agreements, i.e. a given transaction must fall into one or the other category.[58] For this reason, there is a need for a uniform interpretation not only of Article 101 but also of the related cases of concentration. Otherwise, if the GVH were to classify and clear an acquisition of joint control over an undertaking which is not a full-function undertaking as a concentration, the Commission - as the ECJ has interpreted it as not being a concentration - could still assess it under Article 101 TFEU, which would be detrimental from the point of view of legal certainty.

3.1. Differences between Hungarian and EU practice

The differences in the Hungarian practice, as set out in the Jurisdictional Notice of the GVH, are due to the fact that the GVH's main goal is to ensure that the existence of a notification obligation can be clearly identified by the merging parties. In other words, the rules on notification obligation (defining what constitutes a merger, the undertakings concerned and the calculation of net turnover) should be predictable, and the different types of merger should not be subject to notification "*in general*" or "*normally*" and not depend on the merits of the merger from a competition point of view. Failure to comply with the notification obligation will entail serious legal consequences (fines, or even reversion to the pre-merger situation in the case of a serious competition problem), and the primary concern in relation to this obligation is therefore to avoid uncertainty and to apply predictable and enforceable conditions. Thus, in the cases where the Hungarian procedural rules on mergers were considered more favourable than the EU practice in terms of predictability and protection of pub-

55 See Case no. Vj/14/2018 and Jurisdictional Notice of the GVH, 117.

56 Judgment of 7 September 2017, Austria Asphalt, C-248/16, ECLI:EU:C:2017:643.

57 The GVH has also confirmed in a recent decision that when assessing whether a company is full-function, it will assess it in line with EU practice. See Case no. Vj/30/2023.

58 Transactions (cooperations) that constitute concentrations cannot be assessed under Chapter IV of the HCA (rules on restrictive agreements). - see point 11.22 of the GVH Competition Council's Decisions of Principle, and also Article 21(1) of the EUMR.

lic interest, the GVH explicitly maintained the separation, and otherwise aligned the Hungarian practice with EU practice.[59]

3.1.1. Differences as regards qualification as a merger

According to paragraph 90 of the EU Consolidated Jurisdictional Notice, "*Where the operation involves a reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not lead to a notifiable concentration.*" The GVH's practice, on the other hand, is based on the assumption that a reduction in the number of controllers, as the acquisition of joint control by a reduced number of controllers, constitutes a merger. Whether the loss of one or more controllers (as the abilities and incentives could change) may result in a change in the market behaviour of the jointly controlled undertaking is a matter for the competitive assessment of concentration.

Unlike in points 25 to 27 of the EU Consolidated Jurisdictional Notice, the GVH does not examine whether the acquirer of assets (constituting a part of an undertaking) will only use it for its own purposes or for the purposes of the seller (outsourcing), or whether it will carry out market activities for other undertakings through the acquirer. According to Hungarian practice, the obligation to notify is already fulfilled if the acquirer of assets and rights constituting a part of an undertaking (the object of the outsourcing) may be capable of carrying out market activities for third parties. This approach provides greater certainty for businesses, because if a stricter standard than suitability (actual market activity) is applied, the legal classification of the transaction could be affected by subsequent changes. The Hungarian objective approach to the qualification of part of an undertaking thus provides greater certainty for market participants, as they do not have to make uncertain prior assessments in order to qualify their agreement for exemption.[60]

According to the EUMR,[61] "*two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.*" Consequently, the net turnover of the whole series of transactions in the EU practice should be used to determine whether there is a notification obligation under the EUMR.[62] In terms of its basic purpose, a similar provision is contained

59 Bodócsi András - Buránszki Judit - Dudra Attila - Tóth András: A magyar fúziós eljárásjog 2010 óta tartó fejlesztése, Versenytükör, 2021., 17(1), 16.

60 Váczi Nóra: Outsourcing a magyar fúziókontrollban – szemben az Európai Bizottsággal? Versenytükör, 2011., 7(2), 62.

61 Article 5(2).

62 EU Consolidated Jurisdictional Notice, 137.

in Article 24 (2) of the HCA. However, Hungarian practice differs from that of the Commission in that it does not examine the whole series of transactions, but only the merger by which the combined net turnover of the undertakings acquired within two years exceeds the threshold for the notification obligation. Otherwise, even mergers not yet notifiable that could therefore be legally implemented would be subject to standstill obligation.[63]

3.1.2. Differences in the scope of the undertakings concerned

According to paragraphs 145 to 147 of the EU Consolidated Jurisdictional Notice, where direct control is acquired by a full-function joint venture, its joint controllers are "normally" not considered to be undertakings concerned by the merger. On the contrary, under Article 26(2)(a) of the HCA, in order to avoid uncertainty as to the existence of a notification obligation, the joint controllers of an undertaking acquiring direct control (as indirect joint controllers) are always considered to be undertakings concerned by the merger.

According to the EU Consolidated Jurisdictional *Notice, "the Commission will not assess as a separate concentration the indirect replacement of a controlling shareholder in a joint control scenario which takes place via an acquisition of control of one of its parent undertakings. The Commission will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of control of its parent undertaking. In those circumstances, the other controlling shareholders in the joint venture will therefore not be undertakings concerned by the concentration which relates to its parent undertaking."*[64] The Hungarian practice is similar in that it also assesses changes in the competitive position of the joint venture due to the indirect replacement of one of the joint controllers. It differs, however, in that it also considers the remaining joint controllers of the undertaking being indirectly controlled as undertakings concerned. The main rationale behind this is that all undertakings whose market behaviour may have an impact on the competitive situation after the merger should be considered as affected (and thus taken into account in the calculation of net turnover).

3.1.3. Differences in the calculation of net turnover

According to Article 27 (1) of the HCA, only the turnover between the undertakings concerned belonging to the same group of undertakings is to be disregarded when calculating net turnover, and the turnover between the undertakings concerned and

63 Jurisdictional Notice of the GVH, 190.

64 Footnote (81) to paragraph 87. of the EU Consolidated Jurisdictional Notice.

those jointly controlled by the undertakings belonging to the same group and other undertakings may not be deducted when calculating net turnover. However, according to paragraph 168 of the EU Consolidated Jurisdictional Notice, the latter turnover may be deducted.

According to paragraph 188 of the EU Consolidated Jurisdictional Notice, *"in situations involving a change from joint to sole control in order to avoid double counting of the turnover of the joint venture […], the turnover of the acquiring shareholder has to be calculated without the turnover of the joint venture, and the turnover of the joint venture has to be taken without the turnover of the acquiring shareholder"*. The practice of the GVH is identical to the foregoing with regard to the avoidance of "double counting" (the combined turnover of the undertakings concerned). There is, however, a difference with regard to the allocation of the net turnover of the sole-controlled undertaking between itself and the undertaking which has sole control over it. According to Hungarian practice, half of the net turnover of the undertaking becoming a sole-controlled undertaking (in the case of the exit of several joint controllers, the proportionate part) is included in the net turnover of the undertaking becoming a sole-controlling undertaking, while the remaining part (the part attributable to the undertaking losing control as a result of the merger) is considered to be the net turnover of the undertaking becoming a sole-controlled undertaking. This practice is based on the fact that the net turnover of an undertaking jointly controlled pursuant to Article 27(5) of the HCA must be divided equally[65] between the joint controllers, on the basis of the pre-merger control relationship.

3.2. Impact of the European practice on market definition and competitive assessment

As already mentioned in the introduction, market definition and assessment of effects on competition are issues where the GVH relies on EU soft law sources and has not issued any notices of its own (only some informal communications with weaker guidance power).[66] The reason for this is that the test for assessing competitive effects is identical in the two jurisdictions as a result of the regulatory approximation described above (the SIEC test mentioned in the previous chapter), so the GVH does not and should not have a separate approach to these issues,[67] and on the other hand, European practice is developing more intensively due to the larger number of cases and greater analytical resources.

The Commission's practice on market definition - due to the same underlying eco-

65 Similarly, in the EUMR, Article 5(5)(b).

66 The notices are the official soft law instruments of the GVH as the HCA enables the President of the GVH and the President of the Competition Council to issue them with the intention to increase predictability in the application of the law.

67 Tóth T. (footnote 20) 654.

nomic and competition policy principles - is clearly a guiding factor in Hungarian practice: on the one hand, in relation to the relevant market categories[68] applicable in merger notifications, and on the other hand, the Competition Council also refers to the Commission's practice in its individual decisions.[69] The use of previous decisions as a starting point allows undertakings and competition authorities to identify in advance the relevant product and geographic markets in which the effects of the merger should be assessed, thus facilitating subsequent procedure. In this respect, taking into account the Commission's practice based on a larger number of cases has the clear advantage of increasing the likelihood of building on the experience of previous cases in a given market.

As regards the assessment of the effects, it is worth highlighting not only the identity of the substantive test, but also the fact that the Notice of the GVH, which sets out the conditions for *prima facie* pre-screening of mergers,[70] refers to the concentration index thresholds set out in the Commission's Horizontal Guidelines,[71] and clarifies that the portfolio effect under Hungarian case law is the same as the conglomerate effect under the Non-Horizontal Guidelines.[72] The GVH Competition Council's decisions have also referred to the Non-Horizontal Guidelines in relation to the assessment of vertical effects (the three-prong test of ability to foreclose, incentive to foreclose, and harm)[73] and portfolio/conglomerate effects[74] . In addition, the guidance of the Commission's practice and the GVH's intention for harmonisation is demonstrated by the GVH's attention not only to the European soft law that provides the framework for assessment, but also to the Commission's assessment innovations articulated in individual decisions. An example of this can be found in the Commission's "4V" test on databases,[75] which the GVH referred to and considered in a relevant Hungarian case.[76]

68 Notice of the President of the GVH and of the President of the Competition Council of the GVH 1/2022 on the annual publication of the list of markets concerned by concentrations identified in the authority's certificates, paragraphs 7., 11-12., 14.

69 See the decisions in Cases no. Vj/37/2017, paragraph 66. and Vj/46/2018, paragraph 47.

70 Notice 7/2016 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on the "non-obvious" condition applicable in the obligation to notify a concentration, the opening of a competition procedure for the examination of a concentration, and full (Phase II) procedure.

71 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31, 05.02.2004, p. 5–18.

72 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265, 18.10.2008, p. 6–25, Chapter V.

73 See Decision of Principle of the Competition Council, No 30.8.

74 See the decision in Case no. Vj/66/2011, paragraphs 136-138.

75 See Case no. M.8788 (Apple/Shazam), OJ C 417, 16.11.2018, paragraph 317.

76 See the decision in Case no. Vj/14/2019, paragraph 72.

A similar concrete example is the assessment of spare capacity in the market, where the GVH also followed[77] the Commission's approach as can be seen in its individual decisions.[78.]

The shift to the SIEC test has also reinforced the trend towards a "more economic approach" in the Hungarian practice, a trend that has been observed in the practice of the Commission and the European Court of Justice since the 1990s.[79] The GVH has supported its decisions with economic analysis methods in more cases than before (even during the period of preparation for the introduction of the SIEC test), although compared to the Commission, the GVH has typically carried out simpler quantitative analyses[80] and these have not been of decisive importance, and thus have not been subject to judicial scrutiny.

3.3. Comparison of interventions

The results of the competition impact assessments show that the GVH has prohibited mergers less frequently than the Commission.[81] Since the EU accession, there have been only 2 actual prohibitions82 , and 2 withdrawals following the Competition Council's preliminary position on a proposed prohibition[83] , while the Commission[84] has a higher prohibition rate, but it is still less than 1% compared to the total number of notified mergers. The GVH intervened in approximately 2% of the notified mergers

77 See the decision in Case no. Vj/37/2017, paragraph 77.

78 Case no. M.6471 (Outokumpu/Inoxum), OJ C 312, 26.10.2013.; Case no. M.6905 (Ineos/Solvay), OJ C 407, 15.11.2014.

79 Tóth T. (footnote 20) 45. and 77.

80 Bidding study (Case no. Vj/19/2007), market survey (Case no. Vj/155/2008), regression analysis (Cases no. Vj/158/2008 and Vj/37/2017), simulation of price effects (Case no. Vj/19/2015), price correlation analysis (Case no. Vj/46/2018).

81 Tóth T. (footnote 20) 646.

82 Cases no. Vj/158/2008 and Vj/87/2016. The latter prohibition was the consequence of a non-authorizing decision of the Media Council acting as a sector-specific authority with the mission of protecting media-pluralism. The judicial review annulled both decisions.

83 Cases no. Vj/155/2008 and Vj/42/2010, the latter preliminary position on blocking was the consequence of a non-authorizing decision of the Media Council.

84 Based on data available at https://competition-policy.ec.europa.eu/mergers/statistics_en (downloaded: 30.05.2024).

including remedies[85] , compared to around 5% for the Commission over the same period. The higher intervention rate is probably due to the fact that European markets are to a large extent integrated and that, because of the notification conditions, larger transactions in an integrated market are assessed by the Commission, whereas at national level only the mergers involving purely national markets or markets with a narrower geographic scope may justify intervention. The European referral system allows for mergers with a Community dimension but primarily affecting a Member State to be examined by the national authority: an example of such a referral is the case of a readymix-concrete merger.[86] This case ended with an intervention (the divestiture of six plants) in a local market, narrower than the national market,[87] with the appointment of a monitoring trustee, a measure which the GVH applied for the first time, also considering the relevant European practice.

4. Conclusions

Despite the strict division of powers between EU and Hungarian merger control, there has been a convergence of EU and Hungarian merger law and practice since the EU accession, which process has been accelerated by the possibility for GVH representatives to participate in fora and expert meetings related to merger issues with European dimension.

The specificity of legal harmonisation in the field of merger control is that it was not based on an obligation arising from an EU treaty, but on the need for a uniform European approach, which the Hungarian legislator and the GVH had expressed from the very beginning. The GVH has therefore endeavoured from the outset to minimise the differences between Hungarian and EU law in its practice, and the same ambition can be observed in the legislation. As a result, in the field of merger control, the provisions of the HCA have been continuously converging to EU law, and the Hungarian

85 23 cases between 2004 and 2023, source: the GVH's publication Concentrations (Mergers) as a potential instrument for economic growth 2021 and the Parliamentary reports, available on the GVH website (www.gvh.hu). In some cases, there is no formal regulatory procedure and prohibition, but the parties refrain from merging or decide to divest on the basis of the authority's position expressed in a pre-notification phase or during the procedure, which the GVH publication refers to as verbal intervention, and which, although they are interventions without a formal regulatory decision, cannot be considered as mere deterrence of the regulation.

86 Case no. Vj/37/2017.

87 This case clearly illustrates that in cases involving such small markets, it is more sensible for the national authority to investigate, as the Commission can only intervene if the merger raises concerns in substantial part(s) of the common market. See: Nagy Aranka - Révész Éva: Egy összefonódás, négy eljárás, négy eltérő végkifejlet – a DDC/Readymix ügy érdekességei és tanulságai, Versenytükör, 2018., 14(1).

legislation has now become largely similar to EU law. Thus, from a regulatory point of view, the most significant exception is the possibility of exempting from merger control concentrations declared to be of national strategic importance for reasons of public interest. In the practice of the GVH related to these cases, too, the approach to European practice and the adoption of good experience is the dominant trend, although some minor differences remain, which in all cases are motivated by the GVH's desire to make the Hungarian merger control system as predictable as possible.

III. Practice

Csaba Balázs Rigó

Unorthodox possibilities in the toolbox of the Hungarian Competition Authority

1. Introduction

Competition authorities generally have strong authority, as they have a strong legal mandate to enforce their orthodox powers to ensure fair market competition. In their competition enforcement procedures, the authorities often impose substantial fines for infringements, which act as a strong deterrent. Market players are generally unhappy when competition authorities take them to court for cartel detection, abuse of dominant position, merger control or even unfair commercial practices. Fighting anti-competitive practices is a constant priority for competition authorities, but their traditional tools are slow to deliver results, often taking several years, depending on the complexity of the cases. No wonder citizens have the image that competition authorities are like aircraft carriers. Strong and stable vehicles that reach their destination slowly, methodically but surely. They have heavy artillery and ammunition, but they need time to load. National competition authorities can usually only correct market anomalies after thorough investigations, which take time. But in rough seas, changing weather or poor visibility - in times of financial crisis, for example - you need faster manoeuvring ships and fast-firing weapons. In times of crisis, the "impatience" of consumers is understandable, as there are no more years for competition to recover. People in trouble expect help, solutions and rapid public intervention. Since I took office on 15 April 2020, I have been concerned about how the Hungarian National Competition Authority can be equipped with more effective tools to respond more quickly to market disturbances

and contribute to increasing consumer welfare in the foreseeable future. In this chapter, I present unorthodox regulatory tools that focus on the time factor and take into account that certain markets may face (crisis) situations or economic events that allow for effective intervention and rapid reaction, complementing the classical tools of competition authorities. In line with this, I will use a concrete example - the results of the fight against inflation - to illustrate the legal institution of an accelerated sector inquiry for efficiency and the type of food sector inquiries carried out by the Hungarian Competition Authority, and the online Price Monitoring Database, which responds to inflationary pressures by encouraging businesses in the retail sector to compete on price every day, building on transparency rather than prolonged investigations into possible anti-competitive market behaviour and collusion behind price rises. In addition, I will also present the possibilities for cooperation with the Hungarian Competition Authority (hereinafter: GVH) open to those subject to competition proceedings, which can also be good solutions instead of time-consuming procedures. Good faith, effective and continuous cooperation is a prerequisite for successful self-cleaning, which can be a means for bidders to escape exclusion for competition law infringements committed in the past in public procurement procedures (e.g., cartels).

2. Fighting the pressure of time

The European Union, through its Directive (EU) 2019/1[1], gives national competition authorities the right to prioritise cases, at least in their enforcement proceedings under Articles 101 and 102 of the TFEU. The Hungarian Competition Authority has an overriding interest in conducting its competition proceedings efficiently and making the best use of its resources. An important aspect of efficiency is the reasonable time spent on the procedure and its stages (investigation/complaint or notification handling, investigation, competition decision). In recent years, the question of reasonable time has been a recurring issue in Hungarian competition law. The most important administrative procedural dilemma before the courts in relation to this issue, which is otherwise embedded in a constitutional assessment framework, was whether the Competition Authority has the right to impose the most severe legal sanction, i.e., a competition supervision fine, in case of exceeding the time limit. Following conflicting court judgments, the Curia put an end to the case with its uniformity decision no. 4/2023. It was declared that the Competition Authority may impose a fine after exceeding the time limit for the administrative procedure, but "when determining the amount of the fine, the assessment must include the extent to which the authority's exceeding

1 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 on the strengthening of the position of the competition authorities of the Member States with regard to the enforcement of competition law and the proper functioning of the internal market [2018] OJ L 11, 14.1.2019, 3-33.
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0001

the time limit for the administrative procedure caused the infringer legal damage, i.e., whether, in the specific circumstances of the case, his/her right to a fair hearing was infringed and to what extent this justifies a reduction of the fine"[2]. From the point of view of the national competition authority, which has consistently taken the position that fines can be imposed after the deadline, the issue has now reached a point of reference that is in line with the principle of effective application of EU competition law and the competition case law of the Court of Justice of the European Union[3].

However, the time factor as a very important aspect is not only related to the length of competition proceedings in competition law, although it has undoubtedly had decisive consequences in this respect, even at the expense of conventional competition authority interventions. Suffice it to recall that at EU level, for example, the rationale behind the adoption of the DMA Regulation[4] was of paramount importance to intervene in a timely manner in the functioning of anti-competitive digital markets. As the preamble puts it, "Applying only those obligations that are necessary and proportionate to achieve the objectives of the DMA should allow the Commission to intervene in time and effectively, while fully respecting the proportionality of the measures considered"[5]. Not only procedural inefficiencies (lengthy procedures) but also substantive difficulties (establishing dominance and the abuse itself) contributed to the adoption of the DMA[6], and *ex post* competition law intervention was facilitated by legislation of an *ex-ante* nature[7].

3. Unorthodox ways to fight inflation

3.1. The emergence of inflation

The global supply disruptions were already evident during the COVID-19 corona-

2 The uniformity decision no. 4/2023. of the Curia (Jpe.III.60.053/2022/15), 1–2.

3 Tóth András: The enforcement of European Union competition law in Hungary. The practice of administrative courts, Law Journal, 2023, 78(9), 387–398.

4 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on competitive and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act, EEA relevance) [2022] OJ L 265, 12.10.2022, 1–66. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R1925

5 Digital Markets Act, Recital (28).

6 Friso Bostoen: Understanding the Digital Markets Act, The Antitrust Bulletin, 2023, 68(2), 263–306.

7 See more on this: OECD: Ex ante regulation of digital markets, 2021., OECD Competition Committee Discussion Paper. Available at: https://web-archive.oecd.org/2021-12-01/616997-ex-ante-regulation-and-competition-in-digital-markets-2021.pdf

virus pandemic, when countries announced a series of closures. Supply chains were severely disrupted, supply shocks were accompanied by fears of recession, and government intervention, while keeping economies alive and restarting them, triggered a rapidly rising inflation cycle. Looking at events from a historical perspective, the latest inflationary period is complex, bearing the hallmarks of all the high inflationary periods of the 20th century (1920s, 1940s and 1970s). The complexity of the inflationary period was characterised by the simultaneous presence of supply problems, soaring commodity prices, concentrated demand growth, high budget deficits and debt, rapidly expanding money supply, and increased competition for skilled labour due to tight labour markets[8]. These problems were compounded by insufficient competition in some sectors. Potential distortions of competition affect consumers even more in times of inflation because they often lead to price increases, just think of the brutal rise in food prices in Hungary. In a crisis, consumers are even more aware if competition in a market is monopolistic or oligopolistic. It is usual to explain the laws of oligopoly market functioning, such as interdependence, by the theory of oligopolistic interdependence. This means that there are situations where firms, given their similar market power, face minimal price competition, monitor each other's pricing and have no interest in moving away from each other. This can also lead, in certain circumstances, to firms, aware of the constraints of their market position, maintaining prices at levels that result in high profits, rather than more competitive prices, even without demonstrable coordination[9]. This is called tacit collusion. In an oligopolistic market, firms can explain away uniform and almost simultaneous price increases unless there is evidence of collusion against them. In addition, if firms implement a retrospective price increase, the higher inflation rate of the previous year will be an additional upward force on the rate of money depreciation. We saw a similar phenomenon in Hungary in early 2023, when companies providing residential telecommunications services significantly changed their previous pricing practices[10]. However, Richard Whish[11] points out that there may well be relevant differences between specific market structures (e.g., different cost levels and/or profit margins of firms, concentration on the demand side, transparency of price data, quality of goods or services, additional after-sales services, advertising, R&D activity, innovation) that make tacit collusion between firms difficult.

Limited supply due to the pandemic caused by the COVID-19 coronavirus has significantly undercut demand, which has pushed prices up dramatically. Inflation has

8 Matolcsy György: Patterns of the new decade, Polgári Szemle, 2022, Vol. 18., 4–6, 13–32.

9 Tóth Tihamér: Competition Law in the European Union, Wolters Kluwer, 2014, 1–2.

10 National Bank of Hungary: Inflation Report, September 2023, 52–54. Available at: https://www.mnb.hu/letoltes/hun-ir-digitalis-23.pdf

11 Richard Whish: Competition Law, LexisNexis UK, London - Edinburgh, 2003, 508.

risen sharply, particularly in the United States and the European Union[12]. The fears of war were confirmed and became a reality in February 2022 with the outbreak of the Russian-Ukrainian conflict on the old continent. The rate of monetary deterioration has affected countries physically closer to the war more than average. According to Eurostat's report of June 2022, the average 12-month increase in consumer prices in June 2022 was 9.6% in the European Union, 12.6% in Hungary and 19.2%-22.0% in the former post-Soviet states close to Russia[13]. According to Eurostat, the average industrial producer price of energy peaked in September 2022 and the average consumer price of electricity, gas and other fuels reached an unprecedented high by October[14]. Such a dramatic rise in energy prices has had a very negative impact on European economies, including our own. Dependence on imported gas and electricity has multiplied Hungary's energy bill several times over, which had to be paid in foreign currency. This put further pressure on the forint, which weakened again to a low against the euro in September 2022[15]. Imports have become more expensive, which has further increased inflation. The consumer price index finally peaked at 25.7% and the harmonised index of consumer prices at 26.2% in January 2023 compared with the same month of the previous year[16].

In particular, the consumer price index for food was particularly high in Hungary, peaking at 44.8% in December 2022 compared to the same period of the previous year, according to the Hungarian Central Statistical Office (KSH)[17]. At the beginning of the year, the wage settlements for law enforcement agencies, income tax refunds and other social policy measures by the government boosted domestic demand, making it easier for some economic agents to raise prices sharply. Price increases by businesses can result in high profits in times of sluggish competition, but consumers' tolerance and solvent demand are finite. Once the one-off income transfers are over, consum-

12 Eurostat: Annual inflation more than tripled in the EU in 2022, 9 March 2023. Available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230309-2

13 Eurostat: Annual inflation up to 8.6% in the euro area, Euroindicators, Eurostat Press Office, June 2022. Available at: https://ec.europa.eu/eurostat/documents/2995521/14644638/2-19072022-AP-EN.pdf/fff35147-c9b3-a915-7bf0-b09202bbd130

14 European Council: Energy price rises since 2021. Available at: https://www.consilium.europa.eu/hu/infographics/energy-prices-2021/

15 Portfolio: Euro exchange rate (EUR/HUF). Available at: https://www.portfolio.hu/arfolyam/EURHUF/EUR-HUF%20Spot

16 Eurostat: Annual inflation down to 8.6% in the euro area, Euroindicators, Eurostat Press Office, January 2023. Available at: https://ec.europa.eu/eurostat/documents/2995521/16056046/2-23022023-AP-EN.pdf/4a097379-8598-01ff-12d8-75d72570ca85?version=1.0&t=1677085828134

17 Hungarian Central Statistical Office: Consumer price index by main consumption groups and the consumer price index for pensioners, monthly. Available at: https://www.ksh.hu/stadat_files/ara/hu/ara0040.html

ers will cut back on their purchases, which will have happened by the second half of 2022. The internal problems of the domestic economy were compounded in 2022 by the extreme drought that hit the Carpathian Basin, which led to a significant drop in crop yields and also pushed up food prices. The drought has been a blow to a domestic agriculture and food industry already struggling with productivity growth problems. Foreign ownership in food processing and trade in Hungary is significant, and multinational food retail chains import large quantities of foreign food. The exposure of Hungarian producers and processors is exacerbated by the high proportion of so-called private label foods on the shelves of some supermarket chains, which are typically foreign-owned, and they can easily outsource their production abroad. The recent investigation by the UK competition authority[18] has identified the rise of private label products as a particularly positive effect on competition in the market, as it can limit price increases by brands, increase competitive pressure on manufacturers and distributors and the resulting competition can be beneficial for consumers. At the same time, if the forint weakens, imports of private label products produced abroad will drive up prices. All these factors, in combination, caused the high food inflation of 44.8% in December 2022. Consumers reacted to the high prices by cutting back their purchases significantly. Demand was still positive in the first half of 2022 but turned negative from June onwards and then declined steadily[19]. Tackling inflation required coordinated and effective action, so at the beginning of 2023, the clear objective was to tackle inflation first among the problems that were simultaneously weighing on the Hungarian economy. In the current situation, it was right to ask what the Hungarian Competition Authority - alongside the central bank and the government - could do to fight inflation.

3.2. The GVH's action against inflation

The GVH had the opportunity to act quickly against sudden price rises and inflation. This was made possible by Section 43/D(1) Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act[20]), which empowers the GVH to open a sector inquiry by means of an order to investigate and assess market developments if price movements or other market circumstances indicate that competition in a market belonging to a given sector is distorted or restricted. Competition in a market may be restricted in the event of inflation. So in such situations, the GVH has

18 Competition and Markets Authority: Price inflation and competition in food and grocery manufacturing and supply, 29 November 2023. Available at: https://www.gov.uk/government/publications/price-inflation-and-competition-in-food-and-grocery-manufacturing-and-supply

19 Hungarian Central Statistical Office: Factsheet, Retail, September 2023. Available at: https://www.ksh.hu/gyorstajekoztatok/kis/kis2309.html

20 Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. Available at: https://njt.hu/jogszabaly/1996-57-00-00.73#CI

the opportunity - using, if one likes, the accelerated sector inquiry as an unorthodox tool - to investigate and analyse a sector as soon as possible, prepare a report and then make competition proposals to consumers, market players and the legislator.

3.2.1. The relationship between competition policy and price regulation

There is a historical link between competition policy and price regulation. In Hungary, inflationary pressures - in the absence of price regulation - have led the authority to address the issue of prices affecting competition law and its application. Its origins go back to the late 1980s - the beginning of modern Hungarian competition law - when competition was expected to keep prices at a reasonable level, while price liberalisation was gradually taking place, freeing prices from the price controls of the planned economy. The first full-fledged Hungarian competition act[21] was drafted by a group of experts in the former National Office for Materials and Prices. In addition to the classic competition law toolbox, the legislation at the time included a system of prior notification of price increases for certain products, which covered dominant market players, while prohibiting dominant firms from creating a shortfall by withholding products in order to raise prices. More or less the same group of experts worked in parallel on the new price law[22], and the two pieces of legislation were adopted and published almost simultaneously. The Hungarian Competition Authority (GVH) was created on 1 January 1991 by the partial redeployment of the staff and facilities of the National Office for Materials and Prices. This period was characterised by high and persistent inflation in Hungary, with 28.9% in 1990 and 35% in 1991. At the time, the GVH received a relatively large number of complaints about excessive pricing in some sectors. One such market was the market for local cable TV services. Inflation was significantly lower for most of the 2000s and 2010s, but in the event of a significant price increase, many expected the GVH to investigate suspected cases of excessive pricing. The most recent major excessive pricing case was concluded ten years ago[23], which involved an investigation into the pricing practices of the dominant fuel producer, wholesaler and retailer MOL Nyrt. In this investigation, the Competition Authority's experts not only looked at the company's pricing, but also at the theory of price squeeze and the suspicion of asymmetric price transmission. The competition procedure finally resulted in a commitment from MOL to ensure that wholesale fuel prices follow the international benchmark for the next five years. In 2005, the GVH successfully challenged the demands of taxi drivers who wanted to introduce fixed minimum prices in Budapest at a

21 Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices. Available at: https://mkogy.jogtar.hu/jogszabaly?docid=99000086.TV

22 Act LXXXVII of 1990 on the Determination of Prices. Available at: https://njt.hu/jogszabaly/1990-87-00-00

23 VJ/50-722/2010. Available at: https://gvh.hu/dontesek/versenyhivatali_dontesek/archiv/dontesek_2010/vj_50_2010_722

time when petrol prices were typically high. The Hungarian Competition Authority has also argued for the removal of price controls for hotel bookings by telephone, but without success. While the GVH has generally taken a position in favour of deregulation, it has sometimes proposed price regulation or tightening of existing price controls on statutory monopolies, or in some cases market opening, as the first best solution. The Competition Authority also raised the possibility of regulating cable TV prices in the mid-2000s, following complaints about excessive pricing by local natural monopolies.

3.2.2. Accelerated sector inquiries to detect market disturbances

In addition to competition enforcement proceedings, the Competition Authority has in recent years focused on various market analyses and sector inquiries. The most important difference between the two market surveys is that the market analysis is voluntary, while the sector inquiry is based on mandatory data provision. In the latter investigation, the authority will look at a sector if there are problems that could have a negative impact on competition and consumer welfare. Traditional sector inquiries can take several years, but in Hungary there is a more efficient version of the inquiry that can be carried out at the same time, the *accelerated sector inquiry*.

Although the GVH is not a price authority, it has researched the causes of price hikes in certain sectors in Hungary and how it can act more quickly in crisis situations. Sensing a dramatic increase in the price of construction materials in 2020, the national competition authority has launched a rapid investigation into the sector. The construction industry did not stop during the pandemic, but there were significant increases in raw material prices. This is another reason why the legislator has provided the Hungarian Competition Authority with a much more effective tool than the existing ones, namely the possibility of an accelerated sector inquiry.

Under the special rules adopted in July 2021[24], the GVH is now entitled to carry out sector inquiries with tighter deadlines and in a more efficient way. Unique in Europe, the new tool proved useful in the fight against inflation because of its speed and could later be used to examine food inflation. Even in the case of an accelerated sector inquiry, Section 43/D(1) of the Competition Act is prevalent and can be applied. If, on the basis of the characteristics, the totality of the individual features or the structural organisation of a sector, there are grounds to believe that competition in a market belonging to that sector is distorted or restricted and that urgent intervention is warranted in order to identify and address these market problems, the Competition Authority may open an accelerated sector inquiry by means of an order to identify and assess market developments. The reasoning for the order for an accelerated sector inquiry, which must be published by means

24 Government Decree No. 406/2021. (VII. 8.) on the different application of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.
Available at: https://njt.hu/jogszabaly/2021-406-20-22

of a notice, must state the market characteristics in respect of which the inquiry needs to be opened. The purpose of an accelerated sector inquiry is to gather information and analyse the competitive conditions in a given market. Under the new rules, the initiation of an accelerated sector inquiry may be justified if two conditions are met. On the one hand, there is a reasonable presumption that competition in a given market is distorted or restricted, and on the other - and this is a completely new element in regulation - there is an urgent need to identify and address these market problems. The accelerated sector inquiry is an *ex-officio* investigation launched by the GVH, not against individual companies, but to identify market problems. The procedure is a new information-gathering tool that allows the GVH to obtain large amounts of data in a short period of time, including through on-site inspections, thus enabling it to identify potential competition problems in markets that are crucial for consumer welfare. Reinforced fact-finding powers, such as procedural fines and unannounced on-the-spot checks, should be used appropriately. The court will authorise a search if the GVH has reasonable grounds to believe that evidence relevant to the purpose and subject matter of the investigation can be found at the place of the request.

Compared to the general rules governing traditional sector inquiries, the accelerated sector inquiry has tighter time limits and differs in its fact-finding powers. The deadline for traditional sector inquiry reports is not specified in the Hungarian Competition Act (they must be prepared within a reasonable time), and in our experience they usually take one to two years. On the other hand, a draft report on the outcome of the procedure must be drawn up within one month of the date of the order for an accelerated sector inquiry, which may be extended twice by the President of the Authority, with a maximum of one month each time. Before the adoption of the report, businesses in the sector concerned should be given the opportunity to make their views known in writing, giving them at least eight days to express their views, which should be made public if they specifically request it. A public hearing may be held where the companies in the sector concerned cannot be clearly identified or where individual contacts with such companies would be unduly difficult because of the large number of companies concerned and the authority considers it necessary to hear the views of other interested parties on the draft report. In the event of an infringement, the GVH may also initiate competition supervision proceedings. If the market distortion cannot be remedied in whole or in part by means of competition supervision proceedings, the GVH may inform the legislator - the competent committee of the Parliament, the competent minister or authority - about the distortion, initiate legislative amendments or publish non-binding recommendations to market participants in order to promote fair and effective competition. The Hungarian Competition Authority used its new powers to launch its first accelerated sector inquiry in the summer of 2021. The new legal instrument has proved so successful that the legislator decided to retain it permanently and incorporate it into Hungarian competition law[25].

25 Act CXXX of 2021 on certain regulatory issues related to emergency situation. Available at: https://njt.hu/jogszabaly/2021-130-00-00.0

While in traditional sector inquiries, which are extremely time-consuming and involve a lot of data collection and analysis, the GVH's experts examine the sector in depth, exploring its structure, the interconnections between the players and the functioning of the industry itself, in the accelerated sector inquiry, the staff do not examine an entire economic sector, but work in a more targeted way. Only relevant companies are contacted, with fewer but better targeted questions to those who have to provide data. Accelerated sector inquiries are therefore significantly shorter, even if a longer deadline is necessary where justified. The draft report will be ready in no more than three months in any case, allowing the GVH to focus and react quickly to urgent market problems.

From the introduction of the new legal instrument in July 2021 until the end of 2023, the GVH has conducted a total of eight accelerated sector inquiries[26]: three in the market of construction materials (ceramic masonry, wood building materials, thermal insulation materials), two in the health sector (COVID-19 antigen rapid tests, COVID-19 antibody rapid tests), two in the food sector (milk and dairy products, durable food) and one in the online accommodation booking and services market. All of the studies had to do with price increases and pricing.

In 2021, the Hungarian Competition Authority wanted to know the reasons behind the increase in construction prices, the economic motivations behind these developments and the exposure of these markets to raw materials. Our main findings were that price increases for products based on domestic raw material base and manufacturing capacities (e.g., bricks) were significantly lower than for imported products, so in order to reduce import exposure, it is recommended to bring home the majority of the supply chains, such as extraction, processing, manufacturing, distribution and sales. Capacity needs to be increased in value chains with few players and the economy needs to be further whitened.

According to the indications received by the Authority, the market for COVID-19 rapid tests in Hungary was characterised by high prices in regional and European comparison, as well as misleading advertising practices. Following the conclusion of the investigations, the GVH proposed to the legislator to allow the sale of rapid antigen tests for self-testing in retail chain stores, drugstores and petrol stations. We also recommended that market players should aim to create shorter value chains, reduce vertical integration levels, and buy directly from domestic importers where possible. As an option, direct sourcing from foreign manufacturers was recommended primarily for domestic pharmaceutical wholesalers. According to model calculations and statements by pharmacy chains in daily newspapers, the price of COVID-19 rapid antigen tests has fallen by 50% after the government temporarily allowed them to be sold over the counter. According to our preliminary calculations, consumers have saved billions of forints when buying rapid tests thanks to this market opening. Depending on how

26 Hungarian Competition Authority: Sectoral inquiry. Available at: https://www.gvh.hu/dontesek/agazati_vizsgalatok_piacelemzesek/agazati_vizsgalatok/$rppid0x1530730x14_pageNumber/1

much of this price reduction is attributed to market opening and the volume of sales, a conservative estimate of at least HUF 2-4 billion in consumer savings in 2023 value terms from the start of freer sales in February 2022 until the end of summer 2023. In addition to the financial benefits, the availability of tests has also improved, helping to control the epidemic. This demonstrates the strength and benefits of competition, and that the GVH's interventions and proposals can bring substantial consumer benefits, which can also reduce inflation by lowering prices.

Accelerated sector inquiries were continued in the food industry, given the exceptionally high price increases. The lessons learned from the accelerated sector inquiries in the milk and milk products and preserved food markets are presented in more detail later.

The latest accelerated sector inquiry, conducted in autumn 2023, concerns the online reservations market, where the GVH's investigators analysed whether competition in the market is distorted. The investigation was launched in response to a significant number of complaints received by the Competition Authority, which was confirmed by the fact that even before the complaints, several competition proceedings had to be conducted in the sector. The procedure was linked to price developments in that the GVH's experts dealt with the so-called price parity clauses. These are in essence to limit the pricing freedom of the accommodation and stipulate that the accommodation cannot offer a lower price than the room rate on the relevant accommodation platform on its own platform (narrow price parity) or on any other platform (wide price parity). In the investigation report, the Competition Authority recommended to the legislator to prohibit by law the use of both broad and narrow price parity clauses by operators in the domestic market for accommodation intermediation. We have also proposed to regulate the framework of the General Terms and Conditions and related business practices used by major online accommodation intermediaries, in order to ensure a more level playing field between accommodation providers and intermediaries. The Hungarian Parliament's Economic Committee discussed the GVH's findings and recommendations just a few days after the draft report was published, and the amendment to the legislation was submitted to the Parliament in 2024.

Summarising the experience, it is clear that the possibility of accelerated sector inquiries has given the GVH an effective tool to obtain data, analyse and make recommendations in a regulated and rapid manner. The possibility of an accelerated sector inquiry is unorthodox in terms of the time available.

3.2.3. Fight against high food prices

The GVH can in itself contribute to increasing competition and thus reducing inflation through its administrative procedures, as they have an impact on economic operators, can promote competition and can lead to more competitive prices. At the same time, depending on their complexity, competition supervision proceedings can

take several years, so it is legitimate to ask how prices can be reduced more quickly (unorthodoxly) by increasing competition. The ability to act more quickly requires up-to-date knowledge of economic developments, the ability and speed of obtaining market information, analytical capacity at the ready, a constant sense of the authority's vigilant presence, a kind of well-meaning pressure on market players.

High food inflation in 2022 has also attracted the attention of the GVH. Drastic price increases and increased customer complaints during daily shopping have also been reported to the Competition Authority. High food prices have hit the population hard, as households in Hungary spend more than 17% of their total expenditure on food and non-alcoholic beverages, which is higher than the average for the European Union and the Eurozone[27]. Looking at the decomposition of inflation, it can be seen that food price rises from the end of 2021 onwards, among other factors, contributed significantly to the deterioration in money[28].

Food products account for a significant share of the total consumer basket, according to the KSH's product classification, so the price developments of these products have had a significant impact on domestic inflation developments. Food inflation has also been high by regional standards and has contributed to a higher inflation environment than in the surrounding countries[29]. Food accounted for around two-thirds of the surplus of domestic price level increases over Visegrad countries in the period between June 2021 to December 2022. Against this background, the Hungarian Competition Authority has focused its investigations on the food value chain.

3.2.4. Accelerated investigations in the market of milk and milk products and preserved food

Due to the dramatic increase in food inflation, the GVH's experts started a market consultation with food industry stakeholders, including the Bakers' Association and the Institute of Agricultural Economics, in the last quarter of 2022, and in January 2023 a special analytical group[30] was set up to investigate the competition law causes of the price increase. This was followed by two accelerated sector inquiries in early 2023, at

27 Eurostat: How much do households spend on food and alcohol?, 1 February 2023. Available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230201-1

28 National Bank of Hungary: Rapid review of inflation, November 2023, 5. Available at: https://www.mnb.hu/letoltes/gyorselemzes-az-inflacio-alakulasarol-hu-2023-november.pdf

29 National Bank of Hungary: Inflation Report, December 2023, 55. Available at: https://www.mnb.hu/letoltes/hun-ir-digitalis-24.pdf

30 Hungarian Competition Authority: Action by the GVH! Competition authority investigates food retail chains, 18. January 2023. Available at: https://www.gvh.hu/sajtoszoba/sajtokozlemenyek/2023-as-sajtokozlemenyek/lep-a-gvh-vizsgalodik-a-versenyhatosag-az-elelmiszer-kiskereskedelmi-lancoknal

the peak of inflation, in the domestic markets for milk and milk products[31] and for preserved food[32]. These two food sectors were chosen because of suspicions that retailers tried to compensate for losses on products affected by the official price by increasing the prices of milk, milk products, frozen and canned food. On the basis of the two accelerated food sector inquiries, we have made a number of recommendations to market players, the Government and the legislature.

In the case of milk and milk products, we proposed a revision of the base price forecast for raw milk, which led the Interbranch Organisation and Product Board for Milk to start the revision in May 2023, while suspending the publication of the base price forecast calculated according to the old methodology. We have offered professional advice on future legislative considerations on the price freeze in view of its distortive effects on competition. We have also proposed to improve the position of consumers of plant-based drinks and soy yoghurts through trade policy instruments such as a reformulation of pricing. We have pushed for a shift to sustainable packaging. We are committed to continue to pay particular attention to the commercial sector in order to increase competition and reduce prices. One of the notable technical results of the accelerated sector inquiry into the market of milk and milk products is the so-called price transmission analysis[33], which involves examining the relationship between input and output prices, and drawing conclusions from the analysis of cost pass-through to identify which actor has greater market power in each exchange contract. The analysis shows that on the one hand, the increase in producer prices was directly and rapidly reflected in the transfer prices to processors, so that the change in raw milk prices had a significant impact on milk product prices. On the other hand, the processing level has corrected the unfavourable margin changes. When producer prices increased, thus narrowing processors' margins, they increased their transfer prices to traders within a few weeks. At the same time, when consumer (retail) prices were higher, processors also raised prices in a very short period of time (just a week or two). Processor transfer prices are typically finalised during negotiations with retailers, putting retailers in a position to take processor and consumer prices into account at the same time, essentially aligning them, i.e., adjusting consumer prices to processor price changes. From a consumer point of view, it is a positive process if retailers are constantly looking for sources of supply from which they can obtain purchase prices that still allow them to offer reasonable prices to consumers.

31 Hungarian Competition Authority: Report on the Accelerated Sector Inquiry into the Hungarian Milk and Milk Products Market, 2023, Budapest. Available at: https://www.gvh.hu/pfile/file?path=/dontesek/agazati_vizsgalatok_piacelemzesek/agazati_vizsgalatok/Tej_es_tejtermek_gyorsitott_agazati_vegleges_jelentes_230713.pdf1&inline=true

32 Hungarian Competition Authority: Report on the Accelerated Sector Inquiry into the Hungarian Preserved Food Market, 2023, Budapest. Available at: https://www.gvh.hu/pfile/file?path=/dontesek/agazati_vizsgalatok_piacelemzesek/agazati_vizsgalatok/Tartos_termek_gyorsitott_agazati_vizsgalat_jelentes.pdf1&inline=true

33 Hungarian Competition Authority (footnote 31) 67–74.

Following an investigation into the market for preserved food products, the GVH proposed to promote the domestic production of fruit and vegetables by intensifying support for the installation of modern and sustainable irrigation systems, in view of the growing share of imports in the food industry. We have proposed further subsidies for investments by market players to increase energy efficiency, the expansion of the use of renewable energy sources, and the expansion of precision agriculture training, adapted to market needs. We have welcomed the further deepening and broadening of producer engagement and have called for greater use of sustainable packaging in this case, and, as in the dairy market, we have also envisaged increased attention and pressure from the authorities.

In both sectors under investigation, it has been shown that consumer prices are significantly influenced by retailers' buying-in prices, which account for 50-75% of the consumer price plus VAT. If traders compete effectively and constantly look for cheaper products, this can trigger increased competition and price reductions throughout the supply chain. Nobody wants to compete on their own unless they are forced to. The GVH's analyses confirmed that the profit margin built into the retail gross margin was significantly increased for some products, i.e., some businesses chose to make easy profits rather than increase competition, taking advantage of the fact that demand for some products did not decrease significantly despite significant price increases. Some retailers have spread the losses they made on food at the official price to other foods that consumers prefer. This may also have driven the surge in food inflation. We found products where the retail gross margin increased significantly in nominal terms, and looking at its composition, we can see that the average share of profit built into the margin multiplied from 2021 to 2022. For example, the profit multiplication was striking for 20% fat sour cream, but the profit multiplication was also present for 2.8% ESL milk, semi-fat cottage cheese, Trappist cheese or natural yoghurt.

With food prices skyrocketing, many have talked about profit-driven food price rises and profit-driven inflation. Their hypothesis was partly supported by the fact that there were firms that ended the crisis year 2022 with sales growth and profits above inflation. Moreover, this was also true for some of the actors at lower levels of the supply chain, as was evident from the 2022 reports. Similar phenomena to those observed for milk products were also found in the case of crumbled sweetcorn, quick-frozen green peas, frozen vegetable mix, dill quick-frozen shelled pumpkin, frozen fruit mix, quick-frozen semi-prepared French fries or condensed tomatoes in the analysis of preserved foods. The annual reports for 2022 show that in the face of food inflation, it was not just some retail chains that made good money. There have been some outstanding results in areas such as oil production, meat processing, milk production, beer production and detergent production, among others, which are typically suppliers to the retail sector.

Based on the experience of the accelerated sector inquiry into the Hungarian market for milk and milk products, I proposed the idea of an online price monitoring

system to the Ministry of Economic Development (GFM)[34] in March 2023, which was considered worthy of support by the Government.

3.2.5. The online Price Monitoring Database

The launch of an accelerated sector inquiry into the Hungarian market for milk and milk products in response to high food prices has raised the idea of a market instrument to reduce prices by increasing competition. It was obvious to concentrate on the end of the value chain, i.e., retail, where customers meet the gross consumer price of products. After a detailed mapping of international examples and working practices, the idea of creating an online price monitoring database based on similar examples from abroad was born. The Government supported the proposal to reduce competition and inflation, and in order to implement it as soon as possible, the Hungarian Competition Authority and the then Ministry of Economic Development decided to set up a joint working group to develop the *online Price Monitoring Database*[35].

In March 2023, the Price Monitoring Working Group was established, comprising the staff of the GVH and the Ministry of Economic Development (GFM), the Cabinet Office, the Digital Government Agency, IdomSoft Zrt. (the Developer), the Ministry of Justice, the Consumer Protection Authority, the Ministry of Agriculture and the Hungarian Central Statistical Office. The list shows that there were also consumer protection aspects to the creation and operation of the online Price Monitoring Database. Through the system, increased price transparency, comparability of consumer prices and thus reduced search costs for consumers can increase competition, which can have a moderating effect on prices in the long run, help to reduce inflation and increase consumer awareness. Thanks to the efficiency of the Price Monitoring Working Group, the final legal regulation of the system was adopted within a short time on 8 May 2023, by announcing Government Decree No. 163/2023. (V. 8.)[36]. Pursuant to Section 3 of the Decree, in order to promote market competition for economic efficiency and social advancement, promote the protection of the competition rules under Sections 11 and 21 of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union, and to protect consumers, the GVH operates a public price monitoring system on the daily prices of certain products offered to consumers.

34 Hungarian Competition Authority – Ministry of Economic Development: Joint press release, GFM supports the proposal of the Competition Authority to create an online price monitoring database, 23. March 2023. Available at: https://www.gvh.hu/sajtoszoba/sajtokozlemenyek/2023-as-sajtokozlemenyek/a-gazdasagi-versenyhivatal-es-a-gazdasagfejlesztesi-miniszterium-kozos-kozlemenye-a-gfm-tamogatja-a-gazdasagi-versenyhivatal-online-arfigyelo-adatbazis-letrehozasat-celzo-javaslatat

35 Hungarian Competition Authority: Online Price Monitoring Database. Available at: https://arfigyelo.gvh.hu/

36 Government Decree No. 163/2023 (V. 8.) on the creation and operation of the price monitoring system. Available at: https://njt.hu/jogszabaly/2023-163-20-22

The product categories and products covered by the price monitoring system are decided by a separate decree of the Minister of Economic Development[37] with the technical assistance and agreement of the Ministry of Agriculture, while the key role in its control is played by the Consumer Protection Authority and the Ministry of Justice as its technical manager. After the IT design and software development, the Developer developed the online Price Monitoring website available at https://arfigyelo.gvh.hu which is available free of charge to consumers from 1 July 2023 and operated by the Office of Economic Competition. The database initially included daily prices for around 1,170 products in 62 product groups from around 1,200 stores in six retail chains. Any domestic retailer is free to join the system. The real novelty of the online Price Monitoring Database is that there was no food price comparison site in Hungary before, which was based on the mandatory daily data reporting of traders, and which included prices of physical shops. The solution encourages price competition on a daily basis, which can be continuously increased. With the online Price Monitoring Database, consumers can compare prices between retail chains and make informed choices.

The product categories cover a wide range of basic food products. Retail chains with an annual net turnover of at least HUF 100 billion will be required to upload the prices of their products to the cloud-based system on a daily basis. The Price Monitoring Database will, to a certain extent, even out the information power relations between businesses and consumers, reducing information asymmetries. Consumers can compare prices between different chains very easily and very quickly. This gives shoppers a tool to make more informed decisions about where they want to shop. Perhaps the most significant achievement of the system is that it encourages retail chains to compete intensively on a daily basis, by providing up-to-date price comparability. The Price Monitoring Database also fits well with the GVH's long-term objectives, as it contributes to two of the Authority's main objectives: in addition to increasing competition in the market, it enhances consumer welfare by reducing search costs by comparing prices in one interface, saving time and money for consumers.

The reception of the Price Monitoring Database has been extremely positive, with an outstanding press coverage. Retail chains have already implemented price cuts in the first few days, with one supermarket chain cutting the prices of more than 100 of its products in line with the launch of the Price Monitoring Database. Consumer interest has also been high, with total downloads and server interactions rising to over 25 million in the first week. In the first two months of its launch, the site received almost 1.2 million unique visitors, who spent an average of more than 4 minutes on the site. This high level of interest is important because the press is the main way to reach consumers, the very people we set up the database for. According to a survey published by Pulzus Research at the beginning of August, more than 6 million people were aware of the

37 Decree No. 11/2023. (VI. 22.) of the Ministry for Economic Development on the product categories and products covered by the price monitoring system.
Available at: https://njt.hu/jogszabaly/2023-11-20-8P

online Price Monitoring Database in the first month and 15% of respondents over 18 years old said they had used the system.

The working group developing the online Price Monitoring Database continued to build the system by processing consumer feedback. As a result of the first additional development, at the end of August 2023, Price Monitoring Database also enabled visitors to create their own, freely compiled and shareable shopping list, whose shopping basket value can be monitored on a daily basis. So you no longer have to spend time comparing prices before you do your usual shopping, because the system provides all the information you need in one place.

With the new map store filtering feature, announced on 28 September 2023, consumers will be able to set their favourite stores and narrow down to a limited area by entering their location. They can even compare the prices of products from shops in their immediate area. Better price transparency for individual shops could encourage further daily competition between retail chains, as micro-market competition could develop in a given area. These features may also have contributed to the gradual decline in observed food prices. The Price Monitoring Working Group will continue to work in 2024 to further develop the services of the system, expand product categories and features, train voluntary joiners and support the Consumer Protection Authority's inspections.

The Ministry of National Economy - formerly GFM - has been regularly analysing the quantified impact of the Price Monitoring Database over the past six months. According to the latest survey, the Price Monitoring Database, together with the mandatory promotions, contributed significantly to price reductions in more than 80% of the 62 product categories monitored, by an average of around 5.5%. According to the ministry, the decline in observed food prices compared to the beginning of July could have had a 0.4%-point downward effect on inflation and a more than 1.3%-point downward effect on food inflation, taking into account the weights of the CPI inflation basket.

As of 13 January 2024, the product categories and products covered by the price monitoring system[38] have been extended to include lactose, milk protein and gluten-free products most commonly consumed by people with food allergies and beef consumers. From mid-January 2024, customers will be able to compare the prices of 1,843 products in 78 product categories. In Hungary, more than 3 million people have a food intolerance or allergy, so the online Price Monitoring Database can help them in a targeted way. By the end of 2023, after six months of operation, the latest statistics show that the number of unique visitors to Price Monitoring Database exceeded 1.5 million, while the number of free-word searches since the system's launch reached 900,000.

38 Decree No. 74/2023. (XII. 29.) of the Ministry for Economic Development on amending Decree No. 11/2023. (VI. 22.) on product categories and products covered by the price monitoring system. Available at: https://njt.hu/jogszabaly/2023-74-20-8P

3.3. The unorthodox tools worked; food inflation collapsed

Thanks to the interventions of the Government, the Central Bank and the GVH (accelerated sector inquiries, operation of the online Price Monitoring Database), the combined effect of several factors has slowed food price increases from 44.8% month on month, thanks to more intense competition. The Price Monitoring Database is well established, as the food products included in the system account for a significant share of the total consumer basket according to the KSH's product classification. The effect of the daily price competition generated by the system has contributed to a reduction in observed food prices and a reduction in food inflation. Since the introduction of the online Price Monitoring Database on 1 July 2023, food inflation has fallen by a sixth in six months. While in June food prices were 29.3% higher than in June of the previous year, the year-on-year increase in food prices fell to 4.8% in December and to 2.2% in January 2024[39]. Food prices have also fallen on a monthly basis[40], and if we look beyond the averages, we see deflation in some basic food products compared to the previous spikes in food prices.

Based on the data uploaded to the Price Monitoring Database, it can be said that after the price caps are phased out in March 2024, products with the former official price level will be available at a lower price than the official price level fixed on 15/10/2021 and 30/09/2022. In addition, there are other popular food products whose prices have fallen (e.g., butter, cheese and dry pasta).

1. table: Changes in consumer prices of certain food products

Former official price products	Average official prices (HUF)	Best price monitoring price (HUF) on 20/03/2024	Change (%)
2.8% UHT milk (l)	274	229	-16
Sunflower oil	700	439	-37
Wheat flour	290	139	-52
Hind leg	1,400	1,289	-7
Chicken breast	1,499	1,522	+2
Egg	73	40	-45
Potato	352	165	-53
Granulated sugar	261	249	-5

Source: *Price Monitoring Database - daily prices on 20/03/2024, own editing*

39 Hungarian Central Statistical Office: KSH Monitor - Prices, December 2023. Available at: https://www.ksh.hu/heti-monitor/arak.html

40 Hungarian Central Statistical Office: Producer price indices for agricultural products, monthly, cumulated from the beginning of the year.
Available at: https://www.ksh.hu/stadat_files/ara/hu/ara0049.html

There are at least three keys to the long-term, unbroken success of the online Price Monitoring Database. The first is additional functional improvements to make life easier for users (e.g., the system could send an alert to the user when a favourite product is on sale in a nearby shop). Secondly, the expansion of product categories should be mentioned. Many consumers are looking for seasonal food products, but it would make sense to extend the Price Monitoring Database to other FMCG *(Fast-Moving Consumer Goods*) but non-food products. For example, there was a clear consumer demand for household and hygiene products that are regularly consumed. Thirdly, it should be addressed and facilitated for volunteers to join the system. Although the online Price Monitoring Database has an impact on the whole sector through the six big store chains, there are uncovered, small rural areas in the country where franchises and other small shops serve the population.

4. Opportunities for cooperation with the authority to speed up the conclusion of procedures

Exploiting the potential for cooperation from those subject to proceedings can lead to a faster and more efficient conclusion of competition supervision proceedings. Since the conjunctive conditions of self-cleaning include cooperation with the authority (the GVH), their use may be a discretionary circumstance that may justify the active cooperation of the undertaking in the self-cleaning process required under the Public Procurement Act. The GVH's ambition is expressed in a transparent way through the emphasis on cooperation forms in the Notice on Fines[41]:

- The so-called leniency policy is one of the most important channels of cooperation that an undertaking subject to proceedings can choose. In essence, a company that is party to an anticompetitive agreement can benefit from full immunity from fines if it is the first to provide decisive evidence of the infringement or to provide substantial information about an undisclosed agreement that could justify a raid by the Competition Authority. These contacts can be risky for a company participating in a cartel, which is why the GVH provides an anonymous form of contact through the Cartel-Chat[42] contact system, which was awarded an Honorable Mention by the International Competition Network (ICN) and the World Bank Group in 2015. The leniency policy can be applied in the case of infringements specified in Article 78/A(1) of the Competition Act in accordance with the communication no. 2/2016.

41 Hungarian Competition Authority: Notice of 1/2020 by the President of the Competition Authority and the President of the Competition Council of the Competition Authority on the determination of the amount of the fine in cases of infringements of the prohibitions on antitrust infringements. Available at: https://www.gvh.hu/pfile/file?path=/szakmai_felhasznaloknak/kozlemenyek/1_2020_antitroszt kozlemeny_04_30&inline=true

42 Hungarian Competition Authority: Cartel-Chat. Available at: https://www.gvh.hu/kartellchat#/login

and 14/2017. on the application of rules for leniency as per Article 78/A of the Competition Act of the President of the Competition Authority and the President of the Competition Council of the Competition Authority.

- In the case of an application for leniency from fines or reduction of fines, the infringement will be established, but effective and continuous leniency cooperation can also be a significant burden-reducing element for businesses.
- A finding of infringement can be avoided if the undertaking voluntarily proposes a solution to remedy the competition problem that has arisen and commits to implement it (which the GVH's Competition Council accepts and makes binding). This could include, for example, the development of a consumer education campaign and the voluntary cessation of the infringing situation.
- Active reparation, which also operates on a voluntary basis, is relatively similar. If the person subject to proceedings makes good the negative effects of the infringement, in whole or in part, by compensating the consumers harmed, the Competition Council will take this into account when imposing the fine. The GVH considers as active reparation (compensation) where the infringing undertaking partially or wholly remedies the negative effects of the infringement.
- The Competition Council may initiate a settlement in antitrust proceedings if the customer admits the infringement and waives its rights of access to documents, to make a statement, to a hearing and to judicial remedies. In return, the company will receive a reduction in fines. The settlement procedure is governed by Section 11 or Section 21 of the Competition Act, Article 101 or Article 102 of the TFEU or Sections 7 and 7/B of Act CLXIV of 2005 on Commerce ("Commercial Act") may be applied at the initiative of the Competition Council acting in accordance with the settlement notice. The GVH may reduce the amount of the fine to be imposed on an undertaking that has made a settlement statement in the course of the settlement procedure by between 10-30% under Section 79 of the Competition Act.
- Compliance programmes are about those subject to the proceedings making efforts to comply with regulations, possibly by preparing internal compliance programmes. These can be discussed before and during the proceedings. Both *ex-ante* and *ex-post* compliance efforts may be taken into account by the GVH's Competition Council as a fine reduction factor, with demonstrated *ex-ante* compliance efforts leading to a higher fine reduction factor, for example by voluntarily providing evidence of the infringement, clarifying the circumstances of the infringement or admitting or not contesting the facts of the infringement.
- The Hungarian Competition Authority may also take into account other cooperation not mentioned above as a factor in reducing the fine. In particular, the authority may take into account a degree of cooperation during the procedure that is conducive to the effective detection of the infringement (e.g., by voluntarily providing evidence of the infringement, clarifying the circumstances of the infringement, admitting the infringement, not contesting the facts or voluntarily waiving the right to a remedy). The Competition Council may reduce the

fine by up to 20% overall as a result of other cooperation. By stating the grounds for exclusion in Article 62(1) (n) of the Public Procurement Act the legislator - as the Minister's justification points out - also intended to encourage the disclosure of possible illegal agreements through the Public Procurement Act.

2. table: Characteristics of forms of cooperation

	Is an infringement established?	Will a fine be imposed?	Is a reduction of fines possible?
Leniency application for immunity from fines	YES	NO, if first leniency applicant	YES, if the application for immunity is not granted by the Competition Council
Leniency application for reduction of a fine	YES	YES	YES
Commitment	NO, aligns their market conduct with the law	NO	NO
Active reparation	YES	YES	YES
Settlement procedure	YES	YES	YES
Substantial compliance effort	YES	YES	YES
Cooperation	YES	YES	YES

Source: *GVH, own editing*

5. Self-cleaning

In the evaluation of public procurement procedures, contracting authorities may have to exclude a tenderer from the procedure because it is subject to exclusion for a previous infringement. It may also be the case that, at the time of the evaluation, the tenderer is in fact already reliable, and its operation does not pose a threat to the economy, so the company concerned has the burden of proving its reliability, i.e., the unorthodox remedy of self-cleaning, as a matter of equal treatment. Self-cleaning is a matter for the Public Procurement Authority, but a previous infringement is often the participation in a cartel that is detected by the Competition Authority in a competition supervision proceeding, while the way in which the subject to the proceedings cooperates with the Competition Authority is not always the same. In Hungary, the legislator has also created the legal institution of self-cleaning on the basis of EU law - for exemption from the grounds for exclusion set out in Article 62(1) (n) of the Public Procurement Act - in order to quickly prove the reliability of the contract. The possibility of self-cleaning was introduced by the Public Procurement Act[43] at the same time as the exclusion of competition law infringements was included in

43 Act CXLIII of 2015 on public procurement (hereinafter: Public Procurement Act) Article 64(1).

the mandatory grounds for exclusion. This implies that the legislator intended to encourage tenderers to use self-cleaning at the same time as tightening up. Article 188(1) of the Public Procurement Act states that "*any economic operator who (that) is subject to a ground for exclusion other than those referred to in Article 62(1)(b) and (f) may lodge an application with the Authority to establish that the measures taken by it are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion*". The text of the Act refers to the Public Procurement Authority. Article 64(1) of the Public Procurement Act defines the legal institution of self-cleaning as a method of exemption from the grounds for exclusion, the scope of which includes the grounds for exclusion set out in Article 62(1) (n) of the Public Procurement Act. According to the above provision, a tenderer, candidate, subcontractor or an organization contributing to the certification of suitability shall not be excluded from the procurement procedure if the decision specified in Article 188(4) of the Public Procurement Authority since became final or, in the case of an administrative procedure for challenging the latter, a final judicial decision specified in Article 188(5) established that measures taken, prior to the submission of the tender or the request to participate, by the economic operator concerned are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

The declared purpose of the self-cleaning legal instrument - and also set out in the ministerial justification of the Act - is to ensure that an economic operator which for some reason "appears" to be unreliable is not allowed to participate in a public procurement procedure until it has proved its reliability to the Public Procurement Authority. The exclusion of a company that appears to be unreliable from public procurement proceedings is not only a requirement for transparency and fairness in public procurement, but also a fundamental public interest in the efficient use of public money. In addition, the protection of the public interest in the sound functioning of the economy also justifies this. The possibility of self-cleaning is therefore intended to resolve the conflict between the interests of transparency in the use of public funds, fair competition and the protection of other economic operators and the private interests of the economic operator concerned, which is precisely the reason why public procurement law ensures that if an undertaking is excluded for reasons which do not in fact jeopardise the public interests in question, it may be exempted from the adverse consequences. According to the express intention of the legislator and pursuant to Article 188 (1) of the Public Procurement Act, this is a matter for the Public Procurement Authority. According to the relevant EU legislation, it would be sufficient if the decision on exclusion were a matter for the contracting authority, but the Hungarian legislator's intention is quite clear on the issue, i.e., to involve the Public Procurement Authority in the process. The background to the exemption from the exclusionary effect is that from 15 June 2016 until 19 December 2019[44], the Hungarian Government may exempt a company subject to an exclusionary effect from the application of the exclusionary effect by means of an individual decision, if the restriction affected several players in the relevant market, thus leading to a restriction of competition. According to the relevant ministerial

44 Public Procurement Act Article 62(5a).

justification, the reason for the repeal of Article 62(5a) was that the legal provision has never been applied and is not expected to be applied, *"since experience has shown that the possibility of self-cleaning can effectively deal with situations for which Article 62(5a) of the Public Procurement Act applies"*.

Since its introduction on 1 November 2015, the legal institution of self-cleaning has been integrated into Hungarian jurisprudence, its application is continuous and effective, and many companies have already made use of this possibility. The Public Procurement Authority was prepared in time, both in terms of organisation and expertise, and published the list of self-cleaners on its website by 1 July 2021. From 1 July 2021, the records will be transferred to the EKR[45].

From the point of view of the time factor, the time limit for the administration of the official proceedings for the application for the establishment of trustworthiness is unique in Hungary, as pursuant to Articles 188(4) and (4a) of the Public Procurement Act, the Authority only has 15 working days for administration, which - in justified cases - can be extended once by an additional 15 working days. Pursuant to Article 37(2) of the General Civil Procedure Code - effective from 1 January 2023 - the proceedings start on the date of receipt of the application by the competent authority. The extension of self-cleaning requests by an additional 15 days is used by the Public Procurement Authority in 90% of cases, partly because of the length of the file (GVH decisions are often several hundred pages long) and partly because of the fact-finding evidentiary procedure. Even so, the maximum of 30 days to establish reliability is a unique Hungaricum, almost negligible compared to the three-year period of exclusion. In the Hungarian public administration, this speed of decision is a record for such a high-profile issue - whether a company can return to the public procurement market. In addition, in the event of an unsuccessful self-cleaning (rejection), the company concerned can make a new application. In such cases, there is usually no need to extend the time limit, because if the applicant has already submitted an application once and has not received a positive decision on all measures, the re-application will be granted more quickly because of the knowledge of the file.

Due to the nature of self-cleaning, the importance of cooperation with the competent authority - in many cases the GVH - is only one of the measures that the applicant has to prove, and other factors will be assessed during the procedure. According to the practice of the Public Procurement Authority, mere compliance with a legal obligation cannot be considered as active cooperation. To establish trustworthiness, it is necessary to show and justify measures that indicate active behaviour that goes beyond the legal obligation; Article 188(2) (b) of the Public Procurement Act cannot be performed with a passive activity. The mere fact that the applicant for self-cleaning offers to cooperate further in all competition proceedings and submits their data within the deadlines does not in itself constitute conduct that goes beyond the legal obligation. In the opinion of the Public Procurement Authority, the protection of business secrets protects the interests of the undertakings sub-

45 Public Procurement Authority: Public Procurement Authority decisions in self-cleaning cases. Available at: https://ekr.gov.hu/nyilvantartasok/hu/megbizhatosagi-hatarozatok

ject to the proceedings and is irrelevant in the context of the investigation of the facts and circumstances of the case in the case of self-cleaning. The Public Procurement Authority places great emphasis on the continuous provision of information to public procurement practitioners, in line with which the President of the Public Procurement Authority has issued a briefing note to increase awareness of evolving jurisprudence and the legal instrument of self-cleaning[46].

A good example of effective and successful self-cleaning is the Treszner case[47], where the applicant submitted a high-quality, well drafted self-cleaning request to the Public Procurement Authority, even though the GVH decision was 600 pages long. The company has effectively cooperated with the GVH, has effectively compensated the damage/undertaken the necessary measures. It did not merely "pretend to repent" and, unlike many other applicants, did not wait for the Public Procurement Authority to figure out what it should have done and what it should have presented in the proceedings launched in response to the request. The requesting company quickly complied with the deficiency claim, comprehensively clarifying the facts and circumstances of the case. After receiving the preliminary views of the GVH's Competition Council, but before the decision was taken, the company submitted three statements acknowledging the infringements found against it, waiving its rights to appeal the decision and undertaking not to seek judicial review of the decision. The Competition Council of the GVH assessed the non-contestation of the facts, the cooperation of the applicant and the waiver of remedies going beyond that as a reduction of the fine of significantly more than five percent and explicitly underlined that the waiver of remedies by the applicant allows the GVH to save a particularly high amount of resources. In addition to the above, the GVH assessed the applicant's commitment to pay an active reparation and to introduce a competition compliance programme to promote the company's future compliance as cooperation, which was rewarded with an additional 5% reduction of the fine. The applicant had cooperated with the GVH even before the admission of the infringement, as it had always complied with all requests for information within the time limits and in full, and had regularly attended the hearings, during the on-site inspections carried out by the GVH's staff, its employees cooperated fully and it engaged a law firm with sufficient experience in the competition proceedings to ensure that it was able to provide the GVH with documents and materials that were prepared smoothly and professionally. Thus, in all its actions during the competition supervision proceedings, the applicant respected the principles of speed and fairness in the competition supervision proceedings, which were also confirmed by the fact that no procedural fine was imposed on it. Therefore, the company behaved in good faith and cooperatively throughout the competition supervision proceedings and did not mislead or obstruct the relevant authority (the GVH) in any way.

In recent years there have also been several cases where the applicant for self-cleaning

46 Public Procurement Authority: Information note by the president. Available at: https://kozbeszerzes.hu/media/documents/2024-ont.elnoki-taj.pdf

47 Public Procurement Authority: Public Procurement Authority decisions in self-cleaning cases. Available at: https://ekr.gov.hu/nyilvantartasok/hu/megbizhatosagi-hatarozatok

did not sufficiently demonstrate the existence of the conditions under Article 188(2) (b) of the Public Procurement Act, in which cases the Public Procurement Authority rejected the applications. Rejections of self-cleaning applications can be challenged before an administrative court. A good example for the development of self-cleaning jurisprudence is the examination of the legality of the Public Procurement Authority's decision KTF-00044/07/2023 in the public procurement reliability case. The reasoning of the judgment of the Metropolitan Court of Budapest No. 106.K.701.364/2023/16 of 11 July 2023[48] contains a number of important findings on the obligations of the economic operator requesting the establishment of its reliability with regard to Article 188(2) of the Public Procurement Act, as well as on the procedure of the Public Procurement Authority for the assessment of the request.

6. Summary

In recent years, the Hungarian Competition Authority has not been content with exercising its competition oversight powers to ensure fair market competition but has instead sought unorthodox regulatory tools that focus on the time factor, which can be deployed in times of crisis and are more effective. The GVH has used several tools to fight inflation. The accelerated sector inquiries have allowed the Authority to gain a realistic picture of the entire food value chain, the price transmission along the value chain and the causes of price increases in a short time. In its investigation reports, the GVH made pro-competitive proposals, several of which have been implemented. One such proposal was the online Price Monitoring Database, which increases transparency, reduces search costs for consumers and generates daily price competition between multinational food retail chains. The online Price Monitoring Database helps to increase conscious shopping habits through the shopping list and facilitates price competition in the micro-market through visual map zooming. It is almost a catchphrase that "the best consumer protection is competition". Greater competition also undoubtedly has a positive impact on prices. Possibilities for cooperation with the Hungarian Competition Authority open to those subject to competition proceedings can be effective solutions instead of time-consuming procedures. Self-cleaning is a solution to resolve past competition law infringements in public procurement procedures. This relatively "young" legal institution is also an unorthodox solution, given the time factor, in the sense that the Public Procurement Authority is uniquely quick to decide on a request for self-cleaning, one of the conditions of which is the applicant's good faith, effective and continuous cooperation with the GVH.

I would like to thank my colleague Martin Csirszki for the ideas for my work, the Public Procurement Authority for the data I received for the presentation of the self-cleaning and President László Kovács.

48 Decision of the Metropolitan Court of Budapest No. 106.K.701.364/2023/16. July 2023.

Gábor Gál

Differences, divergences and conflicts in relation with EU competition law

1. Introduction

Competition law has deep historical roots in Hungary.[1] However the DNA of modern Hungarian competition law framework, both on the substantive and procedural level, is to a great extent common with EU competition law, thanks to voluntary harmonisation even before EU accession, and of course subsequent harmonisation. Following the accession, the Hungarian Competition Authority (GVH) and the courts continued to be open and receptive towards the enforcement practice of the European Commission and the interpretation criteria developed by the EU Courts.[2]

To start with, for the purposes of the current analysis, it is useful to point out that a friction between national and EU competition law is conceivable on several levels, although in reality the chances of a real conflict are very limited.

First, if national competition law and EU law are applied in parallel, conflicts may arise due to differences in substantive competition law rules or their interpretation. Real conflicts, however are rather

1 The first acts containing competition law provisions were adopted in 1923 (Act V of 1923 on Unfair Competition) and 1931 (Act XX. of 1931 on Agreements regulating competition).

2 In addition to judicial review of the GVH's decisions, in recent years, the number of private damages claims have picked up, and in these cases, Hungarian courts are also facing a number of issues related to EU competition law (see for example judgment of the Court of Justice in the Tibor-Trans case, Case C-451/18, ECLI:EU:C:2019:635)

rare, as there are a number of checks and balances built into the system in order to ensure the consistent application of EU law both at the enforcement (the respective provisions of Reg. 1/2003 and the European Competition Network) and the judicial level (requests for preliminary rulings). Since other chapters deal with this topic in detail, it is sufficient to just recall here that EU competition law is designed to be enforced in a decentralized way. As such, Regulation 1/2003 and the ECN serve the purpose of enhancing a harmonized enforcement of EU competition rules. As the European Commission highlighted in its ECN+ impact assessment, indeed it is the NCAs who are responsible for 85% of the enforcement of EU competition rules.[3]

Second, and this seems to be a more common cause for potential conflict, national legislation may be adopted, interfering with EU competition rules.

Third, there may be differences and divergences in the non-harmonized areas as well, which, however, can also have an impact on the enforcement of EU law.

This chapter will look at the above categories and identify instances and issues where the question of conformity with EU law has arisen, and also highlight the diverging approaches chosen in the enforcement of Hungarian competition law, compared to the European Commission's practice.

The aim of this chapter, however, is not to provide an exhaustive catalogue of conflicts, divergences and differences between EU competition law and enforcement practice. Rather, it highlights the most notable and important issues. Also, it does not cover the fields of merger control and judicial review, which will be the subject of dedicated chapters.

Accordingly, this chapter will address (i) conflicting national laws, (ii) de minimis rules, (iii) stricter national laws relating to unilateral conduct, (iv) the public service and service of general interest exception, (v) the definition of non-independent undertakings, (vi) leniency, and (vii) fines, settlement and compliance.

2. Conflicting national laws

2.1. The watermelon case and the Agricultural Organisations Act

One of the rare occasions when a real issue arose concerning the compatibility of Hungarian law with EU competition law was the watermelon cartel case.

In 2012, the GVH launched an investigation into an alleged price-fixing of watermelon by major supermarket chains and two agricultural professional organisations. The essence of the conduct was an agreement concluded by these market players, and

3 SWD(2017) 114 final, https://competition-policy.ec.europa.eu/document/download/4dc1f684-1ac3-467d-a0df-b9608a43b23a_en?filename=ECN%2Bdirective_impact_assessment_annexes_en.pdf (downloaded: 2024.03.06.).

facilitated by the Ministry of Agriculture, according to which they agreed to distribute watermelon at mutually agreed "fair prices", and to limit the distribution of watermelons produced outside of Hungary, at discounted prices.

Following the launch of the investigation, the Hungarian Parliament swiftly adopted an amendment to the so-called Agricultural Organisations Act (Act CXXVIII of 2012), according to which agreements concerning agricultural products are exempt from competition liability if the purpose of such an agreement is to secure a fair revenue for agricultural producers, none of the players on the concerned market are prevented from realising such revenue, and Article 101 of the Treaty on the Functioning of the European Union (the "TFEU") is not applied. Also, pursuant to the same Act, the Ministry of Agriculture was entitled to issue a statement on whether the conditions of the exemption were fulfilled and the GVH was required to proceed according to such statements. In addition, the Act required the GVH to suspend imposing a fine for anti-competitive practices in violation of Article 11 of the Competition Act or Article 101 TFEU conducted in respect of agricultural products and to request the involved parties to proceed in compliance with the applicable laws. Only in the event that such parties failed to comply within the deadline was the GVH entitled to impose a fine on them.

The ministerial presentation, setting out the reasons for adopting these provisions, explained that the special characteristics of the agricultural sector warranted a preferential treatment (as is the case in the EU). It also stated expressly, however, that such preferential treatment was possible only in cases where the TFEU competition rules were not applicable to the conduct in question.

Pursuant to the Act (which was applicable to the ongoing proceedings as well), the GVH requested a statement from the Ministry, which declared that the conditions of the exemption were met. Nevertheless, since such exemption could only be applied if EU competition rules were not enforced, the GVH continued its proceedings and established that in this case Art. 101 TFEU applied (as cross-border trade was affected). However, in the GVH's interpretation the Act (more precisely Article 18 (4) of the Act) restricted the possibility of imposing a fine both under national and EU laws. Hence, the authority established that the Act may be in breach of Article 5 of Regulation 1/2003[4] in that it restricted its ability to impose a fine, and was also contrary to Article 4(3) of the TFEU, according to which Member States should ensure effective application of Article 101 TFEU.

4 Article 5 provides that: „…The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:
- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law. …".

However, in its decision the GVH held that it did not have the power to resolve any eventual conflict between the EU competition rules and national legislation, as such questions could only be raised by Hungarian courts during proceedings for a preliminary ruling by the Court of Justice of the European Union.

Therefore, the GVH terminated the proceedings, considering, first, that establishing an infringement without imposing a fine would not have sufficient deterrent power, and second, that it would be unreasonable to continue proceedings in view of a lack public interest at stake (as this was expressed by the legislator).

It is useful to recall here that the principle of full effectiveness of the EU law (including the TFEU's competition rules) requires Member State authorities and courts to give full effect to those obligations by interpreting that legislation or to set it aside.[5]

Later, some commentators argued that the GVH could have set aside Act CXXVIII of 2012., since, from the point of view of enforcing EU law, the Hungarian competition authority should act with regard to the EU (and not the Hungarian) public interest.[6][7] Indeed, the case law made it clear that competition authorities have a duty to disapply national legislation if they run counter to EU competition rules.[8]

On the other hand, it is also pointed out in academic literature that the GVH could correctly conclude that competition enforcement in the agricultural sector is not in the public interest.[9]

In this context it is also important to point out that the TFEU and its predecessors have granted specific treatment to agricultural products. Pursuant to Article 42 TFEU, the legislator can modify the standard competition rules when applying them to agricultural products, taking into account the CAP objectives set out in Article 39 TFEU (i.e. increasing productivity of agricultural production, ensuring a fair standard of living for agricultural communities, stabilising markets, assuring supplies and ensuring reasonable prices for the consumers). The legislator has thus determined some specific antitrust rules for farmers, associations of farmers, producer organisations, and inter-branch organisations insofar as they produce or trade in agricultural prod-

5 For a detailed discussion, see for example: M. Elvira MENDEZ-PINEDO, 2021. "The principle of effectiveness of EU law: A difficult concept in legal scholarship," Juridical Tribune (Tribuna Juridica), Bucharest Academy of Economic Studies, Law Department, vol. 11(1), pages 5-29, March https://ideas.repec.org/a/asr/journl/v11y2021i1p5-29.html (downloaded: 2024. 03.06.).

6 Nagy Csongor István: A kartelljog dogmatikai rendszere, HVG-Orac, 2021, p. 28.

7 Nagy Csongor István: Versenyjogi kézikönyv, HVG-Orac, 2021, p. 113.

8 See for example the CJEU's judgment in the CIF case (C-198/01), where the Court ruled that where undertakings engage in a conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority has a duty to disapply the national legislation.

9 Tóth Tihamér: Jogharmonizáció a magyar versenyjog elmúlt harminc évében, Állam-és Jogtudomány, LXI. évf. 2020. 2. szám, 88.

ucts. The antitrust rules for agricultural products (other than fisheries products) are set out in Regulation 1308/2013, known as the Common Market Organisation (CMO) Regulation.

Other authors[10] also argue, that, based on the practice of the European Court of Justice, setting aside is only necessary if consistency with the prevailing EU law cannot be restored through legal interpretation. However, in this case, the Competition Council, in accordance with Article 5 of Regulation 1/2003/EC and the relevant case law[11], had another choice, notably to terminate the proceedings.

Against the above background, it appears that the circumstances of this case certainly call for a nuanced interpretation, and it can be stated with a great degree of certainty that the duty to disapply was not completely unambiguous in this case.

After the case was closed, the Commission opened infringement proceedings, claiming that the Agricultural Organisations Act essentially prevented the Hungarian competition authority from sanctioning cartels in agricultural products, and arguing that the effective enforcement of Article 101 TFEU requires the imposition of actual deterrent fines on undertakings that participate in cartels pursuant to Article 5 of Reg. 1/2003, the duty of cooperation according to Article 4(3) of the EU Treaty and the general EU law principle of effectiveness.

Consequently, when a new Agricultural Organisations Act was enacted in 2015 (Act XCVII of 2015), the potentially conflicting provisions had not been included, but the respective provisions were transferred into the Competition Act.[12] The amendment expressly spelled out that these rules are only applicable insofar as the EU competition rules do not apply, thereby clearly emphasizing that competition enforcement is in line with EU competition law in cases where cross-border trade is affected. Accordingly, the Commission closed the infringement procedure without further action.

However, some authors argue that the amended Hungarian Competition Act still maintains a very broad exemption of agricultural products from the cartel prohibition, raising more general questions of legal, economic or social justification for intervening in the economic relationships of market participants within the agricultural sector and the operation of EU law derogations from the application of competition rules, such as the general derogation in Article 101 (3) TFEU, and most notably, specific derogations laid down in the CMO Regulation 1308/2013.[13]

10 Tóth András: A magyar versenyjog kölcsönhatásai az európai versenyjoggal és a magyar közigazgatási bíráskodással, Habilitációs tézis, 2022, 14-15.

11 Case C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA. ECLI:EU:C:2011:270, para. 27.

12 Act LXXVIII of 2015.

13 Cseres, K. J. (2020). "Acceptable" Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power. The Antitrust Bulletin, 65(3), 401-422. https://doi.org/10.1177/0003603X20929122.

2.2. The requirement of full review

In addition to the watermelon case, there was another case where setting aside a national legal provision in relation to competition law enforcement was discussed. Contrary to the previous case, on this occasion, it was explicitly declared that a provision of Hungarian law had to be set aside. This case concerned the review of a decision of the Hungarian competition authority.[14]

The issue arose before the Supreme Court of Hungary (hereinafter referred to as the Curia), while interpreting the requirement of full judicial review of competition law enforcement decisions as set out in the Menarini judgment of the European Court of Human Rights[15], as it was argued by the applicants that a provision in the Hungarian Code of Civil Procedure – contrary to the ECHR's judgment – narrowed down the scope of judicial review for administrative decisions in respect of those matters, where there was a margin of appreciation available for the administrative authority.[16]

The Curia, in its judgment, came to the conclusion that the administrative courts reviewing the decisions of the competition authority should not apply this limiting provision when applying EU law (but interestingly it found that in the given case, the courts had in fact conducted a full review, thereby departing from the limiting provision, despite that they had explicitly referred to that Article).[17]

3. The 'De Minimis' safe harbour

The so-called *de minimis* doctrine was developed by the Court of Justice - it requires that the restrictive effects be appreciable. Accordingly, agreements will not be caught by the prohibition of Article 101(1), provided they only have an insignificant effect on competition.[18]

On the basis of this well-established case law, the Commission has provided guid-

14 Kfv.III.37.690/2013/29, 20 May 2014 (Vj-174/2007 – railway construction cartel), p. 34.

15 A. Menarini Diagnostics S.r.l. v. Italy - 43509/08 Judgment 27.9.2011.

16 The respective provision, Article 339/B of the Code on Civil Procedure limited the scope of review of legality for administrative decisions rendered within a margin of appreciation, to the review of whether relevant facts were correctly stated, complied with the relevant procedural rules, points of discretion were identifiable and the justification was reasonable in weighing the evidence.

17 In this respect see for example Gombos Katalin: A versenyjog legújabb fejleményei Európai uniós kitekintéssel, Dialóg-Campus Kiadó, 2017, p. 103.

18 Case 5/69 Völk v Vervaecke [1969] ECR 295, paragraph 7; Case C7/95 P John Deere v Commission [1998] ECR I3111, paragraph 77; Joined Cases C215/96 and C216/96 Bagnasco and Others [1999] ECR I135, paragraph 34; and Case C238/05 Asnef-Equifax and Administración del Estado [2006] ECR I11125, paragraph 50, Case C-226/11, Expedia, EU:C:2012:795 paragraph. 17.

ance on the application of the *de minimis* doctrine through its so-called De Minimis Notice, first adopted in 2001 and subsequently revised in 2014.[19]

The 2001 De Minimis Notice quantified appreciability with reference to market share thresholds separately for horizontal and vertical agreements (10% for horizontal and 15% for vertical agreements, respectively). Point 4 of the De Minimis Notice states that in cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, the notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 101(1).

The Notice also specified (in point 11), however, that the above safe harbour does not apply to hardcore restrictions, such as resale price maintenance.

Subsequently, in 2014, as a result of the Expedia judgment[20], the EU Commission adopted a revised De Minimis Notice which clarified that the safe harbour will not apply to any restrictions of competition by 'object' or restrictions listed as 'hard-core' in any current or future block exemption (which are considered by the Commission to generally constitute restrictions by object).

In contrast, Article 13 of the Hungarian Competition Act originally exempted all agreements from the general prohibition of Article 11, provided the joint market share of the parties remained below 10%. These rules were modified in 2000, when price-fixing and market sharing horizontal agreements were carved out from this safe harbour (in other words they were prohibited regardless of the market share of the parties). Nevertheless, vertical agreements under the 10% market share threshold continued to remain within the scope of the safe harbour, even if they contained hardcore elements.

Despite the different approach of the EU Commission Notice with regard to vertical agreements (and the adoption of the vertical block exemption regulation and their implementation rules in Hungary), the same rules remained in force until 2017, when the exception from the de minimis rule was amended to include vertical price-fixing arrangements (but no reference was made to other vertical hardcore restrictions). The ministerial presentation of the amending Act[21] explicitly refers to the goal of harmonization with the European rules with regard to vertical price-fixing; however, it does not contain any explanation on why other hardcore restrictions were left out of the amendment. In a next step, from 2018, the legislator aligned the market share thresholds with

19 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU, OJ 2014 C291/1 (the 'De Minimis Notice').

20 In 2012, the ECJ in Case C-226/11 Expedia held that an agreement that has any anti-competitive object and that may affect trade between EU Member States constitutes, by its nature and independently of any concrete effect, an appreciable restriction on competition.

21 Act XCVI of 2016.

the EU De Minimis Notice.[22] However, even with the updated text, hardcore restrictions in vertical agreements below the market share threshold could continue to benefit from the de minimis exemption.

The differences in the de minimis rules had actual consequences in a number of vertical cases. For example, in some RPM cases the GVH could only establish infringement under Art. 101 TFEU, but not for the breach of Hungarian competition rules.[23]

Obviously, for legal certainty, it does not appear to be ideal that agreements could qualify differently merely because cross-border trade is implicated, and therefore – also in view of the Expedia judgment – amendment of the de minimis provisions of the Hungarian Competition Act may be considered.

In addition, another issue that arose in relation to the de minimis rule, is that according to the Curia's recent interpretation[24], based on the wording of Article 13(3) of the Competition Act, a decision of an association of undertakings which is a restriction of competition by object, could still benefit from the de minimis safe harbour (as it was not listed as an exception according to the wording of Article 13, where reference was made only to agreements and concerted practices, but decisions of associations of undertakings were not mentioned)[25]. However, this does not appear to be consistent with the principle that arrangements that are restrictive by object, have – by nature – an appreciable effect and is neither in line with the De Minimis Notice, pursuant to which the principles set out in the Notice also apply to decisions by associations of undertakings and to concerted practices.[26]

22 According to the ministerial reasoning of Act CXXIX of 2017: Establishing consistency with European Union law in itself increases legal certainty, as this excludes diverging qualification of agreements merely on account of whether cross-border trade is affected. On the other hand, in the case of vertical agreements that already have a less significant effect on market competition, it is justified to allow the application of the de minimis exception even at higher market shares. This significantly reduces the administrative burden of companies with a low market share with regard to competition law compliance.

23 Vj/115/2010, see in particular paragraphs 255-258; Vj/104/2014, paragraphs 186-188; Vj/57/2017, paragraphs 295-298.

24 Kfv.II.37.762/2022/24.

25 Pursuant to the wording of Article 13 (3), the de minimis safe harbour „ …shall not apply to agreements between competitors or concerted practices which have as their object the restriction, prevention or distortion of competition, such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets, including bid-rigging, restrictions of imports or exports (hereinafter referred to as "cartel"), including any agreement aiming, directly or indirectly, for fixing purchase or sale prices, or concerted practices".

26 See paragraph I.6 of the Notice.

Since the Curia's decision was also contrary to the established decisional practice of the GVH[27] and the prevailing view in academic literature[28], it appeared necessary in this respect that the legislator closes this gap. Accordingly at the time of writing of this study, an amendment of the Competition Act was adopted, which amended Article 13 of the Competition Act in this latter respect, and thereby resolved this issue.[29]

4. Stricter national laws relating to unilateral conduct

Another – not so much discussed – area of divergence, or maybe it should rather be labelled as a difference from, or extra-layer to the EU competitions rules, is that the Hungarian legislator has introduced specific rules relating to unilateral conduct through the provisions of the so-called Trade Act (Act CLXIV of 2005 on Trade).

The Trade Act introduced the notion of significant market power in the field of trade in order to protect small and medium-sized suppliers. Accordingly, significant market power is understood as a market position which renders a trader a reasonably unavoidable or irreplaceable contractual partner for suppliers when delivering their products to final consumers. In this case, due to its asymmetric position of market power and negotiating power, the trader may be able to force unfair conditions on suppliers[30].

Pursuant to the Act, significant market power is not defined as a result of a market analysis, but on the basis of consolidated net revenues established on a group level - a trader is deemed to have significant market power if such revenues exceed HUF 100 billion. The Act then defines the different types of conduct that constitute abuse of significant market power, and as such, are prohibited. These include – inter alia – undue discrimination of suppliers, applying unfair contract conditions or imposing undue unilateral fees for the sale/marketing of their products.

27 See for example: cases Vj-89/2003., Vj-98/2004., Vj-74/2003., Vj-92/2003., Vj-199/2005. y.

28 See Csongor István NAGY: Versenyjogi Kézikönyv, HVG-ORAC 2021, page 236: „It is important to emphasize that Article 13 of the Competition Act applies not only to agreements in a strict sense, but also to concerted practices and decisions of associations of undertakings. Indeed, Article 13 only contains reference to agreements, but in line with Article 11 (1), it should be interpreted to include all three types of conduct".

29 The amending act was Act XVII of 2024. In the amended text, the phrase „concerted practices" were deleted from Article 13 (3), which now only makes reference to „agreements", which are defined in Article 11 (1) of the Competition Act, and this term, by definition, includes agreements, concerted practices and decisions of associations of undertakings. Thus, in this way, it was clarified that the exception from the de minimis safe harbour is meant to cover all three type of practices if they are restrictive of competition by object.

30 See Article 7 of the Act. According to the Ministerial presentation of the Act, based on current case-law, a dominant position can normally be demonstrated only above 30% market share, while in distribution processes, such conduct resulting from significant market power can usually be observed even at lower market shares, estimated at 5-10%.

The Trade Act empowers the Hungarian Competition Authority to enforce the above provisions, applying the procedural rules for proceedings relating to the abuse of dominant position. The GVH adopted a few decisions pursuant to the Trade Act[31].

In 2020, the Trade Act was amended, prohibiting unilateral conduct by breweries and soft drink and bottled water manufacturers, according to which Horeca units would source more than 80% of their requirements from the same brewer/manufacturer. The purpose of the amendment was to address unilateral exclusivity arrangements in a market which is also characterized by significant asymmetries of market power, and therefore to open up markets for smaller breweries/manufacturers.

So far, on this new legal basis, the GVH has only adopted four decisions[32]. In one of the cases, on appeal, the court initiated constitutional review due to lack of clarity of the relevant provisions of the Trade Act, which is currently pending before the Constitutional Court.

In this respect, it is useful to recall that under Article 3(2) of Regulation 1/2003, Member States shall not be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings. Pursuant to recital 8 „*These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings …*".

Similar rules do exist in other countries as well. The aim of these rules is essentially to regulate disparities of bargaining power in distribution relationships, including where neither the supplier nor the distributor holds a dominant position on a specific market. The European Commission's report on the implementation of Reg. 1/2003 listed a number of countries with such legislation in place.[33] The Report explains that besides rules concerning specifically the abuse of economic dependence, some national provisions regulate behaviour labelled as 'abuse of superior bargaining power' or 'abuse of significant influence'. The aim of these kinds of rules is essentially to regulate disparities of bargaining power in distribution relationships, including where neither the supplier nor the distributor holds a dominant position on a specific market.

In summary, in Hungarian competition law – similar to other European countries

31 The GVH had cases against major retailers in Hungary concerning unfair commercial conditions in the general terms (see for instance Vj/22/2008 – Tesco), or unilateral fees (Vj/60/2012-Auchan, Vj/43/2016-Spar).

32 Vj/49/2021, Vj/50/2021, Vj/51/2021,Vj/52/2021

33 Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council, Report of the functioning of Regulation 1/2003, COM (2009) 206 final https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0574;
See paragraphs 162-169, for example the Report refers to the French Commercial Code (Art. IV.2 of the Code of Economic Law, Art. L420-2, second subparagraph of the Commercial Code) and Article 20 the German Act Against Restraints of Competition (GWB), as well as the Hungarian Trade Act.

but unlike the EU competition rules - there exist stricter national laws relating to unilateral conduct concerning certain economic sectors which address relative market power.[34]

5. The public service exception

As regards substantive competition law provisions, academic literature points out that so far no provision similar to the TFEU's Article 106 (2) has been introduced into Hungarian competition law. Notably, Art. 106 (2) TFEU provides special treatment for undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly. In other words, such undertakings are only subject to EU competition rules in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.[35]

It is, however, argued that this issue may already be covered by Article 1 (1) of the Competition Act, according to which the Act does not apply to conduct in relation to which different rules provided by law exist. In turn this means that rules relating to services of undertakings providing services of general economic interest similar to Art. 106 (2) TFEU may be introduced by the specific acts regulating the given service/activity. [36]

6. Agreements between non-independent undertakings

Under EU law, when a company exercises decisive influence over another company, they constitute a single economic entity and, hence, are part of the same undertaking. Companies that form part of the same undertaking are not considered to be independent, and thus competitors, and therefore agreements between them do not fall under the scope of Article 101.

The new Horizontal Guidelines, consolidating the case law of the Court of Justice[37], now provides that parent companies and their joint venture form a single economic

34 It may, however, be argued that the EU also has such rules, with the DMA being the latest example, however this was not adopted on the basis of competition rules, but internal market provisions (Art. 114 TFEU).

35 Tóth Tihamér: Jogharmonizáció a magyar versenyjog elmúlt harminc évében, Állam-és Jogtudomány, Volume LXI, Issue 2020.2, pp. 88-89.

36 Ibid.

37 Judgment of 26 September 2013, EI du Pont de Nemours and Company, C-172/12 P, EU:C:2013:601, paragraph 47 and judgment of 14 September 2017, LG Electronics Inc. and Koninklijke Philips Electronics NV, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraphs 71 and 76.

unit and, therefore, a single undertaking as regards competition law and the relevant market(s) in so far as it is demonstrated that the parent companies exercise decisive influence over the joint venture. In light of this, it is set out that the Commission will, in general (with the exceptions listed in the Guidelines), not apply Article 101 to agreements or concerted practices between parent companies and their joint venture to the extent that they concern a conduct that occurs in relevant market(s) where the joint venture is active and in periods during which the parent companies exercise decisive influence over the joint venture.[38]

As it was pointed out in a recent article[39], parent companies and their joint venture – contrary to the EU approach – are currently considered to be independent under the Hungarian competition law.[40]

In particular, the Hungarian approach is more formalistic and follows a more structured line. Accordingly, under Art. 15 of the Competition Act, companies belonging to the same group and the undertakings which are controlled by these are not considered to be independent, however, undertakings with a joint control over another undertaking are considered to be independent from each other and thus agreements between them fall under the scope of Art. 101 (and its Hungarian equivalent). This interpretation was even confirmed by decisional practice and case law.[41]

It appears, however, that this issue was resolved by a recent amendment to Article 11(1) of the Competition Act[42], which now explicitly provides that an agreement between a joint venture and one of its jointly controlling parent does not fall within the prohibition, to the extent that they concern a conduct that occurs in relevant market(s) where the joint venture is active.

7. Leniency for vertical agreements

As it is pointed out in other chapters, one of the best examples of soft convergence

38 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C/2023/4752, OJ C 259, 21.7.2023, paragraphs 11-12.

39 Váczi Nóra: Review of the European Regulatory Regime for Horizontal Cooperations, Versenytükör, Volume XIX, Issue 2., 2023/2.

40 See in more detail: Notice 2/2003 of the President of the GVH and the President of the Competition Council on Issues related to the application of the Competition Act with regard to the merger review procedure, Section II.2. ttps://www.gvh.hu/pfile/file?path=/szakmai_felhasznaloknak/kozlemenyek/2-2023_kozlemeny_230614.pdf1&inline=true (downloaded: 2024. 03. 07.)

41 In a cartel case concerning railway construction, coordination between a controlling undertaking and the undertaking controlled jointly was found to be an infringement and this was confirmed by the Curia as well [See case VJ/138/2002. and judgment Kúria Kfv.III.37.451/2008/7.].

42 The amending act was Act XVII of 2024.

is leniency, which is very much based on the ECN Model Leniency Program and is very similar to the leniency programme operated by the European Commission[43].

However, there is an important difference: as from 2017, the Hungarian system allows for the introduction of leniency applications concerning vertical price-fixing agreements[44], although this possibility has not been frequently used.[45]

8. Fines, settlement and compliance

There are also a few divergences concerning sanctions. Since a fully-fledged analysis would exceed the limits of this chapter, therefore only the most apparent ones are highlighted here.

First, there is a slight difference as regards the setting and calculation of fines. This concerns the legal maximum of the fine, which has increased to 13% under the Hungarian Competition Act as of September 2023[46], compared to 10% in the European's Commission practice[47], and at the same time is in line with the ECN+ Directive, which prescribes that the ceiling should not be less than 10 % of the total worldwide turnover of the undertaking concerned.

Moreover, the Hungarian settlement regime also differs in a number of aspects from the European's Commission settlement rules[48]. Probably the most important difference is that the Hungarian Competition Act allows for a much greater reduction of fine, a minimum of 10%, but a maximum of 30%[49], as opposed to the 10% foreseen in the Commission's proceedings, and parties must also waive their right for judicial review. Finally, the settlement avenue is not reserved exclusively for cartels, but it is also open for antitrust cases and cases initiated on the basis of the Trade Act. For a complete picture, however, it must be noted that in recent years the EU Commission has also become more flexible and offers settlement type cooperation also in antitrust

43 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006

44 This possibility was enacted by Act CLXI of 2016.

45 For instance, leniency applications were filed in the Husquarna (VJ/103/2014) and the Yamaha (Vj/8-2018) RPM cases.

46 See Art. 78 (1b) of the Competition Act – the new, higher ceiling was introduced to increase deterrence, according to the ministerial presentation of Act LIII of 2023.

47 Art. 23 (2) of Regulation 1/2003.

48 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008.

49 Article 79 of the Competition Act.

cases.[50]

Finally, another difference worth mentioning is the enforcement approach towards compliance programmes. While the EU does not reward such programmes, in contrast, Hungarian competition enforcement extensively promotes (both ex-ante and ex-post) compliance initiatives by rewarding undertakings with fine reduction (provided they meet the criteria set out in the GVH's Fining Guidelines). The introduction of compliance programmes can also be prescribed as part of a sanction against small and medium-sized undertakings.

9. Summary

The above analysis shows, on the one hand, that so far there have not been any major conflicts with EU competition law. Frictions are extremely rare, and even in those few instances where inconsistencies were identified, the Hungarian legislator and/or the GVH pro-actively proceeded to resolve the respective issue considering EU competition law and practice.

Moreover, Hungary has a stricter regime for unilateral conduct in the commercial sector, which is effectively applied to specific business conduct and where relative market power raises a concern. This, however, does not interfere with EU competition provisions, which explicitly allow such national divergences.

Finally, in the field of non-harmonized procedural matters, while the procedures and procedural tools are very similar to the EU enforcement practice, in some cases Hungarian enforcement has chosen slightly different solutions, broadening the scope for leniency applications, and opting for a wider range of discretion in terms of sanctioning infringements. These solutions are fully in line with the harmonized ECN+ framework, and do not pose any material issue for the effective enforcement of EU competition law.

50 For more details, see for instance: Dunne, Niamh, From Coercion to Cooperation: Settlement within EU Competition Law (November 5, 2019). Global Centre for Competition Law Annual Conference in January 2019, LSE Legal Studies Working Paper No. 14/2019, available at SSRN: https://ssrn.com/abstract=3481419 or http://dx.doi.org/10.2139/ssrn.3481419 (downloaded: 01/03/2024).

András György Kovács

Preliminary rulings related to Hungarian competition law

1. Introduction

Hungarian competition law influences EU competition law primarily through the administrative courts' practice. One of the instruments used in this context is the initiation of a preliminary ruling procedure. The preliminary ruling proceedings launched by Hungarian courts have a broader impact on EU competition law than it is reflected in the competition supervision activities and powers of the Hungarian Competition Authority (*Gazdasági Versenyhivatal*, hereinafter referred to as the Competition Authority). There are a number of preliminary ruling proceedings related to State aid, public procurement, tax law and consumer protection, which are either purely of a competition law nature or given some sort of competition law dimension. In addition, although the powers of the Competition Authority in the areas of consumer protection, unfair commercial

1 * The content of the chapter reflects the author's personal opinion. It is not, and cannot be considered as the official viewpoint of the Curia.

practices or matters covered by commercial law[2] have, in the broader sense, a competition law and competition policy dimension, they fall neither within the scope of the classic EU competition law, related in particular to restrictive agreements and the abuse of a dominant position, nor within the classic competition authority competence, *i.e.* merger control.

The present chapter therefore deals only with preliminary ruling proceedings related to competition law in the narrow sense of the term, which in practice concerned Article 101 TFEU and the powers of the Competition Authority. Merger control decisions are rarely referred to the courts, and no such case has ever reached the level of the Curia, being under the obligation to make a reference for a preliminary ruling, due to the specificities of the field of law concerned. Cases in connection with the abuse of a dominant position are indeed brought before the courts, but they are significantly fewer in number than the cases relating to restrictive agreements. From among the approximately dozen cases lodged with the Supreme Court/Curia, only two of them were cases launched after the year 2010, and there were only three cases that were examined on their merits[3], the facts of which could be interpreted as post-accession cases where EU law could have been applied at all. There were only a total of two cases where Article 102 TFEU could actually be applied.[4] In comparison, it is not surprising that in the judicial review practice in respect of the Competition Authority's decisions, the Hungarian courts have made only two references for a preliminary ruling concerning Article 101 TFEU, in particular in connection with the most fundamental issue, the notion of the restriction of competition by object in the course of the past 20 years. One of them was the Allianz case[5] and the other one was the Budapest Bank case[6]. The present chapter therefore seeks to deal with Article 101 TFEU and in particular with the definition of restriction of competition by object.

2 See the provisions of sections 2-10 of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices ('Competition Act') and the provisions of Act XLVII of 2008 on the Prohibition of Unfair Business-to-consumer Commercial Practices ('Businesstoconsumer Commercial Practices Act'), Osztovits András: A magánjogi jogérvényesítés gyakorlata a közbeszerzési kartellekkel okozott károk kapcsán (Private enforcement practice in relation to damages caused by public procurement cartels), Közbeszerzés és Versenyjog (Public Procurement and Competition Law) (ed.: Tóth András), Gazdasági Versenyhivatal (Hungarian Competition Authority), Budapest, 2022, 202-215; Act CLXIV of 2005 on Commerce (hereinafter referred to as the Commerce Act).

3 An additional case was based on a lack of standing, hence, not on competition law issues as to the case's merits, Supreme Court judgement no. Kfv.III.37.965/2009/6.

4 Supreme Court judgement no. Kfv.II.37.442/2009/12 and Curia judgement no. Kf.IV.38.050/2018/8.

5 Judgement of 14 March 2013, *Allianz Hungária Biztosító Zrt and Others*, C-32/11, ECLI:EU:C:2013:160.

6 Judgement of 2 April 2020, *Budapest Bank and Others*, C-228/18, ECLI:EU:C:2020:265.

2. Too much or too little?

The aforementioned disputes may seem like a small amount of cases, but it is in fact a rather large number. In the period between 2004 and 2011, the Supreme Court made almost no use of the preliminary ruling procedure[7], whereas in the caselaw of the Supreme Court and the Curia in the second seven-year period between 2011 and 2018, references for a preliminary ruling became a common tool for the interpretation of EU law. In this seven-year period, two out of twenty-two cases were competition law cases, representing almost 10% of the total references, and almost 15% of the references made in the field of administrative law (with 15 administrative cases), which is particularly high, given that the number of competition law cases may be expressed only as an extremely low percentage of the total number of cases dealt with by the Curia. On average, there is less than one competition law case per 100 cases. The number of references has slightly fallen since the year 2018, with no competition law related references made at all, but it is too early to make a statistical assessment of this period.[8]

In addition, in relation to the interpretation of the concept of restriction of competition by object, in the last 20 years, two of the approximately 10[9] decisions delivered by the European Court of Justice in preliminary ruling proceedings have been Hungarian cases, which is quite a lot compared to the 27 (at times 28) [10] Member States of the European Union, or to Hungary's GDP, which is around 1% of the EU's GDP, or even to the country's population, which is less than 2.2% of the EU's population. In comparison, the impact of these two references and the resulting judgments of the Court of Justice of the European Union far exceed the potential and abilities of Hungary and Hungarian competition law enforcement. It should be noted that the share of these two Hungarian cases in the total number of preliminary rulings in competition law cases, which also include other Hungarian cases not related to the Competition Authority's decisions, is also proportional, at around 3%, while the share of Hungarian cases is above 5% when taking into account the other Hungarian cases.[11]

7 It turned to the ECJ only in one case, source of data: see footnote no. 8.

8 In relation to the data mentioned and the findings on their assessability, see: Barabás Gergely – Kovács András György: Why Judicial Independence Matters? Administrative Judiciary: the Transmission Point Between National and EU Law, ELTE Law Journal, 2018 (2) 127-155.

9 As a result of EURLex searches for the period between 2005 and 2024, the term "restriction of competition by object" was found in seven cases, while the term "agreement with an anticompetitive object" was found in eight cases. The two lists of results overlapped considerably.

10 With the accession of Croatia (in 2013), the number of EU Member States increased to 28, and with the exit of the United Kingdom (in 2020), the number of EU Member States reduced to 27.

11 Concerning the period between 2015 and 2023, the EURLex database found 68 preliminary ruling proceedings for the keyword "competition", and the share of Hungarian references was calculated on the basis of them.

3. A failure for the parties, the court and EU law, and of little benefit to Hungarian law

However, beyond the quantitative data, the quality of the questions and answers is what really matters. The preliminary ruling procedure was initiated by the plaintiffs in the Allianz case and at the request of the defendant in the Budapest Bank case. From the parties' point of view, the preliminary ruling procedure added essentially nothing to the resolution of the specific cases, and the parties' attempts to force the issue proved unnecessary.

In the Allianz case, the plaintiffs lost, because restriction of competition by object could be established, while in the Budapest Bank case, the petitioner – in this case the defendant – also lost, because restriction of competition by object could not be automatically established. When the Curia sought to ask a further question to obtain guidance as to the final resolution of the dispute at hand and to ensure a coherent interpretation of the law – as it happened in the Budapest Bank case –, it was either answered in a dubious way, as in the case of the double legal basis,[12] or not answered by the ECJ, because the latter argued that it would answer it, if necessary, in the event of a possible reopening of proceedings, thus, the ECJ did not wish to assist the Curia in its adjudication by providing a sufficiently precise guidance. As a result, the Curia decided, in September 2020, to uphold the judgment requiring the defendant authority to reopen its proceedings in respect of the case's merits. The reopened proceedings – started more than three years ago – are still pending.

Apart from the fact that the references have not proved to be relevant from the point of view of the litigants, there have been no significant results in terms of the further development of competition law enforcement either. We are talking about a decade-long detour, which has benefited Hungarian judicial practice, but has harmed the EU's jurisprudence. The domestic legal literature is unanimous in its assessment that the Allianz case has liquefied[13] the welldefined practice – which has contributed to legal certainty – of restriction of competition by object and made it uncertain, requiring an examination of circumstances that do not fall within the scope of purposefulness

12 See section 5.

13 Nagy Csongor István: Állítsátok meg Leviatánt! A "versenyellenes cél" új fogalma a versenyjogban (Stop Leviathan! The new concept of "anti-competitive object" in competition law) in: Valentiny Pál – Kiss Ferenc László – Nagy Csongor István: Verseny és szabályozás (Competition and regulation), MTA KRTK Közgazdaság-tudományi Intézet, 2016, Budapest, 163–194; Nagy Csongor István: The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?, World Competition: Law and Economics Review, 2013 (4) 541–564; Nagy Csongor István: The new concept of anti-competitive object: a loose cannon in EU competition law, European Competition Law Review, 2015 (4) 154–159.

but of impact assessment, and that it is thus misleading in this area[14], and has therefore been met with incomprehension by competition lawyers. This decision has given the impression that the scope of restrictions of competition by object can be extended and that there is even a gateway to this extended area from the side of conducts qualified on the basis of impact assessment if they produce a sufficient degree of damage. The fact that it is possible to extend the category of restrictions by object by means of an impact assessment has called into question the existence of separate effects-based restrictions of competition. Thus, effectsbased restrictions have become, in practice, a subcategory within those having an anti-competitive object, and have ceased to belong to a separate category. This process has been kept in check by subsequent judgments of the ECJ, which have established that anti-competitive object is a very specific and exceptional category, subject to strict conditions and only applicable in cases of clear anti-competitive conduct.[15] The Budapest Bank judgment was a kind of closure of this process, bringing the ECJ, if not back to the starting point, but close to it. An interesting aspect of this historical arc is that both the Allianz case and the Budapest Bank case grew out of a Hungarian competition supervision procedure.[16]

This means that, at present, anti-competitive object is an open category: in addition to the expressly listed agreements with an anti-competitive object, the competition authority or the court may also declare expressly not listed agreements to have an anti-competitive object, depending on the specific circumstances of the case. Furthermore, a distinction must be made between prima facie and non-prima facie restrictions of competition by object[17]. In the latter category of restrictions, it is not possible to make a prima facie assessment of the purpose of a conduct. For the prima facie category of restrictions of competition by object, there is a sufficiently strong and substantial body of reliable data to show that the agreements in question can be regarded as anti-competitive in general and in substance. Where the qualification of a conduct as being restrictive of competition by object is not clear or explicitly classical, and the aim is to qualify it as an already known prima facie restriction of competition by object, it must be shown on the basis of the ECJ's caselaw that it is sufficiently harmful to competition. This does not require an impact assessment, but the ability to present the market and economic environment in which the conduct concerned fits, affecting a substantive dimension of competition, the sufficient harm of which can be shown by experience to be comparable to that of

14 Tóth András: Versenyjogi útkeresés a célzatos versenykorlátozások terén és a magyar ügyek szerepe (Seeking ways for competition law in the field of the restrictions of competition by object and the role of Hungarian cases), Magyar Jog (Hungarian Law), 2021, (9) 494.

15 Judgement of 11 September 2014, *Cartes Bancaires v European Commission*, C-67/13 P, ECLI:EU:C:2014:2204 ('CBcase').

16 Nagy Csongor István: A Kúria határozata a multilaterális bankközi jutalék ügyben (The Curia's decision in the multilateral interbank commission case), Jogesetek Magyarázata (Caselaw Commentaries), 2021 (1) 36.

17 Tóth (footnote 13) 502.

prima facie restrictions of competition by object. As Tóth points out, the caselaw to date has not provided any example of the extension of the category of classical restrictions of competition by object.[18] According to Tóth, the caselaw so far has dealt either with the assessment of hard-to-identify restrictions by object (see the payfordelay agreements in patent disputes) or with conduct the harmfulness of which was not apparent after having been placed in the appropriate economic and market context (see the Hungarian cases). It is highly questionable whether there are further cases of the category of restrictions by object confirmed, in principle, by the ECJ in the Hungarian cases.[19]

4. Legal criteria for determining restriction of competition by object

Based on the Budapest Bank judgment, the criteria for determining a restriction of competition by object are the followings: there must be sufficiently robust, general and reliable experience for the view to be taken that an agreement is, by its very nature, harmful to the proper functioning of competition.

4.1. Impact assessment or potential impact analysis?

In Gál's opinion[20], the Budapest Bank judgment has set an excessive expectation by requiring almost complete consensus in the authorities' practice and in the legal literature in order to establish the existence of an expressly not listed restriction of competition by object, which is not realistic. In his view, there is some contradiction in this respect as the Budapest Bank judgment also includes an impact analysis in the examination of the restrictive object by requiring a counterfactual type of analysis. The hypothetical analysis of the conditions of competition in the absence of an allegedly unlawful agreement (the so-called "counterfactual" analysis) means taking into account in the competition law analysis how competition might have developed in the absence of the allegedly restrictive clause or conduct. This type of analysis has so far been required by judicial practice only to establish the effects of the alleged infringement.[21]

18 Tóth (footnote 13) 502.

19 Tóth (footnote 13) 498.

20 Gál Gábor: Kártyatrükk: Az Európai Bíróság C-228/18 sz. Budapest Bank ügyben hozott ítélete és annak jelentősége [Card trick: Judgment of the European Court of Justice in case C-228/18 (Budapest Bank case) and its relevance], Európai Tükör (European Mirror), 2020, (3) 4849.

21 The principle was laid down in paragraph 8 of the judgment of the ECJ in case C-56/65, *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, which has since been confirmed by the European courts in a number of cases. See Gál (footnote 19) 46, but the same is said by Tóth (footnote 13) 500.

Contrary to Gál's view, I do not see the foregoing as including impact assessment in the legal analysis of restriction of competition by object, but rather think that counterfactual analysis is capable of overturning the potential impact assessment and, thus, a more complex – and ambiguous – qualification of restriction of competition by object.

In this context, it is worth pointing out why the Hungarian cases constitute the framework for the Allianz-Budapest Bank interpretative "detour" in European law.

4.2. Harmonisation of the Hungarian Competition Act and EU law

Hungarian administrative judges deal with cases in hundreds of administrative sectors, thus, they are not specialists in competition law. They do not need to be competition lawyers, as they are to exercise only their legality control powers, and they are to take into account only the law in their judgments, because they are subjected only to the law (judicial independence). Until 2004, they had applied only the rules of Hungarian competition law, and even for some years afterwards, most competition cases did not require the direct application of EU law. Section 11 of the Competition Act prohibits conduct (agreements, decisions of associations, hereinafter referred to as conduct) by undertakings which has as its object or effect the prevention, restriction or distortion of competition (hereinafter referred to as restriction) or which may have such an effect. This legal provision differs from Article 101 TFEU, which prohibits conduct by undertakings which has as its "object or effect" the restriction of competition. This is what the Hungarian act of law states, unlike Article 101 TFEU, and what the judge sees in the written piece of legislation, but he does not see – or does not need to see – the library of literature on these few words, unless such literature is referred to by the parties to the litigation in their submissions. The judge may even be forbidden to see this "library", since he is bound by the parties' pleadings and the law.

By comparison, the typical structure of the reasoning part of the Competition Authority's decisions in cases of restrictions of competition by object of a more complex nature was, until 2010, not to identify the more complex cases as clearly price or quantity restrictions between competitors, but to demonstrate, by a content analysis of the agreement under investigation, that the latter is restrictive of competition by object because it reduces competitive constraints. In the majority of cases, the Competition Authority did not even state that the conduct examined was clearly a price cartel or market sharing practice, but supported its reasoning in such cases with a speculative (*i.e.* without detailed factual elements) and purely economic market theory analysis of the existence of a "potential effect", referring to section 11 of the Competition Act, according to which the possibility of a restrictive effect ("may have such an effect") – without any actual effect – is sufficient for the establishment of a restrictive conduct. In the decisions' wording, a conduct merely "capable" of restricting competition could be qualified as restrictive.

On the one hand, this line of reasoning has consistently given rise to the impression in administrative litigation that there are three categories of conduct, which can be supported by the grammatical wording of the law: restrictive by object, restrictive by effect and potentially restrictive, and it is sufficient to establish the existence of at least one of them, but the coexistence of all three of them may also be found. If all three of them are established, then it is obviously a more serious restriction. On the other hand, the technique of reasoning using the term "capable" has resulted in a distinction – originating also from the wording of the law – according to which a restriction of competition by object could even be qualified as a minor cartel under the Hungarian Competition Act. Pursuant to the wording of section 13, subsection (2), points a) and b) of the Competition Act in its version before the implementation of the Damages Directive[22] on 15 January 2017, in the case of horizontal restrictions of competition, only price and market-sharing cartels were explicitly excluded from the *de minimis* rule (the rule ensuring the possibility of a minor cartel). Therefore, only price and market-sharing horizontal cartels were considered to be, without further proof (*i.e.* proof of potential effect or speculative justification of the capability of restricting competition), *per se* or hardcore cartels, to which the minor cartel rules did not apply, and in addition, there were other restrictions of competition by object which had the potential effect of restricting competition, so the term "may have such an effect" of the Hungarian act of law was definitely applicable. In judicial practice, however, these were not called *per se* or hardcore cartels, but only restrictions of competition by object, and the Hungarian courts' distinction was an attempt to impose some order on this chaos of unclear concepts. For some reason, the highly qualified plaintiffs' representatives did not go into this issue, or did so with a vigour that was inadequate to achieve their purpose. They did not undertake a conceptual attack on this jurisprudence until the Allianz case. Since then, 10 years have passed and it has very slowly become apparent to judges that in fact the law should always have been understood to be that *per se* or hardcore cartels are themselves restrictions of competition by object. Since the Damages Directive, this identical nature is reflected in the Hungarian law, specifically in the wording of section 13, subsection (3) of the Competition Act, in force since 15 January 2017. But then why did the Competition Authority use so many diverging terms in its decisions, pretending that there are professional, substantive differences between such terms?

It is important to see that the error of the judges is due to the statutory provisions of section 11 of the Competition Act – departing from the former Article 101 TFEU – and the diverging rules of section 11 and section 13, subsection (2), points a) and b) of the Competition Act, the latter two rules not containing any textual references to each other, and as such their interpretation cannot be considered formally erroneous. The

22 Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, 1–19. Available at: http://data.europa.eu/eli/dir/2014/104/oj

Hungarian legislation was inconsistent. The harmonisation of the statutory rules in respect of at least sections 11 and 13 of the Competition Act made it easier for judges to understand – not least as a result of the beneficial effect of the abundant literature that was created not independently thereof – that there were decades of misunderstandings.

However, it seems to me that publications from the Competition Authority still do not have a clear understanding of the situation, or perhaps the judges still do not understand what is at stake. The Budapest Bank judgment has provided me with an unexpected revelation as to how the Competition Authority's previous practice should be correctly understood in the context of Article 101 TFEU. It is that in more complex restrictions of competition by object, where a price or market-sharing cartel cannot be inferred by closed logical reasoning from a content analysis based on the paper of the parties' agreement[23], the conduct of a potential effect (capability) analysis – which is a complementary assessment for the purpose of justifying the existence of a restriction of competition by object (and not a separate legal situation) – may be helpful.[24]

If such an analysis does not reveal a price and market-sharing cartel, but a reduction in competitive constraints can be shown, then the conduct examined is to be qualified as an expressly not listed restriction of competition by object. Such a conclusion does not require a counterfactual analysis, but such an analysis may be an instrument for plaintiffs to overturn the Competition Authority's argumentation. In comparison, it might have been more appropriate for the Curia in the Budapest Bank case to require the Competition Authority not to conduct a counterfactual analysis in the reopened administrative proceedings, but only to require the authority to provide the plaintiffs with an opportunity to prove their case by means of a counterfactual analysis.

Putting the foregoing together, it can be concluded that the authorities' practice

23 Nagy Csongor István: A kartelljog dogmatikai rendszere (The dogmatic system of antitrust law), HVGORAC, Budapest, 2021, 16.

24 Pursuant to paragraph 225 of the General Court's judgement in case T-684/14, *Krka v Commission*, ECLI:EU:T.2018:918 (under appeal before the European Court of Justice in case C-151/19 P), *„[…]it should be borne in mind that the Commission and the Courts of the European Union cannot, when examining whether an agreement restricts competition by object and, in particular, in assessing the economic and legal context of that agreement, completely ignore its potential effects (Opinion of Advocate General Wahl in ING Pensii, C172/14, EU:C:2015:272, paragraph 84). However, it is also apparent from the case-law that establishing the existence of a restriction of competition by object cannot, under the guise, inter alia, of the examination of the economic and legal context of the agreement at issue, lead to the assessment of the effects of that agreement (see, to that effect, judgment of 11 September 2014, CB v Commission, C67/13 P, EU:C:2014:2204, paragraphs 72 to 82), since otherwise the distinction between a restriction of competition by object and by effect laid down in Article 101(1) TFEU would lose its effectiveness. For the purposes of verifying the specific capability of an agreement to produce competition-restricting effects characteristic of agreements with an anticompetitive object, the analysis of the potential effects of an agreement must therefore be limited to those resulting from information objectively foreseeable at the time of the conclusion of that agreement (see, to that effect, judgment of 11 September 2014, CB v Commission, C67/13 P, EU:C:2014:2204, paragraphs 80 to 82, and the Opinion of Advocate General Wahl in ING Pensii, C172/14, EU:C:2015:272, paragraph 84)".*

has slipped on the too abstract wording – and partly different from Article 101 TFEU – of the legislation, but has now been put into the right context, and was correct in its essence.

At the same time, this coherent interpretation and coherent legal content could not have been derived from the Hungarian legal text by a judge without the accidental amendment of section 13, subsection (3) of the Competition Act – which can be traced back to the Damages Directive –, since in the case of expressly not listed horizontal restrictions of competition by object, it was impossible to deduce from the previous legal provisions that, for instance, their minor cartel nature should not be examined. I will never forget that, in the first decade of the 2000s, one of the main difficulties of the first public procurement cartels was that the existence of a specific marketsharing practice for a public procurement was not referred to by the Competition Authority's decisions[25], only later on, on the basis of judicial guidelines, did this practice spread, and it was problematic because the courts argued that, in the absence of such reference, the cartel's minor nature should have been examined. I have not received any criticism for the aforementioned arguments, neither in the parties' submissions, nor in decisions, nor at conferences, nor as an active member of the competition law community. It was only after the Allianz case that the first criticisms appeared, mainly in the clarifying studies of István Csongor Nagy[26]. I am grateful for them.

4.3. Potential effect as a justification for restriction of competition by object

The discussion of all these questions is not negligible, also in view of the criticism in the legal literature that there were other cases where making a reference to the European Court of Justice would have been justified in the context of the issues of potential and actual effect. First and foremost, the contact lenses case was to be mentioned.[27] In this dispute, contrary to the criticisms, I believe that the Curia denounced the legal reasoning which – if the examination of the actual effect is inconclusive in the case at hand – considers the existence of a potential effect (capability) to be sufficient, applying it as a separate legal category as a basis for the establishment of a competition law infringement. One can

25 See, for instance, decision no. VJ/28-47/2003., Baucont case, Supreme Court judgement no. Kfv. II.39.162/2008/32.

26 Nagy Csongor István: The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?, World Competition, 2013 (4), 541-564; Nagy Csongor István: EU Competition Law Devours Its Children: The Proliferation of Anti-Competitive Object and the Problem of False Positives, Cambridge Yearbook of European Legal Studies, 2021 (23) 290-310 etc.

27 Tóth (footnote 13) 501; Tóth András: Az Európai Unió versenyjogának magyarországi érvényesülése (The enforcement of European Union competition law in Hungary), Jogtudományi Közlöny (Journal of Legal Literature) 2023 (9) 398.

only agree with the statement that such reasoning is unacceptable, and it would have been unwise to inquire about it.

The lessons learnt from the Allianz and Budapest Bank judgments show that if the Competition Authority does not claim the existence of a restriction of competition by object, but a restriction of competition by effect, then it is indeed not possible to rely on potential effects if the authority's logic fails. After all, this type of analysis is necessary to justify not an effects-based restriction of competition but a restriction of competition by object in the case of horizontal cartels which are not obviously price and marketsharing cartels in order to prove the existence of either an expressly listed restriction by object or an expressly not listed one, which is to be considered a new type of case on the basis of the analysis. In the latter case, however, the plaintiffs can rebut such an argument by an effects analysis or at least by a counterfactual analysis, thus, speculation should also reflect reality.

It can also be deduced from the foregoing that it is not generally the case that sufficient experience is required to establish an expressly not listed restriction of competition by object. Sufficient experience requires judicial practice on the effect-based finding of a restriction of competition and/or a broadly consistent economic literature. In my view, this means that it is sufficient if, according to existing practice, the analysis of potential effects associated with a restriction of competition by object is consistent with the relevant literature and judicial practice.

Previously, the conclusion according to which horizontal restrictions of competition by object cannot only be horizontal price and market-sharing cartels and the minor cartel character can be examined in the case of a restriction of competition by object was drawn from the Hungarian legislation. What does Article 101 TFEU stipulate? The conducts which "have as their object or effect the prevention, restriction or distortion of competition within the internal market" are prohibited. By virtue of section 11 of the Competition Act, a conduct which "has as its object or effect the prevention, restriction or distortion of competition or which may have such an effect" is prohibited.

The difference is clearly noticeable in the wording: the phrase "may have such an effect", which in Hungarian practice also allows for the establishment of prohibition of cartels in the case of potential effects (or otherwise known as "capability"), is not included in this grammatical form in Article 101 TFEU. It is fortunate that the phrase "may have such an effect" in section 11 of the Competition Act, based on its placement in the sentence[28], allows it to be interpreted as a restriction of competition by object and not as a restriction by effect, as was the case in the previous Hungarian judicial practice (the administrative authorities had no caselaw on this issue, as they had no substantive and consistent opinion thereon). In this case, the two different texts can be interpreted in a substantively consistent manner.

28 As the term "has as its object" is followed by the term "may have such an effect". If the clause were to include the phrase "has as its effect or may have such an effect", then the term "may have such an effect" could really be associated only with the effects-based phrase "has as its effect".

Section 13, subsection (2), points (a) and (b) of the Competition Act have been replaced by the more general section 13, subsection (3) of the Competition Act, on the basis of which Hungarian law has indeed been brought into line with EU law and with the general international competition law practice which states that a restriction of competition by object cannot, by definition, be a minor cartel.

On the other hand, judges are human too. New generations are coming and the question is whether it would not be more appropriate to align the wording of section 11, subsection (1) of the Competition Act more precisely with Article 101 TFEU, because the seeds of misunderstanding in the grammatical sense are still there and could be a permanent obstacle to correct interpretation.

5. The issue of dual legal basis

This may explain why, in the Budapest Bank judgment, the European Court of Justice gave a difficult – and to me somewhat unexpected – answer to the question of whether a restriction of competition by object and a restriction of competition by effect can be found at the same time, given the connecting word "or" in Article 101 TFEU. According to the European Court of Justice, Article 101(1) TFEU must be interpreted as not precluding the same anti-competitive conduct from having both a restrictive object and a restrictive effect within the meaning of that provision.

Unfortunately, neither Csongor István Nagy, who is very active in the analysis of the topic, nor András Tóth expresses an opinion on this issue, although the Curia considered this principle to be the most important issue from the point of view of the courts' caselaw, being expressed in the judgment of the Curia published, with precedent value, in the Collection of Court Decisions. According to the Curia's judgment, the Competition Authority may take its decision on a dual legal basis by classifying a conduct as having both an anti-competitive object and an anticompetitive effect, but in this case it must separate the findings and the evidence and must give separate reasons for the classifications.[29] Paragraphs 93 to 94 of the Curia's judgment state that the fine in such a case must be adjusted to the legal basis based on the conduct's effect, because the fine must be in line with the typically lower amount that can be imposed on the basis of the conduct's effect. It should be immediately noted that the Advocate General's reference to Article 23(3) of Regulation 1/2003 EC is completely irrelevant, given that the Competition Authority does not apply Regulation 1/2003 EC when imposing a fine but the Hungarian Competition Act, and must follow the Hungarian judicial practice thereof, with the proviso that the latter practice must, of course, also comply with the principles

29 The principles laid down by the judgement published in the Collection of Court Decisions include: criteria and standards of proof for distinguishing between restrictions of competition by object and restrictions of competition by effect. In comparison, the main conceptual content is therefore the answer to the first question.

required by EU law (appropriate and effective sanctioning, but at the same time having regard to the requirement of proportionality).

In comparison, it is important that Gábor Gál – who is also a member of the Competition Council – addressed the issue in his study.[30] Gál argues that the agreements found to restrict competition by object are more likely to be considered as leading to a serious infringement of competition law. However, this is simply an inevitable consequence of the fact that the concept of "restrictions by object" only applies to those types of agreements which show a sufficient degree of harm to competition. More importantly, it is by no means excluded that, on the one hand, certain restrictions by object may be considered as less serious infringements in the light of all the relevant circumstances and, on the other hand, that restrictions by effect may be equivalent to very serious infringements in the field of competition law.

This approach was ultimately not contradicted by the final judgment of the Curia, which only stated that the fine is to be imposed on the legal basis of an effect-based infringement in such a case (which is typically less severe, but may exceptionally be more severe), implicitly meaning that it is essentially unnecessary to find a restriction of competition by object.

Gál also points out that according to the European Court of Justice, there is no obstacle to a simultaneous finding of restriction of competition by object and effect, but the authority/court must prove both findings. According to Gál, this conclusion is not entirely consistent with the caselaw on proving an infringement by object/effect. After all, as the European Court of Justice pointed out in the Budapest Bank judgment, once the anti-competitive object has been proven, it is no longer necessary to examine its effects on competition, because certain types of collusion between undertakings show a sufficient degree of harm to conclude that they are harmful to the proper functioning of normal competition. If, on the other hand, the restriction in question is a restriction of competition by object and thus shows a sufficient degree of harm, then, on a purely logical basis, the question may arise as to why, in addition to finding a restriction of competition by object, the competition authority should nevertheless conduct a full effects test to establish an infringement by effect, with the full burden of proof.

Furthermore, according to Gál, dual qualification is likely to be of practical relevance only in the case of new types of infringements, where the ascertainability of the infringement by object is in question and the authority may therefore wish to prove the infringement on both grounds. However, it is questionable whether in this case the mere fact that the authority considers that an impact assessment is also required would not in itself cast doubt on the finding of a restriction of competition by object. Consequently, a finding of a combined infringement by object and effect will presumably remain a theoretical possibility. In this context, Gál notes that, according to its Notice on Fines, the Hungarian competition authority takes market effects into account when determining the gravity of the infringement and thus the fine. However, this

30 Gál (footnote 19) 45-47.

"market effect" cannot be equated with the impact assessment necessary to establish the infringement, which is the subject of the Budapest Bank judgment, as the former involves the assessment of only a limited number of circumstances (*e.g.* market shares, occurrence of the infringement) indicating the gravity of the infringement. Therefore, since the relevant legislation and caselaw do not require an impact assessment when imposing a fine, it seems unlikely that competition authorities will carry out a full impact assessment for the sole purpose of determining the fine.

It was necessary to quote at length from Gál's opinion because I fully agree with it. However, I would approach my assessment of the European Court of Justice's response from the point of view that the European Court of Justice has probably not been very well presented with this question. In its decisions, the Competition Authority has – in its practice so far – identified as the legal basis for the effect what is in fact only an assessment of the potential effect, and which does not include a real analysis of the effect based on factual elements. These speculative analyses have so far not been called into question by the courts, and wrongly so, I have to say. Thus, the Curia necessarily asked the question from the wrong starting point. The European Court of Justice has failed to understand why such an assessment would be necessary, and in essence the ECJ says what is true: if there is a restriction of competition by object, it is unnecessary to examine it on the basis of effects. Although it may be so. Why not? Nothing precludes it. What is the point of it? That was not a direct question, nor was it answered by the European Court of Justice. The only reference thereto was in relation to the fine, to which the Advocate General gave a wrong answer based on Regulation 1/2003 EC, not taking into account that the national competition authority of the Member State was applying national law in this regard.

In my view, it can be concluded from the foregoing that the proper practice in the future would be that, if an expressly not listed and more complex restriction of competition by object is to be analysed, then in addition to the substantive analysis of the agreement, new types of agreement can be named on the basis of the potential effects analysis supported by the judicial practice and the legal literature, and a counterfactual effects analysis should be carried out at most to reassure the Competition Authority itself in order to confirm the potential effects analysis. But it is by no means mandatory.

In other respects, a more serious impact assessment beyond the foregoing is not necessary, as it is only required if the restriction of competition by object is to be rejected. If a counterfactual analysis concludes that the effect hypothesised by the speculative analysis of the potential effect is not justified, the presumption of the existence of a restriction of competition by object is rebutted, and the serious work, analysis and reasoning on this point should be excluded from the decision and the case should be further analysed on the basis of the conduct's effect. For reasons of resource efficiency, the Competition Authority may have been right to act as it had always done before 2010, when it had never gone beyond a speculative-theoretical analysis of potential impact.

In a court case, if the plaintiffs come forward with a counterfactual analysis and present a set of concrete data needed to support it, the Competition Authority is put in

a position to carry out a more serious impact analysis. A good example of the foregoing is the hearing of the Allianz case by the court of first instance, in which I acted as a first instance judge. The second plaintiff presented a serious impact analysis with regression calculations prepared by London Economics. The then Chief Economist of the Competition Authority was delighted because he finally had access to factual information that had not been available before and was unobtainable from the companies involved in the proceedings by means of official procedure. The Competition Authority, as the defendant in the case, analysed the data provided and then argued that, according to them, the factual elements of restriction of competition were much more serious than the Competition Authority had found. On the basis of the available evidence, the Competition Authority could prove only a market sharing of 70%-30% between Allianz and Generali in the market of Casco insurance for new cars, but the concrete data showed that a much more elaborate market sharing system with a banding regime was put in place. However, this could not be the subject of the legal action, since, according to the courts' case-law, the principle of *lis pendens* precludes an action from resulting in the court returning the case to the defendant administrative authority in order to establish a more serious infringement and, thus, to impose more serious legal consequences on the plaintiff who brought the action.

However, this whole issue can be put in a different context in the light of the Budapest Bank judgment. In the Allianz case, the judge should not have interpreted this situation as a case that should have been referred back to the authority for a finding of a more serious restriction of competition, but rather as a case in which a restriction of competition by object should be requalified as a restriction of competition by effect on the basis of the data obtained, which, with rare exceptions, does not have more serious consequences in the case at hand, but could be of great importance for the future, so that similar infringements can now be classified as restrictions of competition by object in the light of the available experience.[31] It is a different matter that the Competition Authority was ultimately successful in arguing for the existence of a restriction of competition by object.

Nevertheless, my example shows that if the Competition Authority remains at the level of speculative analysis of potential effects in its assessments of more complex restrictions of competition by object, it is very doubtful whether it is worthwhile for the plaintiffs in court proceedings to rebut the argument of potential effects by counterfactual or even more serious impact analysis by showing that there were no actual effects. In such a case, they would be forced to disclose sensitive data that could form the basis for the finding of an effectbased cartel. Not to mention that negative proof is, in general, rather difficult.

In any event, it should be noted that counterfactual analysis seems to be the only

31 For reasons of space, I do not wish to describe the more complicated situation, because in the meantime the defendant Competition Authority also argued – which was also stated in the first instance judgment – that the second plaintiff did not prove the absence of an effect, but only that even if there was an effect, it would not be possible to show its concrete extent.

effective way to refute such a speculative analysis, which follows the prevailing view in the economic literature and is in line with judicial practice, especially when comparing the period after the termination of the infringement and the period during which such infringement took place, and seems to be the only possible means of providing substantive counter-evidence.

6. Are all price cartels anti-competitive by object?!

Finally, the Budapest Bank judgment has had an important impact on Hungarian caselaw in that it confirmed the solution, which is not clear in Hungarian competition law practice, that a price cartel can exceptionally receive an individual exemption. The Competition Authority's work was assisted, as far as I know, by US experts in the initial period, and perhaps this was the reason for the authority's view that a horizontal price cartel is always so harmful that it is restrictive of competition by object and therefore an individual exemption is not possible. However, I have already explained in my paper appeared in the jubilee publication entitled "The 20th Anniversary of Hungarian Competition Law" (2011) that the Competition Authority has established individual exemption for horizontal price cartels in its practice in the past and therefore has not been consistent in its dealing with cases not brought before the court, and this seems to be the correct position.[32]

What seems quite certain, nonetheless, is that it would require a very creative textual interpretation to read Article 101 TFEU as prohibiting this without exception. While the text of the Hungarian Competition Act can be read in this way – albeit a little forcibly –, because the rules related to individual exemption generally refer to section 11 of the Competition Act, but no specific reference to price cartels can be read out directly, it is quite clear from Article 101 TFEU that Article (3) refers to Article (1) and its point (a) directly mentions the prohibited conduct concerning buying and selling prices. Therefore, the Hungarian courts, in their previous caselaw, also took the view, based on section 11 of the Competition Act, that it follows therefrom that a price cartel can also be exempted on an exceptional and individual basis, although the Competition Authority – at least while arguing before the court – has consistently denied such possibility. The really interesting question is, however, what can be stated on the basis of the Budapest Bank case. Can a price cartel, *i.e.* a restriction of competition by object, exceptionally qualify for an individual exemption, or do we claim that such a price cartel is not restrictive of competition by object if it qualifies for an individual exemption? After all, restrictions of competition by object cannot be individually exempted.

32 Kovács András György: A bíróságok kartelljogi gyakorlatának „rejtett hibái" (The "hidden flaws" in the courts' antitrust practice), A magyar versenyjog múltja és jövője (The past and future of Hungarian competition law) (ed.: Tóth Tihamér – Szilágyi Pál), Pázmány Péter Catholic University, Budapest, 2011, 139.

Gál deals with this issue and comes to a very interesting conclusion which is worth quoting verbatim: "First, it is noteworthy in this respect that the Court of Justice has held that a horizontal price-fixing agreement does not necessarily restrict competition by object, despite the fact that the previous case-law on horizontal price agreements has been consistent in this respect.[33] Moreover, the Court of Justice's analysis also ignored the doctrine established in the case-law according to which each economic operator must determine independently the policy it wishes to pursue on the market and that agreements which replace the uncertainty of competition by practical cooperation may constitute an infringement by object. In this context, the Court of Justice pointed out that the objective of the MIF Agreement may have been to ensure a balance between issuing and acquiring activities within each card scheme – however, the author considers that the Court of Justice does not explain how this aspect is relevant to the assessment of the restrictive nature of the agreement between the card schemes."[34]

Gál therefore argues that the Budapest Bank judgment finds that there are anti-competitive price cartels restricting the competition not by their object. I would be more cautious in that regard. Rather, I read the European Court of Justice's judgment as raising this possibility only in the case of indirect price fixing. However, the real question for me is: if it can be shown in the text that price-fixing can be exempted individually, what is the correct position of principle on the following question: is a restriction of competition by object never individually exempted, or is direct price-fixing exempted and therefore not a restriction of competition by object. Since even practices that would otherwise constitute direct price fixing may be block exempted or benefit from other exceptions to the application of competition law (see the field of agriculture), I would rather agree with the conclusion that can be drawn from the Budapest Bank judgment.

7. Conclusion

I may be completely wrong. I am looking forward to receiving the submissions of the parties!

33 Moreover, the Court of Justice itself refers to the fact that indirect price fixing may also be restrictive of competition by object in paragraph 62 of the Budapest Bank judgment: „*[I]t is clear from the very wording of Article 101(1)(a) TFEU that an agreement on the indirect fixing of purchase or selling prices* [...] *may also be an agreement which has as its object the prevention, restriction or distortion of competition within the internal market. The question therefore arises whether an agreement such as the MIF Agreement can be regarded as falling within the scope of indirect price-fixing within the meaning of that provision in so far as it indirectly fixed the dealer's commission.*"

34 GÁL (footnote 19) 48.

Tihamér Tóth

The impact of Hungarian cases on the interpretation of the concept of "by object" restrictions of Article 101 TFEU[1]

1. Introductory thoughts

The topic of this chapter, as suggested by the editors of this volume, poses various challenges. To begin with, several authors have already discussed at length the relevant cases in the Hungarian and international academic literature[2] to such an extent that it is rather difficult to add anything

1 * The opinions expressed in this article are those of the author and by no way represent the opinion of the General Court of the EU. I admit that I was involved in the decisions of both Hungarian cases discussed in this chapter as a member of the respective five-member competition councils of the GVH. I hope that the passage of time allows me to write in an objective and unbiased manner.

2 Given the volume of international literautre on this topic, I do not even attempt to summarize the most important sources for the purposes of this chapter. As to the Hungarian authors: Nagy Csongor István: EU Competition Law Devours Its Children: The Proliferation of Anti-Competitive Object and the Problem of False Positives, Cambridge Yearbook of European Legal Studies 2021, Vol. 23, 290–310.; Nagy Csongor István: The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis? World Competition Law and Economics Review, 2013, Vol. 36, No. 4, 541–564.; Nagy Csongor István: The new concept of anti-competitive object: a loose cannon in EU competition law, in: European Competition Law Review, 2015, Vol. 36, No. 4, 154–159.; Tóth András: The Recent Development of the Restrictions of Competition 'by Object' in the EU Competition Case Law and the Role of Hungarian Cases, Institutiones Administrationis Journal of Administrative Sciences 2021, Vol. 1, No. 2, 36–48.; Tóth András: Kortárs magyar versenyjog, Ludovika Egyetemi Kiadó, Budapest, 2022, 107–109.; Dömötörfy Borbála – Kiss Barnabás Sándor – Firniksz Judit: Látszólagos dichtómia? Versenykorlátozó cél és hatás vizsgálata az uniós versenyjogban, különös tekintettel a Budapest Bank ügyre, Verseny és Szabályozás KRTK Közgazdaság-tudományi Intézet, Budapest, 2020, 27–49., also available in English: Dömötörffy Borbála – Kiss Barnabás Sándor – Firniksz Judit: Ostenible dichtomy? By object and by effect restraints in EU competition law, with special regard to the Budapest Bank case, Institute of Economics Centre for Economic and Regional Studies, Budapest, 2020, 91–114.; Gál Gábor: Kártyatrükk: Az Európai Bíróság C-228/18 sz. Budapest Bank ügyben hozott ítélete és annak jelentősége, Európai Tükör, 2020, Vol 23, No 3, 28–54.

new to the discourse. Second, a thorough discussion of the topic would require the presentation of the evolution of "by object "restrictions of competition under Article 101(1) TFEU that would go well beyond the boundaries of a short article. Third, I will resist the temptation to compare the "by object" and "by effect" cases, especially those where potential effects were at stake. I will also not compare these concepts by type of abuse under Article 102 TFEU. Such a complex endeavour would require the space of a booklet rather than that of an article. Finally, I will not be able to enter into a detailed comparative analysis of the European "by object" category and the similar "per se" and "rule of reason" concepts of U.S. antitrust.[3]

Bearing all these limitations in mind, in the first part of this chapter I will explain the meaning of "by object" restrictions of competition and clarify some terminological questions. The second and third parts will be devoted to the presentation of the *Allianz Hungária* and *Budapest Bank* cases[4]. In the concluding part I will argue that if there is a "by object" box, it has never been meant to be a closed one, hence these judgments do not represent a shift of a paradigmatic nature, but rather have contributed to the organic evolution of the "by object" concept through evaluating competition restrictions that were mainly due to regulatory failures in unusual market contexts.

2. The concept of "by object" restrictions of competition

2.1. The legal texts

Article 101 (1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Paragraph (1) provides an illustrative list for such restrictions:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby

3 For a summary of these concepts see Richard Whish – David Bailey: Competition law, Oxford University Press, Oxford, 2021, 140–141.; Dömötörfy – Kiss – Firniksz (footnote 1) 40–44.; Spencer Weber Waller: Justice Stevens and the rule of reason, SMU Law Review, 2009, Vol. 62, Issue 2, 693–724.

4 Both investigations involved many undertakings and their associations. As usual, the cases are named after the undertaking that ranked first in the alphabetical order. Allianz Hungária, being the leading car insurance company in Hungary, was in fact an important actor in the first case, whereas Budapest Bank was just one of the many banks involved in the Hungarian MIF (multilateral interchange fees) investigation, alongside with the two most important card companies, MasterCard and Visa.

placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

A similar prohibition of restrictive agreements is enshrined in 11. § (1) of the Tpvt.: "Any agreement, concerted practice or decision of an association of undertakings shall constitute a violation of the general prohibition if either by object or by actual or potential effect it prevents, restricts or distorts competition". The only difference is that Hungarian law expressly recognizes the distinction between actual and potential effects, which can also be traced back to EU jurisprudence. The illustrative list of 11. § (2) mirrors that of Article 101 TFEU, though it is slightly more detailed, as it includes, for example, a distinct prohibition of hindering market entry.

Business behaviour involving at least two independent actors can thus infringe Article 101 TFEU and its Hungarian equivalent[5], if the competition authority or a plaintiff in a private litigation proves either an anti-competitive object, or non-negligible negative effect on competition. The exact meaning and relation of these two concepts have been clarified through numerous judgments of the EU Courts[6] which was basically followed in Hungarian practice.[7]

2.2. Object or effect: does it matter?

Both "by object" and "by effect" restrictions violate the prohibition of Article 101 (1) TFEU, thus they will be null and void, and can result in other sanctions, such as administrative fines. As the wording of paragraph (3) makes no such distinction, at least in theory, both types of conduct can be exempted from the prohibition under paragraph (3).[8] In practice,

5 I will use the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union ('TFEU') Article 101 for the rest of this article to refer to the prohibition of anti-competitive agreements without mentioning Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices ('Tpvt.') 11. §

6 The General Court of the EU and the European Court of Justice.

7 See for example the summary Decisions of Principle ("Elvi jelentőségű döntések"), most recently published in March 2022, especially decision of principle No. 11.46 with references to EU jurisprudence, the nature of the agreement and mentioning typical forms of unlawful conduct. GVH: A Gazdasági Versenyhivatal Versenytanácsának a Tpvt.-vel kapcsolatos elvi jelentőségű döntései 2021, 9. Available at: https://www.gvh.hu/pfile/file?path=/szakmai_felhasznaloknak/versenytanacsi_dokumentumok/Vt_elvi_jelentosegu_dontesek_Tpvt_2021.pdf1&inline=true

8 In a vertical relationship, see the Judgment of the Court 13 October 2011, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi, C-439/09, EU:C:2011:649. For a horizontal restriction of competition, see the Judgment of the Court 20 November 2008, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd., C-209/07, EU:C:2008:643.

however, it is rather unlikely that "by object" restrictions can fulfil all the four criteria of paragraph (3). In the same vein, "by object" restrictions dominate the agenda of competition authorities, and there is a higher probability of significant fines, as compared to "by effect" restrictions.

The only legal relevance of a correct categorization of an agreement impacts the weight of the burden of proof. The burden of proving the facts which allow the application of paragraph (1) of Article 101 TFEU rests on the competition authority or a private plaintiff, regardless of whether it is a "by object" or a "by effect" case. However, there are significant differences in the weight of that burden. It is easier to argue an infringement of competition rules "by object" than to prove negative effects, especially actual negative effects. The advantage of the "by object" avenue is that there is no need to precisely define the relevant market, or to calculate market shares to see whether the agreement can be of minor importance. No need to involve economic experts, demand and process data covering many years.[9]

Having a closed and clear list of "never even think of it" types of agreements serves legal certainty and foreseeability. Yet, as the presentation of the two Hungarian cases will confirm, the idea, or rather the dream of the existence of two obviously distinct boxes with clear contours, with tightly shaped "pigeonholes" in each of the boxes, can hardly be supported by the jurisprudence of EU courts. From a practical perspective, "by object" type of restrictions will be found unlawful more likely, approximately in 80-95% of the cases[10], whereas the outcome of a "by effect" analysis is less foreseeable.

2.3. By object, hardcore, blacklisted, per se unlawful – a maze of expressions

"By object" restrictions are similar, but not identical to hardcore, blacklisted or per se illegal market behaviour. The terms of *hardcore* and *blacklisted* clauses are used to identify those types of cancer-like provisions which "contaminate" an arrangement to such an extent that they will be excluded from the scope of the block exemption regulations. The benefit of the "blind" exemption, without any individual examination of the facts and the markets will not be available for them.[11] We will see that this category can be wider than that of "by object" restrictions, but is also necessarily narrower as the blacklist is definitive, carved in stone so to speak, whereas jurisprudence may add new items to the list of "by object" infringements.

Per se, or naked restrictions are used especially in U.S. antitrust to label those anti-competitive actions which are condemned under Section 1 of the Sherman Act without a need to look into their market effects. This concept comes close to the traditional narrow, formalistic

9 I would not add as difference the otherwise obvious element of time, because "by object" cases do take years of investigation.

10 A rather high likelihood, but never a 100% foreseeability. This is one reason why it is never boring to work as a competition lawyer.

11 At least in theory, just like any other "by object" or "by effect" anti-competitive agreement, can be exempted from the prohibition under Article 101(3) TFEU.

interpretation of the "by object" infringements of Article 101(1) TFEU. Both categories are shaped by jurisprudence, consequently their content can change over time. Interestingly, the list of *per se* unlawful activities has become narrower in the U.S., in as much as vertical price setting was moved from the rule of reason inquiry[12], making the job of plaintiffs harder, whereas our European "by object" box has a potential to expand and embrace restrictions which are not at first sight obviously anti-competitive. The difference is, at least in theory, that *per se* restrictions are always unlawful, whereas a "by object" restriction can be exempted from the prohibition under Article 101(3) TFEU.[13]

Finally, a word on the *illustrative list* provided by Article 101(1) TFEU. Although the existence of this list has not played a significant role in the development of European jurisprudence[14], it has to be admitted that its existence can support a formalistic approach. Should one follow a strict textual interpretation, a practice fitting into one of these categories shall be declared unlawful immediately, regardless of its context, the intentions of the parties, etc. Nagy, recalling some decisions of the GVH, labels these practices as "presumably illegal", forming a sort of sub-category of "by object" restrictions.[15] Although the list does not distinguish between "by object" and "by effect" cases, as the listing does not mention the need for a detailed, case specific market inquiry, it seems fair to conclude that these arrangements should fit into the "by object" category of infringements. Comparing this list with the jurisprudence of the EU Courts, we can observe that most of these practices have been labelled as "by object" restrictions, Yet, there were also cases where a conduct that formally fits into one of the listed categories was considered not to fall under Article 101 (1) TFEU.[16]

2.4. The evolving list of by "object" restrictions

Based on consistent jurisprudence, rather than the illustrative list of Article 101(1) TFEU, one can draw up a short or an extended list of activities covered by the "by object" test. The obvious candidates are horizontal restrictions of competition, collusions between competitors which restrict prices, outputs, or share markets. A more nuanced enumeration would specifically mention bid-rigging and other market allocation and price setting mechanisms

12 Supreme Court Of The United States Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), No. 06-480.

13 See, for example BIDS.

14 Law enforcement by the Hungarian Competition Authority was different, in as much as whenever a practice could be placed into one of these "pigeonholes", the decision of the Competition Council expressly referred to its number. In the EU cases discussed in this chapter, Budapest Bank is an exception where the Court especially refers to the illustrative list in its reasoning.

15 I would add that if we interpret the illustrative list in a vertical context, their anti-competitive nature becomes less obvious, hence an effect analysis would be required.

16 Consider various ancillary restraints of competition, including for example the application of joint purchase prices by a joint venture of small retailers.

relating to public tenders[17], removing excess capacity, paying competitors to delay the launch of a competing product, manipulating financial benchmarks, or exchanging information that reduces future uncertainties, especially as regards prices, outputs, or customers.[18] One could argue that these are not distinct types of anti-competitive practices by their object, but rather should be understood as sub-categories of the traditional ones. By traditional I also refer to those arrangements which economists would mention as obvious restrictions of competition with negative welfare effects.

Mainly due to the specific goals of EU competition policy, "by object" restrictions cover not only cartels[19], but also some agreements in a vertical, essentially distribution related context. These include the setting of minimum or fixed retail prices and ensuring absolute territorial protection to traders by prohibiting not only active but also passive sales into territories served by other traders. If one prefers a more precise list, one can add various types of export bans, such as prohibiting online sales[20]. Despite its origins in protecting the single market project, national competition law in Hungary follows the same interpretation of vertical "by object" restrictions.

17 For example, under Hungarian practice, these types of cartels include "mirror contracts", or various mechanisms ensuring that each cartel member receives its share from the cake. See, for example Hargita Árpád – Tóth Tihamér: God Forbid Bid-Riggers: Developments under the Hungarian Competition Act, World Competition, 2005, Vol. 28, Issue 2, 205–231.; Robert D. Anderson – Alison Jones – William E. Kovacic: Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement, George Mason Law Review 1233 (2019) 26(4), TLI Think! Paper 5/2019, King's College London Law School Research Paper No. 19–14.

18 See, for example Whish – Bailey (footnote 2) 136.

19 Although the term "cartel" is commonly used by experts of competition law, it was only by Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, and only for the purposes of the directive that a legal definition was adopted by the EU legislator. According to Article 2, (1): 'cartel' means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors. Note that this definition, just like the list of by object restrictions, is an open one ("practices such as, but not limited to…"). This definition was introduced into Hungarian law in 2016; see Tpvt. 13. § (3).

20 AG Villalón summarizes vertical "by object" restrictions in the Allianz Hungária case like this: setting minimum resale prices, establishing absolute territorial protection to a trader and prohibiting distributors from using the internet to sell certain products, unless it is justified objectively in the context of a selective distribution network (point 74 of the opinion). One could argue that this third type of conduct forms part of a wider category of absolute territorial protection (restriction of passive sales as well), instead of being a stand-alone restriction.

2.5. The concept of "by object" restrictions in the jurisprudence

The meaning of "by object" restrictions is defined in EU jurisprudence. "By object" anti-competitive conduct is obviously, *by its nature harmful* to competition, displaying a *sufficient degree of harm* to competition. Proving "by object" restriction of competition is a lighter burden then proving negative effects, yet, it is not as easy as simply reading and understanding the text of an agreement, supposing that there is a written text at all.[21] In the very first judgment where the Court dealt with this topic in 1966 concerning an exclusive distribution agreement, it not only emphasized the alternative relationship of the "by object" and "by effect" categories, but also added that after considering the "*precise purpose* of the agreement", its "*economic context* in which it is to be applied" should also be scrutinized.[22] Evaluating "by object" restrictions has always been more demanding than a simple text reading exercise.

To shed some light on the distinction between "by object" and "by effect" cases, the EU Courts emphasized that in order for a practice to be regarded as having an anti-competitive object, "it is sufficient that it has the *potential to have a negative impact* on competition. In other words, the concerted practice must simply be *capable* in an *individual case*, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market."[23] In contrast to the anti-competitive effects test, where the size of the undertakings concerned is of crucial importance to establish the existence of an infringement of Article 101 (1) TFEU, the existence and extent of such anti-competitive effects is irrelevant under the "by object" heading.[24]

It is not the purpose of this chapter to present the milestones of how the evidential rule has developed over time. Yet, it has to be emphasized that even before *Allianz Hungária*, there had been established case law stating that beyond the *textual dimension* of an agreement, its *economic and legal context* were also to be considered. In addition, although the *intent of the parties* was not a necessary element, this factor could also be taken into account. It is certainly true that recent case law has elaborated on the meaning of the economic and legal context, and also added a less clear *pro-competitive*

21 Obviously, most "by object" restrictions are secrete cartels without formalized agreements, based on informal agreements or a set of concerted practices.

22 Judgment of the Court 30 June 1966, Société Technique Miniére and Maschinenbau Ulm, C-56/65, ECLI:EU:C:1966:38, 249. For other cases, applying the same three elements of text, economic and legal context (also with a reference of subjective purpose): Judgment of the Court of 8 November 1983, NV IAZ International Belgium and others v Commission of the European Communities, C-96/82, ECLI:EU:C:1983:310, 25. Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission.

23 Judgment of the Court 4 June 2009, T-Mobile and others, C-8/08, ECLI:EU:C:2009:343., 31.

24 The effect analysis can have legal consequences, however, for the purposes of calculating the appropriate fine and to award potential damages to a successful plaintiff. Judgment of the Court 4 June 2009, T-Mobile and others, C-8/08, ECLI:EU:C:2009:343., 31.

defence layer, but these seem to be evolutionary rather than revolutionary changes, the necessary implications of the atypical facts of those cases.

The above mentioned components of the "by object" test do not necessarily have the same weight in the legal analysis. Some types of market conduct, like a price cartel, are by experience anti-competitive to such an extent that the courts do not put much weight on the analysis of their legal and economic context.[25] One could also say that steps following the formal categorization of the conduct as a typical "by object" case function as a kind of safety check. As AG Bobek put it, the main reason is to avoid condemning an innocuous or procompetitive agreement on the basis of an abstract, formalistic analysis.[26] The competition authority should thus check whether there are *specific circumstances* that may cast doubt on the presumably harmful nature of an agreement.

The quantity and quality of evidence needed to prove these various elements of "by object" restrictions is subject to some uncertainty. In its opinion on *Budapest Bank*, AG Bobek acknowledged the difficulty of distinguishing "by object" from "by effect" restrictions due to existence of this second step of the "by object" test.[27] However, common sense and the structure of Article 101 TFEU should help. Obviously, even if there seems to be some overlap between the elements relevant for the purposes of "by object" and "by effect" analysis, especially as regards the market structure, its depth under the "by object" category should not be equated with the kind of market analysis required for "by object" restrictions. This cannot be supported by the text of paragraph (1), which does make a distinction between "by object" and "by effect" practices. The Court confirmed this in *Toshiba*: 'the analysis of the economic and legal context of which the practice forms part may … be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object'.

In order to provide a context for the discussion of the famous Hungarian cases, I provide a list of the most important cases of the past 15 years relevant to the interpretation of "by object" restrictions, mainly driven by preliminary rulings linked to national enforcement of competition rules.

25 See, for example: Judgment of the Court 18 January 2024, Lietuvos notarų rūmai and Others, C-128/21 ECLI:EU:C:2024:49, 95–96.

26 Opinion of Advocate General 12 January 2023, Lietuvos notarų rūmai and Others, C-128/21, ECLI:EU:C:2023:16, 45.

27 Opinion of Advocate General 12 January 2023, Lietuvos notarų rūmai and Others, C-128/21, ECLI:EU:C:2023:16, 45.

Case	Year of judgment	Type of action	Market	Issues
C-501/06 P GlaxoSmithKline	2009	Review of a GC judgment	Pharma	Restricting parallel trade
C-8/08 T-Mobile	2009	Pr. R., the Netherlands	Telecoms	Exchange of information
C-439/09 Pierre Fabre	2011	Pr. R., France	Cosmetics	Prohibition of internet sales
C-32/11 Allianz Hungária	2013	Pr. R[28]., Hungary	Insurance and car repair services	Complex set of horizontal and vertical agreements, mixing price setting with incentives towards single branding
C-67/13 P Cartes bancaires	2014	Annulling a judgment of the GC[29]	Bank cards	Regulating interchange fees
C-286/13 BIDS	2015	Pr. R., Ireland	Beef slaughter houses	Collective reduction of output during a crises
C-345/14 SIA 'Maxima Latvija'	2016	Pr. R., Latvia	Access to commercial centre space	Anchor tenant's right to competing tenants in the same commercial centre
C-179/16 Hoffman La Roche (Italy)	2018	Pr. R., Italy	Pharma	Misleading information campaign to divert demand towards more expensive medicine
C-228/18 Budapest Bank	2020	Pr. R., Hungary	Bank cards	Interchange fees set between card companies
C-591/16 P Ludbeck	2021	Review of a GC judgment	Pharma	Pay for delay
C-307/18 Generics UK	2022	PR. R., UK	Pharma	Settlement agreement not to challenge a patent and refraining from entering a market
C-211/22 Super Bock Bebidas	2023	Pr. R., Portugal	Food distribution	Fixing minimum resale price
C-883/19 HSBC	2023	Review of a GC judgment	EURIOBOR interest rates	Manipulation of interest rate creating an informational asymmetry between market participants
C-331/21 EDP	2023	Pr. R., Portugal	Energy resale	Non-compete clause in a mixed horizontal/vertical relationship
C-124/21 P ISU	2023	Annulling a judgment of the GC	Sports organization	Restricting participation in competitions organized by others
C-680/20 Royal Antwerp FC	2023	Pr. R., Belgium	Sports organization	Restricting the number of own recruit players
C-333/21 European Superleague	2023	Pr. R., Spain	Sports organization	Restricting participation in other championships
C-128/21 Lithuanian notaries	2024	Pr. R. Lithuania	Association of notaries	Standardising the method of price calculation

28 Preliminary ruling as under Art. 267 TFEU. Most of the national judicial procedures related to a decision of the competent national competition authority.

29 General Court of the EU.

We can observe that most of the cases were horizontal restrictions and related to regulated markets posing complex competition issues, such as financial services with two-sided market features, pharmaceutical markets involving intellectual property issues, or agricultural markets, where competition rules have a delicate role to play. It is therefore not surprising that these special market circumstances created unusual restrictions of competition testing the boundaries of "by object" restrictions.

This table shows the relatively important role Hungarian cases played in the development of EU jurisprudence. Considering the size of the country and its economy, the two cases suggest an importance matched only by Portugal. It is also interesting to note the dominance of preliminary rulings which means that provocative questions arose mainly in the national enforcement procedures of Article 101 TFEU.[30]

However, significance can be measured in other ways too. Take for example the number of grand chamber cases before the EU Court of Justice. Assigning a case to a grand chamber signals the importance of the case for the development of EU jurisprudence. Interestingly, only two of the cases mentioned above were decided by a grand chamber (*Hoffman Laroche* and *ISU*), the Hungarian cases, however important they seem to us Hungarians, were handled by panels of five judges.

One can also count the references in other judgments. From this perspective, *Allianz Hungária* is indeed influential with 36 references, but the frontrunner is *CB* with 47 and also *BIDS* comes close with 34 references. In contrast, *Budapest Bank* has been referenced only six times, whereas other cases from the same period show significantly higher results: *Hoffman La Roche* 28, *Generics UK* 26.[31] This proves that *Allianz Hungária*, in contrast to *Budapest Bank*, did indeed have a significant impact on the development of the jurisprudence of EU courts.

3. *Allianz Hungária*: horizontal and vertical restraints involving the insurance and car repair markets

3.1. The GVH procedure

The GVH started an investigation targeting a set of agreements concluded by Allianz and Generali, the two leading insurance companies at the time with motor vehicle

30 To be noted: in the case of Allianz Hungária, the Competition Council of the GVH applied only national competition rules. Yet, based on the similarity if not identity of those with Article 101 TFEU, the Court admitted reference from the Kúria.

31 I am grateful for the research assistance provided by my assistant Gyalog Renáta and Somogyi Olívia. Date of research: 28 February 2023.

insurance brokers.[32] The fine of HUF 6.8 billion (approximately EUR 27.8 million) imposed was among the highest at the time. [33]

The story began with Gémosz, the national association of car dealers that adopted a list of recommended prices for car repair services. To accept increased hourly repair charges, the two insurance companies concluded incentive agreements resulting in higher remuneration on condition of successfully increasing the share of Allianz's, or, respectively Generali's liability and CASCO insurances sold to buyers of new cars. The incentives had been formulated in various ways, each of which was held anti-competitive by the GVH:

- setting the number of insurance contracts to be concluded by the broker;
- setting the percentage of insurance contracts the broker had to conclude on behalf of the insurance company, and setting a minimum amount of contracts on a monthly basis;
- agreeing that the number of contracts concluded on behalf of the insurance company had to exceed the number of contracts concluded during a previous reference period;
- agreeing on a scale of broker fees the level of which increased if the broker sold more contracts on behalf of the insurance company.

The GVH was also concerned that supposedly independent brokers will not provide impartial advice due to these incentives. The Competition Council of the GVH held that these agreements were anti-competitive by object because they caused a serious conflict of interest and interfered with the requirement of impartial and professional advice imposed by Hungarian financial regulations. The investigation by the GVH found that the recommended prices made it possible for the car dealers to restrict price competition, and the combination of vertical and horizontal agreements could have foreclosed the car insurance market in relation to smaller insurance companies. Consumers were harmed through higher insurance fees and increase in repair shop rates well above the annual rate of inflation. The agreements were vertical in their nature as they related to the promotion of a specific service, however, there was also a horizontal dimension due to the involvement of GÉMOSZ, which co-ordinated the conduct of car dealers. It should be noted that there was no evidence as to a potential collusion between the insurance companies. The GVH proved the infringement of Tpvt. 11. § on the basis of the "*by object*" criterion, but also added that the increased market shares of Allianz and Generali show that the agreements also had negative market effects.

32 Cseres Katalin J. – Szilágyi Pál: The Hungarian Car Insurance Cartel Saga, Landmark Cases in Competition Law – around the World in Fourteen Stories, 2013, 145.

33 Vj-51/2005/184.

3.2. Judicial review of the GVH decision

Following appeals by the undertakings and GÉMOSZ, the Metropolitan Court amended the decision of the GVH.[34] The first instance review court refused the plaintiffs' attack on the horizontal price recommendation cartel, confirming that it was by object anti-competitive and therefore the GVH had no obligation to demonstrate the actual or potential effects on the market. However, the part of the decision relating to vertical relations was annulled in as much as it concerned the restrictions listed above under point d). The court found that the relations between the insurance companies and insurance brokers should be analysed independently by the competition authority. Yet, the court did not criticize the GVH's evaluation as regards the characterization of the conduct as anti-competitive "by object", since the parties not only incorporated the insurance commissions in the hourly repair rates, but linked the increase of the commission to achieving certain market shares.

The Metropolitan Court of Appeal modified the first instance judgment in favour of the GVH.[35] The review court agreed with the competition authority that in order to evaluate the facts, the activities of all market participants had to be considered. As regards the topic of this chapter, the review court made it clear that the prohibition of anti-competitive agreements does not require proof of intent. Indeed, the term "by object" is an objective concept and should not be confused, as the first instance court's reasoning did, with subjective intent. Furthermore, as the anti-competitive object of the vertical agreements on target commissions was clearly established, the GVH was not obliged to prove their effects.

Finally, the Kúria, the supreme court of Hungary, by allowing an application requesting a special legal review, annulled the second instance judgment and sided with the conclusions of the first instance review court.[36] The Kúria requested a preliminary ruling solely concerning the agreements concluded with the repair shops. This was interesting in as much as the GVH procedure was conducted only under Hungarian competition rules, given that some of the market conduct pre-dated the country's EU accession date of May 1, 2004. However, as the two provisions are basically identical, and the EU case law on the distinction between "by object" and "by effect" restrictions was not instructive, the Kúria did it right to turn to the judges in Luxembourg. With the resulting judgment of the EU Court, *Allianz Hungária*, became one of the most frequently cited case as regards the interpretation of "by object" restrictions.

34 Metropolitan Court judgement no. 7.K.31.116/2007/44.

35 Metropolitan Court of Appeal judgement no. 2.Kf.27.129/2009/14.

36 Supreme Court judgement no. Kfv.IV.37.077/2010/11.

3.3. The procedure before the EU Court

AG Cruz Villalón came to the conclusion that the bilateral agreements between the insurers and the repair shops were not anti-competitive by object, unless there was a horizontal agreement or concerted practice. The Court did not exactly follow AG Cruz Villalón's opinion and ruled[37] that the agreements between the insurance companies and the repair shops, stipulating that the scale of the remuneration paid by the insurer depended on the number and percentage of insurance products the dealer-broker sold as intermediary, can be considered a restriction of competition 'by object', where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it was apparent that they were, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.

Recalling *BIDS* and *T-Mobile Netherlands*, the judges emphasized that the distinction between "by object" and "by effect" 'infringements arises from the fact that "certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition."[38] The first category does not require the analysis of actual negative effects on competition. It is sufficient that it has the potential, in other words, it is capable to have such negative result.[39]

Based upon Expedia, the Court explained as regards the context of the agreement, that it is "appropriate" to take into consideration the nature of the goods or services, as well as the real conditions of the functioning and structure of the market or markets.[40] The agreements referred to the Court link the remuneration for the car repair service to that for the car insurance brokerage based on the dealers' dual capacity, acting as insurance brokers and as repair shops. The Court seems to have had some hesitation whether this agreement linking the two distinct activities was by its nature injurious to the proper functioning of normal competition, as it endangered the independence of those activities and was likely to affect not one but two markets.[41]

It was obvious for the Court that the insurance companies intended to increase their market shares through these agreements. If they had done that following a horizontal agreement or concerted practice, this would have resulted in a "by object" in-

37 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160.

38 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160., 35.

39 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160., 38.

40 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160., 36.

41 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160., 41–42.

fringement of Article 101 (1) TFEU. Even in the absence of such horizontal co-operation, the two sets of vertical agreements could qualify as "by object" infringements, if after an analysis of their economic and legal context they were sufficiently injurious to competition on the car insurance market. At this point it can be decisive whether the dealers act on behalf of the policy holder, or for the insurer. We must recall that this was one of the main concerns of the Hungarian Competition Authority. However, the Court did not elaborate on this option but rather invited the Kúria to determine whether the proper functioning of the car insurance market was likely to be significantly disrupted by the agreements.[42]

The Court added that the agreements would also amount to a restriction of competition by object if "competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, the court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance, and the market power of the companies concerned."[43]

This argument is difficult to follow. First, it is not clear which market the Court had on its mind: competition between the insurance companies or rivalry among the small car repair shops, or both? The existence of alternative distribution channels may refer to the insurance market, where Allianz and Generali were the two most important players, which makes the reference to market power understandable. Still, this reference may cause some problems in as much as it uses phrases which are typically associated with the "by effect" analysis of agreements. Furthermore, it is questionable to what extent it is a different, alternative "by object" scenario compared to the previous one mentioned in paragraph 47 of the judgment.

Finally, as regards the car repair service market, the Court recalled that it is necessary to take into account that the agreements were concluded on the basis of the recommended prices established by GÉMOSZ from 2003 to 2005. This statement also seems to be in harmony with the concerns of the Hungarian Competition Authority.[44] The Court opened the door for a "by object" categorisation if the decisions of GÉMOSZ to harmonise hourly charges for car repairs had been confirmed by the insurance companies.

I believe that the preliminary ruling was not a clear win for the plaintiffs. One could conclude that the Court, considering the special circumstances of the case, although not being enthusiastic about it, acknowledged that there can be circumstances under which such an agreement could be held unlawful by its object. Yet, we will see that the Kúria drew different conclusions from the judgment.

42 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160., 47.

43 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160., 48.

44 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160., 49.

3.4. National follow-ups of the preliminary ruling

The Kúria annulled the second instance judgment and confirmed the ruling of the first instance review court that had ordered the GVH to re-examine the vertical aspects relating to the target incentives offered to car dealer repair-shops. This approach was mainly driven by procedural illegalities relating to the infringement of the rights of defence, failure to exactly identify the scope of the investigation and the shortcomings of factfinding. The reasoning of the judgment is rather short on the interpretation of the preliminary ruling. In fact, what the Kúria did was to quote the operative part thereof, then summarized how the parties interpreted the EU Court ruling, and finally noted that it took the EU Court's interpretation into account. However, the Kúria makes no references to the reasoning of the EU Court when it elaborates on its own reasoning.

Following the judgment of the Kúria, in 2014, the GVH started a new investigation into the target bonus contracts as regards the years 2000-2005. Finally, in 2018, the competition authority issued a commitment order under which the two insurance companies agreed, among others, not to conclude such contracts for five years.[45] Although such an order never establishes an infringement of Article 101 (1) TFEU, the reasoning makes it clear that the Competition Council, in light of the preliminary ruling, was unable to establish anti-competitive objectives. In order to avoid lengthy investigation into anti-competitive effects, the authority accepted the commitments offered.

4. The Budapest Bank case: co-ordinated regulation of MIF

4.1. The procedure of the GVH

The Competition Council of the GVH found in 2009, three years after its Allianz Hungária decision, but well before the corresponding preliminary ruling of the EU Court of Justice, that an agreement concluded in 1995 between 22 Hungarian banks regulating multilateral interchange fee (the MIF agreement), supported by MasterCard and Visa, amounted to an anti-competitive agreement by its object and also by its effect under both Hungarian and EU competition rules.[46] The investigation, unlike similar procedures at EU level and some Member States, involved not only one of the two card companies, but almost every bank operating in Hungary.

45 VJ/32/2014.

46 Vj-18/2008. This sort of "to be on the safe side" approach led to fierce litigation, as will be presented in this piece.

The GVH categorized the MIF agreement as a restriction of competition "by object" as it indirectly determined the service charges paid by retailers on the acquiring market of bank cards. The subject matter of the investigation posed complex economic and policy issues which had to be answered in an international context. Interchange fee arrangements were subject to various procedures at EU level, in some Member States, as well in the U.S. At that time the European Commission just opened a proceeding against Visa Europe in relation to its cross-border MIFs as well as to certain domestic MIFs.[47] The Hungarian competition authority sent its draft decision, the preliminary position of the Competition Council to the EU Commission which did not criticize the "by object" approach.[48] Visa argued that the GVH breached the principle of uniform application of EU law by failing to conform to the findings of the Commission in the Visa II Decision, where the Commission did not consider the MIF agreement to be a restriction of competition by object, although this possibility was not excluded either.[49] Similarly, the Commission found MasterCard's MIF regulations to be unlawful following a by effect analysis. On appeal, a few years later, the General Court found no irregularities with the Commission's effect analysis.[50]

A five-member panel of the Competition Council adopted an infringement decision with modest fines.[51] This was the end of a long administrative procedure, but just the beginning of an even lengthier judicial review phase.

4.2. Judicial review of the GVH decision

The decision of the Competition Council was challenged before the Budapest Administrative and Labour Court which dismissed the action. On appeal, however, the Budapest High Court annulled the contested decision in part, finding that it was not possible for a conduct to constitute both a restriction of competition "by object" and "by effect". It also held that the agreement in question did not qualify as a restriction of

47 The Commission issued a statement of objections just before the Competition Council of the GVH adopted its final decision.

48 It is likely that the EU competition experts regarded the Hungarian decision as a test case. At that time there was no EU case law on whether MIFs require a detailed competition law assessment under the "by effect" heading or whether the "by object" shortcut can be applied.

49 Commission Decision of 29. April 2019. relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, AT.39398 – Visa MIF, C/2019/3034, OJ C 299, 4.9.2019, p. 8–11, 69. The same approach was followed in MasterCard, point 407. The Commission made no substantial criticism during the GVH procedure either.

50 Judgment of the General Court 24 May 2012, MasterCard and Others v Commission, T-111/08, ECLI:EU:T:2012:260, 137.

51 The seven founding banks (Budapest Bank, OTP Bank, MKB Bank, CIB, Erste, K&H Bank and ING Bank) were fined a total of HUF 968 million (at that time EUR 3.57 million), and the two payment card organizations received a fine of HUF 477 million each (EUR 1.76 million each).

competition by object. The GVH lodged an extraordinary appeal with the Kúria. It was this court that decided to stay the proceedings and refer questions as to the interpretation of Article (1) TFEU to the CJEU.

4.3. The procedure before the EU Court

The EU Court's preliminary ruling delivered in April 2020[52] made it clear that although in most cases an agreement is unlawful either by object or by effect, it cannot be ruled out that it can fit into both categories. However, when a competition authority classifies the same anti-competitive conduct as a restriction "by object" and "by effect", it should support each of these findings with the necessary evidence, specifying which evidence relates to the "by object" and which to the "by effect" analysis of the restriction.[53]

Discussing the essence of "by object" restrictions, the Court mentioned horizontal price-fixing by cartels as considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it is unnecessary to prove their actual effects on the market. This is because "experience shows that such behaviour leads to fall in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers".[54]

Although the preliminary ruling did not clearly classify the MIF agreement as a restriction of competition "by object", the Court gave a detailed methodology to the Kúria for this purpose. Following AG Bobek, the five-member panel of the Court recalled that recent case-law interprets the concept of restriction of competition "by object" restrictively, meaning that it can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition so that it is unnecessary to examine their effects.[55]

As to the content of the agreement, the Court concluded that the MIF agreement did not directly set prices. It standardised a cost element the acquiring banks faced to the benefit of the issuing banks in return for the services triggered by the use of the cards issued by the latter banks. However, quoting Article 101 (1) a) TFEU, the Court

52 Judgment of the Court 2 April 2020, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, C-228/18, ECLI:EU:C:2020:265.

53 Judgment of the Court 2 April 2020, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, C-228/18, ECLI:EU:C:2020:265, 43.

54 Judgment of the Court 2 April 2020, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, C-228/18, ECLI:EU:C:2020:265, 36. The judges did not elaborate upon whose and what kind of experience is relevant for this purpose.

55 Opinion of Advocate General 5 September 2019, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, C-228/18, ECLI:EU:C:2019:678, 40., 54.

reminded that indirect price fixing may also be unlawful "by object".[56] Furthermore, the Court emphasized that the list of "by object" restrictions listed in Article 101 (1) is not exhaustive, thus the MIF agreement may be classified as a restriction "by object" if it neutralised one aspect of competition between two card payment systems.[57] Looking again at the content of the agreement, the Court did not find it unlawful "by object". It took into account that although the fees were set uniformly, and even some of the earlier uniform fees increased over the years, yet other fees were kept at the same level. In addition, over the lifespan of the MIF agreement, between 1996 and 2008, the levels of the interchange fees decreased on several occasions.

AG Bobek was more elaborate on the point of the content of the agreement. He emphasized that the key aim was to ascertain whether the agreement falls within a category of agreements whose harmful nature is, in the light of experience, commonly accepted and easily identifiable. Unlike the Court, he explained that this experience may be understood to refer to "what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law".[58]

In contrast to its advocate general, the Court devoted several thoughts to the issue of the objectives. For AG Bobek, following a formal examination of the content of the agreement, the next step is the analysis of the economic and legal context. The Court repeated his formula that this should take into account "the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the markets".[59] Finally, although not necessary, the intentions of the parties can also be considered.

Next, as regards the objectives pursued by the MIF agreement, the Court referred to its CB judgment acknowledging the balancing role played by such agreements in the case of two-sided card payment systems.[60] The nature of the services, as well as the real conditions of the functioning and structure of the markets, all these being part of

56 This reference to the non-exhaustive list of paragraph (1) is rather unusual. It may be understood as if the types of co-ordinations listed there were automatically "by object" restrictions.

57 Judgment of the Court 2 April 2020, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, C-228/18, ECLI:EU:C:2020:265, 63.

58 Opinion of Advocate General 27 March 2014, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:1958, 42, 79.

59 Opinion of Advocate General 27 March 2014, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:1958, 43.; Judgment of the Court 2 April 2020, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:2204, 51.

60 Judgment of the Court 2 April 2020, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:2204, 66. This statement neither excludes, nor confirms the anti-competitive nature of MIF agreements, it seems that a case by case approach is required.

the economic or legal context, help understand the objectives of coordination.[61] Based upon the limited information available in the file, the Court seems to have a slight preference for concluding that the object of the MIF agreement was not to guarantee a minimum threshold for service charges, but rather to establish a degree of balance between the issuing and acquisition activities within each of the card payment systems.

The Court acknowledged, following the concerns of the referring court that, by neutralising competition between the two card payment systems as regards the aspect of cost represented by the interchange fees, the MIF agreement could have had the result of intensifying competition between those systems in other respects. However, such a counterfactual analysis belongs to the "by effect" territory.[62] Referring again to AG Bobek's opinion, there is no sufficiently reliable and robust experience to conclude that the MIF agreement was, by its very nature, harmful to the proper functioning of competition.

The Court did not take a stance in the debate whether competition between the card payment systems in Hungary would have triggered an increase in interchange fees.[63] However, it pointed out that if the file includes strong indications capable of demonstrating that the MIF Agreement triggered upward pressure on fees, this should be taken into account when the anti-competitive object of the agreement is considered.[64] On the other hand, if evidence shows that the argument of the undertakings about the downward pressure is well established, than the competition authority can establish the infringement of Article 101 (1) TFEU only following an in-depth examination of the effects. This requires examining competition in the absence of that agreement in order to assess its actual impact on the parameters of competition.[65] AG Bobek also emphasized that this analysis cannot stop at the mere capability of the agreement to negatively affect competition, but must determine whether the net effects of the agreement on the market were positive or negative.[66]

61 Judgment of the Court 2 April 2020, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:2204, 67.

62 Judgment of the Court 2 April 2020, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:2204, 75.

63 According to the arguments of the undertakings, in this special market merchants can exert only limited pressure on the determination of interchange fees, while it is in the issuing banks' interest to increase their revenue from higher fees.

64 Judgment of the Court 2 April 2020, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:2204, 82. This may also show how difficult it can be to clearly distinguish the "by object" and the "by effect" legal analysis.

65 Judgment of the Court 2 April 2020, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:2204, 83.

66 Opinion of Advocate General 27 March 2014, Groupement des cartes bancaires (CB) v European Commission, C-67/13 P, ECLI:EU:C:2014:1958, 50.

4.4. National follow-ups of the preliminary ruling

Following the CJEU judgment, the Kúria ordered the GVH to conduct a new procedure and gave detailed guidance for that purpose in 2020.[67] The judgement followed the preliminary ruling, and unlike the Kúria's judgment on Allianz Hungária, it gave a precise recollection of the statements of the EU Court. It explained that the competition authority is relieved of its obligation to examine the effects of a conduct if it falls into the category of "by object" restrictions. The Kúria also noted, drawing a clear line between the two categories, that "by object" restrictions are rarely exempted under paragraph (3) and they are subject to more severe legal consequences.[68] The judgment emphasized that if the GVH were to choose to characterize the infringement as anti-competitive both "by object" and "by effect", a distinction should be made as to these two different sets of legal bases, especially when the conditions for exemption and the level of fines are explained.[69]

The Kúria concluded that although the GVH can pursue the case under the "by object" part of Article 101 (1) TFEU, yet new evidence is required for that purpose, in line with the preliminary ruling of the EU Court of Justice. Due to the special features of the market, it was not evident that an agreement setting the same level of fees for both card companies was able to restrict competition. The judgment follows the opinion of AG Bobek as well in as much as it stresses that categorizing a certain type of conduct as a restriction of competition by its nature should be supported by a consensus among economists. This seemed natural to the judges in as much as the restriction of competition is fundamentally an "economic notion".[70]

The Kúria also noted that the GVH will be in a comfortable position when re-examining the case. If data shows that the two card companies introduced different and especially lower fees following the termination of the MIF agreement, this could support the argument that the conduct was unlawful by its object. In the absence of such data, however, a thorough effect analysis will be required.[71] This is all the more necessary as the GVH's original decision included just a "speculative" economic reasoning instead of a proper counterfactual analysis.

The GVH had already repaid the fine to the parties following the final judgment of the second level administrative court. Now, the competition authority is still working on the adoption of a new decision on facts which occurred more than twenty years

67 Supreme Court judgement no. Kfv.II.37.385/2020/17.

68 Supreme Court judgement no. Kfv.II.37.385/2020/17., 90.

69 Supreme Court judgement no. Kfv.II.37.385/2020/17., 94. This part of the judgment is not entirely clear. It seems that the Kúria expects two parallel reasoning as regards Article 101 (3) TFEU and as regards the calculation of the fines if the same conduct was qualified under two different legal bases. It is difficult to see how this can be carried out in practice.

70 Supreme Court judgement no. Kfv.II.37.385/2020/17., 124.

71 Supreme Court judgement no. Kfv.II.37.385/2020/17., 131–132.

ago, trying to solve a problem which had long been regulated, mainly based upon the experience gained in the course of the first GVH investigation.

5. Conclusions: Allianz and Budapest Bank: was there really a change?

Did Allianz Hungária intend to signal a change of paradigm? Is there really a new approach to interpreting "by object" restrictions, or what we witnessed was just applying the existing test to a rather special and complex set of facts which were difficult to be clearly explained before the EU Court of Justice? I would argue that the significance of these two cases is a bit exaggerated, especially in the Hungarian literature.

A claimed novelty of the Budapest Bank case was the parallel application of the "by object" and the "by effect" tests. However, the concept of "dual enforcement", although rarely applied, was not unprecedented. In the eighties, in a Belgian case involving the restriction of imports of washing machines through a conformity label, both the Commission and the Court regarded the recommendation of the water utilities' association as a "by object" and "by effect" restriction of competition.[72] Later, in a vertical context, the Commission held GSK's general terms restricting parallel trade in pharma products as unlawful both "by object" and "by effect". The Court of First Instance carried out the same dual legal evaluation under Article 101 (1) TFEU and held that the Commission did not prove anti-competitive object in the specific regulatory context, however, it was correct to rely on negative market effects.[73] On appeal, the Court agreed that the Commission was entitled to hold the practice unlawful under the "by object" heading, hence there was no need to discuss the legality of the "by effect" analysis. These twists-and-turns in GSK show that in some complicated cases, challenging an agreement as unlawful both "by object" and "by effect" has its merits.

A number of competition law experts expressed criticism about the Court's approach started with Allianz Hungária[74] in 2013, arguing that judges were blurring the

72 Judgment of the Court of 8 November 1983, NV IAZ International Belgium and others v Commission of the European Communities, C-96/82, ECLI:EU:C:1983:310, 24. Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission. I should add that the effect analysis, at least in the Court's judgment was limited to one paragraph, or even to one sentence in which the judges stated that as the undertakings participating in the practice, which had been in fact implemented, reached 90% of the market, it had a restrictive effect on competition.

73 Judgment of the Court of First Instance 27 Spetember 2006, GlaxoSmithKline Services Unlimited v Commission of the European Communities, T-168/01, ECLI:EU:T:2006:265.

74 Judgment of the Court 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160.

distinction between "by object" and "by effect" infringements.[75] The EU Courts now seem to expect a sort of counterfactual analysis76 of not only "by effect" but also "by object" infringements. Taking the context seriously could mean that the evaluation of the object of an agreement can be almost as detailed as that of its effects.

Yet, as Cseres and Szilágyi point it out, the complex set of agreements which was subject to scrutiny in the Allianz Hungária case has to be considered in its unique market context. Both Hungarian cases discussed in this chapter remind us that the examination of clearly anti-competitive nature requires a case-by-case process, the depth of which should depend upon the specifics of the case.[77] As the agreements investigated by the GVH could not have been categorized as traditional price cartels, but seemed to come close, it should come as no surprise that the EU Court insisted on a more careful examination of the objects of the agreements. "By object" should be interpreted restrictively, which indirectly means that the starting point should be a "by effect" analysis.

Both cases featured an important horizontal element. Allianz Hungária featured vertical agreements enforcing a market-cleaning horizontal price agreement promoted by the association of car dealers. In the case of Budapest Bank, the arrangement did not simply regulate an important cost element of a card payment system, but also involved co-ordination between competing card companies. Another difference compared to similar EU MIF cases, although not raised in the preliminary ruling, was that the same fees were set for debit and credit cards, whereas in most EU countries the fees for debit cards were significantly lower than the fees for credit cards. In addition, neither the banks nor the card companies prepared cost studies predating the introduction of the MIF and the fees did not significantly change in response to market developments. The Competition Council's "by object" conclusion might have been influenced by the fact that, before the MIF agreement, the same banks had also set a minimum level of merchant surcharge. However, this cartel-smelling conduct had ceased to exist long before, so it could not have been challenged by the GVH. Finally, the arrangement was secre-

75 Nagy Csongor István: Are Payment Card Systems' Multilateral Interchange Fees Anticompetitive by Object under EU Competition Law? Competition Policy International, 2020; Marian Ioannidou and Julian Nowag: Can two wrongs make a right? Reconsidering minimum resale price maintenance in the light of Allianz Hungária. European Competition Journal, 2015, Vol. 11, Issue 2–3, 340–366.; Gál (footnote 2) 27–54.

76 This concept requires an analysis of the conditions of competition that would have existed in the absence of an agreement. In this case, the parties argued that the agreement was not restrictive by object because, in its absence, the conditions of competition would have been worse, i.e. the level of the MIF would have been higher.

77 Tóth András concludes in the same vein, referring to Pablo Ibáñez Colomo, that a distinction can be made between prima facie and non prima facie restrictions of competition by object. Pablo Ibáñez Colomo: Legal Tests in EU Competition Law, Taxonomy and Operation, Journal of European Competition Law & Practice, 2019, 43.

tive, which is a typical sign of a true conspiracy.[78]

Allianz Hungária is often criticised for extending the category of "by object" restrictions under Article 101 (1) TFEU and for blurring the distinction between "by object" and "by effect" restrictions of competition.[79] The first concern is unfounded, as long as we accept the thesis that the category of "by object" restrictions has never been a closed one. Following market developments and new competitive strategies, especially in complex regulated markets, the list of infringements can be, and has been, broadened.

As to the second criticism, the Court indeed held that it is appropriate to consider "the real conditions of the functioning and structure of the markets", "the existence of alternative distribution channels and their respective importance" and "the market power of the companies" for the purposes of a "by object" analysis. It is fair to say that such issues are investigated typically under the "by effect" heading. However, some overlap between these two different kinds of analysis is acceptable, as both "by object" and "by effect" investigations seek to answer the question to what extent competition was affected by market conduct.

The jurisprudence before Allianz Hungária supports the argument that minimizing the "by object" concept to a purely formalistic approach is difficult to sustain.[80] There is no judgment referring to a list of "by object" restrictions carved in stone. This may present an important difference between how economists and lawyers look at harmful co-ordinated actions. A formal approach focusing on the content of the agreement does exist, but it is only the starting point of the examination. Beyond the textual analysis of its objective, the mission of the agreement has always been relevant. To understand the objective, depending upon the nature of the restriction, an inquiry into the legal and economic context is also often necessary. Needless to say, competition law enforcers had an easier task to establish a "by object" infringement if documentary evidence showed a clear intention to limit rivalry at the expense of customers.

78 In fact, some of the minutes included references to other anti-competitive collusions among the banks related to the card industry, which were not investigated by the case handlers.

79 See, among others: Dan Harrison: The ECJ's judgment could have ugly consequences, Competition Law Insight, 11 June 2013, 10., 38–39. (after voicing some fears, concluding that the specificities of the case make it unlikely that Allianz Hungária would become a "wide-ranging authority". András Tóth, considering the agreement in essence a single branding type of restriction, argues that the alleged extension of the "by object" category was not justified on the basis of the facts of the case, some of which might have been misinterpreted by the EU Court. Tóth (2021) (footnote 2) 38–39.

80 The same is argued by Pablo Ibáñez Colomo: Form and Substance in EU Competition Law. Available at: https://ssrn.com/abstract=4570358 or http://dx.doi.org/10.2139/ssrn.4570358.

András Osztovits

The first experiences of Hungarian private enforcement cases for cartel damages: does the force awaken?

1. Introduction

The heart of European economic integration is the Single Market, which can only function properly and provide economic growth and thus social welfare if effective competition rules ensure a level playing field for market players. The real breakthrough in the development of EU competition policy in this area came with Regulation 1/2003/EC, and then with Directive 2014/104/EU which complemented the public law rules with private law instruments and made the possibility to bring actions for damages for infringement of competition law easier.

It is not an exaggeration to say that the CJEU has consistently sought in its case-law to make this private enforcement as effective as possible, overcoming the procedural and substantive problems that hinder it. One of the reasons for this is certainly the professional consensus that the fight against cartels is a priority economic and legal aim among anti-competitive practices.[1] Despite the growing powers of the national and regional competition authorities and their increasingly effective procedural and investigative methods, the institutions with regulatory powers are not sufficient in themselves to achieve this. One reason for this phenomenon is that the amount of the fine is also a predictable expense which is many times outweighed by the amount of extra profit made by the cartel members. Increasing attention is therefore being paid to private enforcement,

1 Nagy Csongor István: A kartelljog dogmatikai rendszere, HVGORAC, Budapest, 2021., 109-113.

which is complementary to public enforcement, with the aim of enabling victims to claim damages directly from the cartel members and to ensure that the amount of damages awarded, together with the fine imposed in the competition proceedings, is sufficient to discourage undertakings from engaging in anti-competitive behaviour.[2]

The effectiveness of regulation and legal protection is particularly important against cartels in the context of public procurement procedures, given that in such procedures they directly harm the state, the state budget, and jeopardise investments made with public funds. It is useless for the competition authority to detect and fine such practices if the state is then unable to effectively enforce its private claims. This is particularly true in countries where the state is currently the largest investor.

It is no coincidence that the first competition damage claims to reach the Hungarian Supreme Court (Kúria) were related to public procurement cartels. In these cases, the Kúria was the first to examine, in the light of the defendants' arguments, the concept of the victim, causality, limitation, joint damages, etc.[3] No decision of the Kúria is known to have ordered the cartel members to pay compensation for the damage caused by the cartel as established by a GVH decision. One reason for this is that the Kúria can only rule on points of law which the parties raise in their application for review as breaches of law, due to the strict legal provisions of the review procedure. If a case or a question of law is not brought before the Kúria, there is a risk that it will be interpreted and decided differently by the lower courts for many years. A particular significance of the decisions of the Kúria is that since 1 April 2020, when the so-called limited precedent system was introduced, the decisions of the Kúria are - as a general rule - binding on the courts.[4]

The next wave of competition damage claims, which is much larger in terms of the number of cases, started in 2018, following the European Commission's decision[5] in the truck cartel case, as follow-on actions. Due to the territorial jurisdiction rules of the Hungarian Civil Procedure Act[6], these were brought before different courts, sever-

2 Csöndes Mónika – Fenyőházi András: A versenyjogi jogsértéssel okozott károk, In: Polauf Tamás (ed.): Versenyjogi kártérítési perek, Wolters Kluwer, Budapest, 2018., 103-120.

3 Osztovits András: A magánjogi jogérvényesítés gyakorlata a közbeszerzési kartellekkel okozott károk kapcsán, In: Tóth András (ed.): Közbeszerzés és versenyjog, Gazdasági Versenyhivatal, Budapest, 2022., 202-215.

4 Osztovits András: Törvénymódosítás a bírósági joggyakorlat egységesítése érdekében – jó irányba tett rossz lépés? Magyar Jog, 2020., (2), 72-80.; Varga Zs. András: Tíz gondolat a jogegységről és a precedenshatásról, Magyar Jog, 2020., (2), 81-87.

5 Case no. AT.39824 (Trucks), OJ [2016] C 108., 2017.04.06.

6 Act CXXX of 2016 on the Code of Civil Procedure.

al of which have already reached the Kúria.[7] In the truck cartel cases, three issues have so far reached the Kúria: jurisdiction, period of prescription, damage in the case of a lease contract. The next three sections will present these issues and the answers given by the Kúria.

2. Jurisdiction - Article 7(2) of the Brussels Ia Regulation

The Hungarian courts have so far initiated two preliminary ruling proceedings seeking an interpretation of the place where the damage occurred as a ground of jurisdiction under Article 7(2) of the Brussels Ia Regulation. Although only one of these cases has been decided so far, it can already be said that both referrals have contributed to a uniform interpretation of this EU legal norm, preventing diverging national case law on this issue.

2.1. Case C 451/18 Tibor-Trans

Tibor-Trans sued only the sole member of the cartel, DAF Trucks NV, arguing that the cartel had led to distorted prices for trucks and that it was claiming the resulting extra costs. In relation to jurisdiction, he referred to Article 7(2) of the Brussels Ia Regulation and explained that, in the light of the case-law of the CJEU, in particular the CDC Hydrogen Peroxide judgment, Hungarian courts may exercise jurisdiction.

Although the factual background of the case is more similar to that of the CDC Hydrogen Peroxide case, the CJEU nevertheless went back to, and even went beyond, the 'flyLAL-Lithuanian Airlines' judgment. First of all, the CJEU stated that the concept of "place where the damage occurred" includes both the place where the harmful event occurred or may occur, so that the defendant can be sued in any court in any place, depending on the choice of the plaintiff. The Hungarian courts may not base their jurisdiction on the place where the event giving rise to the damage occurred. The damage claimed by Tibor-Trans arises from the additional costs paid as a result of the artificially high prices applied to trucks under the cartel agreements, which constitute a single and continuous infringement contrary to Article 101 TFEU, and does not constitute a mere financial consequence which could have been suffered by direct customers, such as Hungarian truck dealers, and which could have resulted in a loss of sales following the price increase. On the contrary, the damage claimed is a direct consequence of an infringement contrary to Article 101 TFEU, that is to say, it constitutes direct damage which, in principle,

7 It is worth noting that class actions are not possible in such cases under the Code of Civil Procedure, but only in consumer contract claims, labour disputes and environmental cases, according to Article 583(2). This rule does not seem to be effective, even from a comparative law perspective, and it would be advisable to extend it to competition damages, avoiding divergent judgments against the same defendant for the same infringement of competition law.

may give rise to the jurisdiction of the Member State in which the damage occurred.

The relevant market for the anti-competitive exercise, as the CJEU emphasised in the 'flyLAL-Lithuanian Airlines' judgment, is located in the Member State in whose territory the damage is claimed to have occurred, and therefore it must be considered to be within the scope of Article 7(2) of the Brussels Ia Regulation, the place where the damage occurred is also that Member State and the courts of that Member State are competent to determine the market. In addition, a single and continuous infringement implies joint and several liability of the participants in the cartel, so that the fact that Tibor-Trans sued only one cartel member from which it did not directly purchase is irrelevant.

The CJEU therefore stressed that victims of a cartel, including indirect purchasers, who claim distorted high-price selling resulting from an anticompetitive agreement, regardless of whether they had a contractual relationship with one or more of the cartel members, can sue any cartel member in the courts of the Member State where the relevant market was affected by the anticompetitive practice. However, the factual background to the case was quite simple, as the additional costs resulting from the distorted price were geographically limited and the plaintiff's purchases were concentrated only in Hungary - it suffered no harm elsewhere. In determining the place where the damage occurred, the CJEU confirmed the CDC's departure from its position in the Hydrogen Peroxide case; the legal reasoning of the judgment does not in any way refer back to this decision, despite the fact that the applicant is also based in Hungary. The crucial factor is the geographically definable market affected by the cartel; this answer would seem to provide the predictability for the harm caused as to which state's courts might be sued. Contrary to its position in the flyLAL-Lithuanian Airlines case, the CJEU now considered the relevant market as the only relevant factor in establishing jurisdiction and did not leave room for other interpretations.[8]

In the Tibor-Trans judgment, the CJEU considered the damage resulting from the extra costs paid because of artificially increased prices as direct damage. It made a distinction between the concepts of jurisdictional and competitive harm in the EU legal sense: the claimant was a direct victim in jurisdictional terms, but an indirect purchaser through the prism of competition law. However, the loss of business resulting from the price increase was assessed as a mere financial consequence for direct customers, such as Hungarian distributors of trucks.

8 Szabó Péter: A joghatóság és a perbeli legitimáció uniós jogi alapjai kartellkár iránti perekben, Európai Jog, 2021., (5), 39-47.; Mester Ágnes: A „káresemény bekövetkezésének helye" értelmezése az Európai Unió Bíróságának Tibor-Trans-ügyben hozott ítélete tükrében, Versenytükör, 2019., (2), 70-76.

2.2. Case C-425/22 MOL

It was the CJEU which, in the course of its case law, developed the concept of the economic unit, allowing victims to bring an action against the whole of the undertaking affected by the cartel infringement or against certain of its subsidiaries or to seek their joint liability.[9]

The concept of an economic unit is generally understood to mean that a parent company and its subsidiary form an economic unit where the latter is essentially under the dominant influence of the former. The CJEU has reached the conclusion in its case law that an infringement of competition law entails the joint and several liability of the economic unit as a whole, which means that one member can be held liable for the acts of another member.

2.2.1. The question referred by the Kúria

However, there is still no clear guidance from the CJEU as to whether the principle of economic unit can be interpreted and applied in the reverse case, i.e. whether a parent company can rely on this concept in order to establish the jurisdiction of the courts where it has its registered seat to hear and determine its claim for damages for the harm suffered by its subsidiaries. This was the question raised by Kúria in a preliminary ruling procedure, in which this issue was raised as a question of jurisdiction. More precisely Article 7 (2) of the Brussels Ia Regulation had to be interpreted, according to which a person domiciled in a Member State may be sued in another Member State, 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

The facts of the case were well suitable for framing and answering this question. The applicant is a company established in Hungary. It is either the majority shareholder or holds another form of exclusive controlling power over a number of companies established in other EU Member States. During the infringement period identified by the Commission in its decision of 19 July 2016, those subsidiaries purchased indirectly, either as owners or under a financial leasing arrangement, 71 trucks from the defendant in several Member States.

The applicant requested, before the Hungarian first-instance court, that the defendant be ordered to pay EUR 530 851 with interest and costs, arguing that this was the amount that its subsidiaries had overpaid as a consequence of the anticompetitive conduct established in the Commission Decision. Relying on the concept of an economic unit, it asserted the subsidiaries' claims for damages against the defendant. For

9 Marc-Philippe Weller – Victor Habrich – Laura Korn – Anton Zimmermann: Liability of the Economic Unit – A General Principle of EU Law? European Company and Financial Law Review, 2023., (5-6), 759–793.

that purpose, it sought to establish the jurisdiction of the Hungarian courts based on Article 7(2) of Regulation No 1215/2012, claiming that its registered office, as the centre of the group's economic and financial interests, was the place where the harmful event, within the meaning of that provision, had ultimately occurred. The defendant objected on the ground that the Hungarian courts lacked jurisdiction. The courts of first and second instance found that they lacked jurisdiction, but the Kúria, which had been asked to review the case, had doubts about the interpretation of Article 7(2) of the Regulation and referred the case to the CJEU.

2.2.2. The Opinion of Advocate General

In his Opinion delivered on 8 February 2024, Advocate General Nicholas Emiliou concluded that the term 'the place where the harmful event occurred', within the meaning of Article 7(2) of Regulation No 1215/2012, does not cover the registered office of the parent company that brings an action for damages for the harm caused solely to that parent company's subsidiaries by the anticompetitive conduct of a third party.

In his analysis, the Advocate General first examined the jurisdictional regime of the Brussels Ia Regulation, then the connecting factors in the context of actions for damages for infringements of Article 101 TFEU, and finally the question of whether the place of the parent company's seat can be the place where the damage occurred in the case of damage suffered by a subsidiary. He recalled that, according to the relevant case-law of the CJEU, rules of jurisdiction other than the general rule must be interpreted restrictively, including Article 7. He pointed out that 'the place where the harmful event occurred' within the meaning of that provision does not cover the place where the assets of an indirect victim are affected. In the Dumez case, two French companies, having their registered offices in Paris (France), set up subsidiaries in Germany in order to pursue a property development project. However, German banks withdrew their financing, which lead to those subsidiaries becoming insolvent. The French parent companies sought to sue the German banks in Paris, arguing that this was the place where they experienced the resulting financial loss. According to the Advocate General, the applicant in the present action is also acting as an indirect victim, since it is seeking compensation for damage which first affected another legal person.

Recalling the connecting factors in actions for damages for infringement of Article 101 TFEU, the Advocate General pointed out that there were inconsistencies in the case law of the CJEU, which needed to be clarified in a forthcoming judgment. Both types of specific connecting factors (place of purchase and the victim's registered seat) could justify the application of the rule of jurisdiction under Article 7(2) of the Regulation. The Advocate General referred to the Volvo judgment, where the CJEU qualified 'the place where the damage occurred' is the place, within the affected market, where the goods subject to the cartel were purchased. The Court has simultaneously reaffirmed, in the same judgment, the ongoing relevance of the alleged victim's registered office, in cas-

es where multiple purchases were made in different places. According to the Advocate General, the applicant seeks to extend the application of that connecting factor to establish jurisdiction in relation to its claim in which it seeks compensation for harm suffered solely by other members of its economic unit.

The Advocate General referred to the need for predictability in the determination of the forum in cartel proceedings, although he acknowledged that when it comes to determining the specific place 'where the harm occurred', the pursuit of the predictability of the forum becomes to some extent illusory in the context of a pan-European cartel.

In examining the Brussels Ia Regulation, the Advocate General recalled that it only provides additional protection for the interests of the weaker party in consumer, insurance and individual contracts of employment, but that cartel victims are not specifically mentioned in the Regulation, and therefore, in its interpretation, the interests of the claimants and defendants must be considered equivalent. Even so, the parent company has a wide range of options for claiming, the victim can initiate the action not only against the parent company that is the addressee of the respective Commission decision establishing an infringement but also against a subsidiary within that parent company's economic unit. That creates the possibility of an additional forum and may therefore further facilitate enforcement. The victim also has the option of bringing proceedings before the court of the defendant's domicile under the general rule of jurisdiction, which, while suffering the disadvantages of travel, allows him to claim the full damages in one proceeding. In these circumstances, the Advocate General failed to see in what way the current jurisdictional rules fundamentally prevent the alleged victims of anticompetitive conduct from asserting their rights.

2.2.3. In the concept of economic unit we (don't) trust?

Contrary to the Advocate General's opinion, several difficulties can be seen which may prevent the victim parent companies from enforcing their rights if they cannot rely on Article 7(2) of the Brussels Ia Regulation. The additional costs arising from geographical distances and different national procedural systems may in themselves constitute a non-negligible handicap to the enforcement of rights, although this is true for both parties to the litigation. However, the aim must be to minimise the procedural and substantive obstacles to these types of litigation, whose economic and regulatory background makes them inherently more difficult and thus longer in time. It is also true that the real issue at stake in this case is the substantive law underlying the jurisdictional element: whether the parent company can claim in its own name for the damage caused to its subsidiaries on the basis of the principle of economic unit. If so, then Article 7(2) of the Brussels Ia Regulation applies and it can bring these claims in the court of its own registered office. Needless to say, having a single action for damages in several Member States is much better and more efficient from a procedural point of view, and is therefore an appropriate outcome from the point of view of EU competition policy and a more desirable outcome for the functioning of the Single Market. The opportunity is there

for the CJEU to move forward and further improve the effectiveness of competition law, even if this means softening somewhat the relevant jurisprudence of the Brussels Ia Regulation, which has interpreted the special jurisdictional grounds more restrictive than the general jurisdiction rules. The EU legislator should also consider introducing a special rule of jurisdiction for cartel damages in the next revision of the Brussels Ia Regulation at the latest.

3. Limitation period

It is interesting to note that defendants in all truck cartel cases have raised statute of limitations objections. The reason for this is certainly that the same defendants and the same law firms represented them in all these cases. The most common argument concerning the limitation period for the plaintiff's claim for damages was that the plaintiffs could have brought their claim before the publication of the Commission's decision on 6 April 2017, as they were already aware of the Commission's proceedings and the identity of the contractors involved on 20 November 2014. The Commission's notice of 19 July 2016 also made it clear that they had suffered damage. Another common reason for the limitation period is that publication of the Commission's decision is not a precondition for bringing a claim. The courts of first and second instance have assessed the limitation period for damages claims under Hungarian law and applied the limitation provisions of the former Civil Code.

The question of how long the limitation period should be suspended was also relevant: until the date of publication of the press release on the Commission's decision (19 July 2016) or until the publication of the full cartel decision in the Official Journal of the European Union in all EU languages, on 6 April 2017.

Hungarian courts have ruled on the question of the statute of limitations in several final judgments in cases concerning the truck cartel. Among these, it is worth highlighting the judgment of the Metropolitan Court of Appeal No. 20.Gf.40.050/2020/36-II of 7 October 2020, in which it held that the limitation period was suspended only until the earlier date, the publication of the press release on 19 July 2016. Examining the provisions of the former Civil Code, the court pointed out that the damage alleged by the plaintiff had been caused by the payment of the increased leasing charges, which, under the § 326 (1) of the former Civil Code, the limitation period began to run. It was not contested between the parties that, since the plaintiff was not aware of the defendants' anti-competitive conduct or of the resulting damage, it was not in a position to pursue its claim for any justifiable reason. In order to be able to pursue its claim in the present action before the court, the plaintiff had to have been aware of the defendants' anti-competitive conduct and the resulting harm. To do so, he had to know the legal entities involved in the cartel, the substance of the anticompetitive agreement, the period of the infringement and the relevant market. This information would enable him to assess whether the vehicle he had purchased was involved in the infringement.

The Court stressed that the applicant needed this knowledge only to the extent and in the depth necessary to enable it to bring its own claim. It therefore did not attach any importance to any uncertainty which had no connection with the applicant's specific claim, such as the exact date on which the infringement had ended in 2011, since the vehicle at issue had been acquired earlier. It stressed that the claimant cannot be passive, but must adopt the active conduct normally expected in order to obtain the information necessary to pursue a claim. It referred to the generally applicable statement in Opinion 1/2012 (VI. 21.) PK on certain questions of law relating to contractual breach of contract, which states that the discovery of a breach of contract, which results in the expiry of the limitation period, is deemed to be the discovery of the facts relating to the breach of contract, which are necessary for the enforcement of a warranty claim based on the breach of contract. On that basis, it held that it is not merely the subjective knowledge of the claimant that is relevant for the purposes of the expiry of the limitation period, but also the time when, in the objective circumstances, he obtained the information necessary to bring the claim, even with the assistance of a lawyer or other expert, on the basis of the measures that such a person could have taken. It also took into account the fact that the claimant is not a layman but a professional in the trucking market.

The Metropolitan Court of Appeal examined the Commission's press release of 19 July 2016 on the basis of these criterias. It found that the press release clearly contained the relevant information, including that the competition infringement involved pricing agreements in the EEA. The cartel concerned trucks between 6 and 16 tonnes (medium) and heavier than 16 tonnes (heavy) and the infringement covered the whole EEA and lasted for 14 years from 1997 to 2011. Although the press release identifies groups of companies, not specific legal entities, it refers to further information which can be obtained by contacting case number 39824. According to the press release, all the companies have admitted their participation in the cartel and have settled the case. It points out, however, that Scania did not participate in the settlement and that the proceedings against it are continuing. It is also clear from the press release that all of them participated in the cartel, but no decision has been taken in relation to Scania.

The contents of the press release must therefore have made it clear to the claimant that damage had been caused and by who had caused it. With the publication of the press release, the claimant was in a position to bring his claim - with the necessary preparation and by obtaining any missing data and information - and the limitation period therefore expired. Even if the claimant could not be expected to study the Commission's website, the news was reported in the national public and economic press, as well as in professional journals dealing with transport and logistics, and he must therefore have been informed of it with sufficient care.

The Debrecen Court of Appeal, in its judgment Gf.VI.30.066/2021/53 of 10 November 2021, upheld the judgment of the court of first instance on similar grounds as the Metropolitan Court of Appeal. In the light of the grounds of appeal, it held that the limitation period expires when the claimant becomes aware of all the information nec-

essary for the enforcement of the claim or when all obstacles to enforcement have been removed. Under the former Civil Code rules, the date of publication of the Commission Decision finding an infringement was irrelevant for the purposes of the running of the limitation period, but only the objective date on which the claimants had all the information necessary to bring proceedings. The Court agreed with the Court of First Instance that, in order to bring a claim, the claimants needed to know the fact of the infringement, the period of the infringement and the extent of the market concerned, the identity of the members of the cartel and the substance of the restrictive agreement, and that they had suffered damage as a result. According to the Court, the claimants needed this information only to the extent and in sufficient detail to enable them to pursue their own claims for damages. Therefore, detailed information which was not yet contained in the press release but which was not relevant to the claimants' claims could not be considered relevant for the purposes of the assessment of the termination of the suspension. It also referred to the fact that the claimants were professional participants in the transport market and were therefore subject to a higher standard of care in obtaining the information necessary to bring proceedings than lay persons in the same market. In obtaining such information, the claimant cannot be passive but must adopt the active conduct normally expected of him in order to obtain it. It is not only the subjective knowledge of the claimant which is relevant for the purposes of the limitation period, but also the time at which, in the specific case, the measures which such a person could have taken enabled him to obtain the information necessary to assert his claim. The claimants have not taken any further steps to pursue their claims, other than contacting the National Association of the Private Transport Companies[10] and the legal representative recommended by it. They must bear the consequences of the loss of their ability to bring their claims due to the expiry of the limitation period, regardless of who is at fault for the failure to bring the action within the limitation period.

The Kúria, by its order No. Gfv.VI.30.033/2022/37 of 25 October 2022, set aside the final judgment of the Debrecen Court of Appeal and ordered the court of first instance to conduct a new procedure and issue a new decision. In the Kúria's view, in the case of follow-on actions for cartel damages the limitation period is suspended until the victim becomes aware of all the circumstances relevant to the cartel infringement. In principle, this will continue to apply until the date of publication of the Commission decision finding an infringement in the Official Journal of the European Union.

The Kúria, referring to the consistent practice of the CJEU[11] in follow-on actions, emphasised that, even if no EU legislation applicable to the action in question applies ratione temporis, it is for the national courts of each Member State to determine the scope of Articles 101 and 102 TFEU. However, the principles of equivalence and effec-

10 Magánvállalkozók Nemzeti Fuvarozó Ipartestülete.

11 Judgment of 28 March 2019, Cogeco Communications, C-637/17, ECLI:EU:C:2019:263, paragraph 50.

tiveness must be respected, which require that the rules applicable to actions intended to ensure the protection of rights which individuals derive from the direct effect of Union law do not render the exercise of the rights conferred by the Union legal order practically impossible or excessively difficult.[12]

According to the interpretation of the Kúria, it is clear from the case-law of the CJEU that, in order to bring an action for damages, it is essential for the victim to know who is responsible for the infringement of competition law. It follows that the existence of a competition law infringement, the existence of damage, the causal link between that damage and that infringement and the identity of the person who committed that infringement are among the essential information which the victim must have in order to bring an action for damages. The limitation periods applicable to actions for damages for breach of the competition rules of the Member States and of the European Union should not begin to run before the infringement has ceased and the victim has become aware, or can reasonably be regarded as having become aware, that he has suffered damage as a result of that infringement and of the identity of the person who committed the infringement.[13]

By decision Gfv.VI.30.084/2022/31 in another truck cartel case, the Kúria set aside the final judgment of the Debrecen Court of Appeal in Case Gf.VI.30.079/2021/40 and ordered the court of first instance to conduct a new trial and issue a new decision. The reasoning of the decision of the Kúria is the same as the interpretation of the law set out in the order Gfv.VI.30.033/2022/37. In both decisions, the Kúria applied the interpretation of the law set out in the judgment of the CJEU in Case C-267/20 Volvo and DAF Trucks of 22 June 2022.

4. Damage in the event of a lease contract

One of the characteristics of the facts of truck cartel cases is that the injured parties, the claimants, are not direct but ultimate purchasers of the trucks, which are typically acquired through lease contracts. The key question in case Gfv.III.30.246/2023/11 before the Kúria was whether in such a case, where the claimant acquired the truck by means of a lease contract, the damage occurred at the time of the signing of the contract or only upon the verified payment of the lease fees.

The claimant based its claim and derived its damage solely on the fact that its damage occurred immediately upon the acquisition of the trucks involved in the price cartel, which was invariably under a lease structure, to the extent of 10% of the net purchase price, which was the basis of the lease payments due to it. The claimant did

12 Ibid., paragraph 42. and 43.; Judgment of 20 September 2001, Courage and Crehan, C-453/99, ECLI:EU:C:2001:465, paragraph 27.

13 Judgment of 22 June 2022, Volvo and DAF Trucks, C-267/20, ECLI:EU:C:2022:494, paragraphs 59-61.

not base his action on the fact that he suffered damage by the payment of the leasing charges, nor did he put it forward in that context. The claim was therefore based on the fact that the claimant's damage was caused merely by the conclusion of the lease contracts, by passing on the (alleged) price difference of 10% of the net purchase price paid by the leaseholders, which was also reflected in the lease payments. The claimant's damages were quantified in accordance with the facts of the action as the 10% of the net purchase prices paid by the leaseholders and passed on to the claimant in the lease payments.

In its judgment, the Kúria started from the assumption that the possible elements of damage, as typified in the former Civil Code, § 355(4), are the actual damage (damnum emergens), the loss of financial benefit (lucrum cessans) and the costs necessary to eliminate or reduce the financial loss already suffered, the first of which was relevant in the present case. The contractual obligation to pay - in the absence of fulfilment - cannot in itself be regarded as a loss and does not comply with the former Civil Code. Based on the defendants' infringement of competition law, the indirect purchaser, including the claimant, could claim compensation for the actual payment of the higher market price resulting from the price compensation, i.e. the reduction in the victim's assets resulting from the higher price.[14]

According to the Kúria, the damage caused by the defendants' anticompetitive infringement could be interpreted as the price increase by which the direct and indirect purchasers had to pay more for the product affected by the price cartel (price compensation) as a result of the infringement. In view of the well-known and accepted competition law principle of pass-on, i.e. that the direct purchasers of the infringed products - and subsequently the downstream purchasers in the distribution chain - pass on the price increase resulting from the infringement to the final purchaser and that the actual damage occurs to the last indirect purchaser in the distribution chain, the applicant should have developed its claim in accordance with the leasing construct in its action - and thus asserted its claim for damages, first of all, show how much of the total lease payment obligation the claimant had under each lease agreement, and how much of that amount, applying the presumption rule in 88/C § of the Tpvt., was the 10% share which could be regarded as the claimant's possible and maximum loss, given the 10% of the net purchase price paid by the leaseholders, assumed to be passed on to the claimant, and the significance of the lease multiplier. It should then have presented and proved full performance of the lease contracts on its part. To the extent that the applicant had fulfilled its obligation to pay less than the lease payments than it was obliged to under the lease agreements, its damages were also in this case 10% of the amount of the lease payments actually paid by it.[15]

14 Paragraph 73.

15 Paragraph 76.

The Kúria held that the claimant had no cause of action with the reasoning and content set out above. The claim was for compensation for the damage suffered by the claimant as a result of the conclusion of the lease contracts. The claimant did not assert a claim for damages on the basis that its assets had been reduced by the performance of the lease contracts and the payment of the lease payments as a result of the price compensation also reflected in the lease payments.[16] On the basis of the above, the Kúria dismissed the claim for compensation for the loss suffered by the claimant as a result of the conclusion of the lease contracts.[17]

5. Summary

The truck cartel cases have brought to the surface a number of substantive and procedural questions, the answers to which and the development of judicial practice may be determining for the future of the enforcement of damages caused by competition law infringements. In particular, the courts and the Kúria, which is responsible for the uniformity of jurisprudence, must balance two aspects: the principle of effective legal protection and the right to a fair trial. It must ensure that victims have access to reparation within a reasonable period of time, while at the same time allowing the infringers to present their arguments and evidence. It should also be borne in mind that the judicial practice of private enforcement can complement and be a real constraint on the public law rules and practice of competition law.

It is no exaggeration to say that the judgments of the Kúria show a tendency to harmonise these two aspects. On the question of jurisdiction, the Kúria has expressly and innovatively raised to the level of the European Union the legal question of whether the concept of economic unit, as developed for infringers, can be applied to the victims. Although the CJEU has not yet ruled on this issue, it can be assumed that if the CJEU allows victims to claim on behalf of a parent company for damage suffered by its subsidiaries, this will greatly increase the effectiveness of the enforcement of the claim: it will no longer be necessary to pursue individual claims in different countries, in different court systems, in different languages and under different procedural rules, but will be sufficient to do so in one country and in one procedure.

A similar open-minded approach characterises the decision of the Kúria on the issue of limitation periods. It has made a well-founded and justified distinction between the general practice on limitation and the claims for cartel damages established by the Commission's decision, recognising and acknowledging the specificities of the latter: there is a significant information asymmetry between the victims and the infringers of competition law. In order to bring a claim for damages, it is essential for the victim to

16 Paragraph 77.

17 Paragraph 78.

have the necessary information. The press release contained less detailed information on the circumstances of the case and the reasons why an anti-competitive behaviour could constitute an infringement. By contrast, the Commission Decision published in the Official Journal of the European Union was already sufficiently detailed and provided all the information necessary to bring the case to court.

This lack of intellectual courage can be observed in the decision of the Kúria on the damage suffered in the case of a lease contract. Since the damage caused by a competition infringement is a tort, it may not be the only relevant factor in deciding a claim by the victim at the very end of the contractual chain, whether or not he has paid the lease fees. This is a question which may justify a reference for a preliminary ruling to the CJEU for an answer, binding on all national courts, in order to ensure a uniform and effective interpretation of EU law.

It is too early to form an accurate opinion as to whether the Hungarian jurisprudence on damages caused by competition law infringements is capable of fulfilling its purpose, whether it is effective enough to ensure that victims can obtain reparation and thus deter the emergence of new cartels. In the decisions of the Kúria, there is an awakening of the necessary force, which in itself is a cause for confidence.

Csongor István Nagy

Hungarian competition law's contribution to the European discourse on private enforcement

1. Introduction

The private enforcement of EU competition law has a two-decade long history. Agreements on restraint of trade have been pronounced invalid from the outset[1], and actions for damages have always been a theoretical possibility. Nonetheless, concentrated regulatory endeavors to make private enforcement a reality started in the early 2000s. The process was launched by the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules.[2] This was followed by the White Paper of the same title.[3] These generated a very vivid scholarly discourse about the hurdles to private enforcement and the available regulatory means to facilitate actions for damages, and resulted in a growing number of CJEU rulings addressing various aspects of EU competition law's private enforcement.[4] This

1 Article 101(2) TFEU.

2 Green Paper - Damages actions for breach of the EC antitrust rules [2005] COM(2005) 672 final, 19.12.2005.

3 White paper on damages actions for breach of the EC antitrust rules [2008] COM(2008) 165 final, 02.04.2008.

4 Judgment of 20 September 2001, Courage and Crehan, C-453/99, ECLI:EU:C:2001:465; Judgment of 13 July 2006, Manfredi, Joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461; Judgment of 14 June 2011, Pfleiderer, C-360/09, ECLI:EU:C:2011:389; Judgment of 6 November 2012, Otis and Others, C-199/11, ECLI:EU:C:2012:684; Judgment of 6 June 2013, Donau Chemie and Others, C-536/11, ECLI:EU:C:2013:366; Judgment of 5 June 2014, Kone and Others, C-557/12, ECLI:EU:C:2014:1317; Judgment of 28 March 2019, Cogeco Communications, C-637/17, ECLI:EU:C:2019:263.

process culminated in the adoption of the Private Enforcement Directive,[5] which established a detailed European framework. This, of course, does not mark the end of the movement for private enforcement. Although there is a growing number of civil actions concerning competition violations, it seems that private enforcement has still not passed beyond the era when it produced more scholarly publications than court judgments.[6]

This chapter provides an account of the peculiar regulatory concepts and ideas which Hungarian law has developed in the course of the above process, and which contributed to the European discourse on private enforcement. Section 2 presents Hungarian law's presumption of 10 % price increase in cartel matters, which is a unique legal means to facilitate the proof of cartel damages. Section 3 presents how the Hungarian Competition Authority (HCA) has effectively used commitment procedures to further private enforcement. Section 4 presents Hungarian competition law's unique rules on collective redress, which authorize the HCA to launch an opt-out collective procedure to claim a civil remedy.

2. Presumption of a 10% price increase

Article 17(2) of the Private Enforcement Directive, which was transposed into Section 88/D(4) of the Hungarian Competition Act[7] (CA), establishes a rebuttable presumption as to the existence of harm: until the contrary is proved, it has to be presumed that the violation caused harm, provided the claimant proves that the competition violation was a cartel infringement. This presumption is limited to the fact of inquiry (loss) and does not extend to quantum. The CA goes beyond this and, as an idiosyncratic rule on cartel damages, it establishes a presumption that cartels (hori-

5 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349, 05.12.2014, p. 1–19. For a comprehensive overview of the Directive's national implementation see Nagy Csongor István: Hungary, in Barry Rodger - Miguel Sousa Ferro - Francisco Marcos (eds.): The EU Antitrust Damages Directive: Transposition in the Member States, Oxford University Press, 2018.

6 Nagy Csongor István: What Role for Private Enforcement in EU Competition Law? A Religion in Quest of Founder, in Tóth Tihamér (ed.): The Cambridge Handbook of Competition Law Sanctions, Cambridge University Press, 2022., 218.

7 Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (in Hungarian: "1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról").

zontal naked restrictions) result in a 10% price increase.[8] This rule of the CA predated the Private Enforcement Directive by years[9] and, at the time of adoption, was a pioneer solution in Europe. Since then, it has been followed, for instance, by Romanian law, which, in the implementing national legislation of the Private Enforcement Directive, established a 20% presumption of price increase as to cartels.[10]

According to Section 88/G(6) of the CA,[11]

In the event of a competition law infringement caused by a cartel, it shall be assumed, unless proved otherwise, that the competition law infringement had a ten percent effect on the price applied by the infringer.

The term "cartel" is defined in Section 12 as meaning horizontal hardcore restrictions:

[…] agreements or concerted practices of competitors which have as their object the prevention, restriction or distortion of competition (…) [by] the direct or indirect fixing of purchase or selling prices or other business terms and conditions, the limitation of production or distribution, the allocation of markets including bid-rigging and the restriction of imports or exports.

Accordingly, in any civil action against a member of a horizontal naked price-fixing, market-sharing or quota cartel falling foul of Section 11 of the CA or Article 101 TFEU, it is to be presumed, albeit in a rebuttable manner, that the infringement raised the prices by 10%.

The 10% rule is a useful tool for private enforcement, though it does not address all the challenges of proof concerning competition harm. First, it applies only to restrictive agreements. There is no presumption concerning damages caused by abuses of dominant position. Second, even as to restrictive agreements, its scope of application

8 On Hungarian law's 10% rule see Nagy Csongor István: Kártérítési felelősség kartelljogsértések esetén: gondolatok a Tpvt. új szabályai kapcsán, Magyar Jog, 2009., 56(9), 513-520.; Nagy Csongor István: Schadensersatzklagen im Falle kartellrechtlicher Rechtsverletzungen in Ungarn: neue Schadensersatzvorschriften des ungarischen Kartellgesetzes, Wirtschaft und Wettbewerb, 2010., 60(9), 902.; Nagy Csongor István: New Hungarian rules on damages in competition matters, European Competition Law Review, 2011., 32(2), 63.

9 Act XIV of 2009 on the CA.

10 Ordonanța de urgență nr. 170/2020 privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în materie de concurență, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996, Section 16(2) („Se prezumă că încălcările sub forma unor carteluri provoacă prejudicii constând în creșterea prețului produselor sau serviciilor vizate de cartel cu 20%. Autorul încălcării poate răsturna o astfel de prezumție.").

11 This provision was initially located in Section 88/C of the CA, which provided as follows: "[…] in the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article 101 TFEU, when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent."

is restricted to cartels (horizontal naked price-fixing, market sharing and output limitation, and their functional equivalents) as the most harmful violations.[12] Other restrictive agreements are not covered. According to the decisional practice of the HCA, cartels are "naked" restrictions, whose purpose is to directly fix prices, share markets or limit output. Ancillary restrictions, which may indirectly result in the fixing of prices, the limitation of output or the sharing of market, constitute no cartel.[13] Third, the 10 % presumption applies merely to overcharge matters. It does not apply where the loss is not or not entirely triggered by a price increase; for instance, where a potential competitor suffers damages because of market foreclosure.

It has to be stressed that the above rule embeds no presumption of loss but a presumption of price increase. Given the passing-on defense, the price increase cannot generally be equated with the loss the victims suffer. In the case of a sale to a final consumer, such as public procurement, the price increase may usually equal the quantum of damages. Nonetheless, if the purchaser uses the product as an input, it may be able to pass the price increase partially or fully on to its customers. The input-side cartel may entail a price increase on the output-side market and the purchaser may be able to partially or fully recoup the loss caused by the higher prices it paid through the higher prices it charges.

Although the 10% rule has been regularly applied,[14] its practical impact has remained somewhat underwhelming and has not appreciably increased the number of actions for damages. The judicial practice identified no specific cause that could explain this, and it seems that this can be traced back to various issues. First, it seems that the quantification of the loss is one of the central questions but not the central question of actions for damages. Second, based on the rules in force before the Private Enforcement Directive, Hungarian courts developed a relatively restrictive approach to the limitation period. This generally afforded the injured persons one year after the adoption of the HCA decision to launch an action for damages.[15] This meant that the injured person was expected to launch the action for damages years before the judicial review of the administrative decision concluded. This may have excluded numerous cases from substantive consideration. Third, the 10% presumption may lose most of

12 Initially, the 10 % presumption did not apply to buyer cartels (purchase price fixing). See the original statutory text quoted in footnote 9.

13 See Case Vj-195-11/2001, paragraph 26.

14 See Cases Gf.30046/2023/11 (High Court of Appeal of Szeged), paragraph 96.; Gf.30149/2022/21 (High Court of Appeal of Szeged), paragraph 11.; Gf.30031/2023/13 (High Court of Appeal of Debrecen), paragraph 36.; Gfv.30246/2023/11 (Hungarian Supreme Court), paragraphs 75-76., appealed from Gf.I.30.030/2023/13 (High Court of Appeal of Debrecen) and 4.G.40.125/2022/24/I (Regional Court of Nyíregyháza).

15 Cases Gfv.VII.30.521/2018/8 (Supreme Court); 20.Gf.40.302/2019/5-I (High Court of Appeals of Budapest); 20.Gf.40.050/2020/36-II (High Court of Appeals of Budapest).

its merits if an expert is appointed for the quantification of the harm.[16] In this case, it is up to the court-appointed expert to determine if the cartel caused a loss and how much that loss was. Although the presumption still has a role in case of uncertainty, for procedural reasons, the assessment of the expert determines the outcome. This may sideline the 10% rule.

3. Use of Commitments as Surrogates for Private Enforcement

The HCA's enforcement policy stands out in Europe by systematically using commitment decisions to further private enforcement and secure a civil remedy for the victims of competition law violations.[17]

Section 75 of the CA authorizes the HCA to accept commitments from undertakings to address the identified competition concerns.[18] Section 75(1) of the CA provides that if the party, in respect of the conduct investigated in the competition proceedings, offers commitments to bring his conduct, in a specified manner, in conformity with the applicable provisions of the law and the public interest can be effectively safeguarded in this manner, the HCA may, in a decision, make these commitments binding, without establishing the occurrence or lack of a violation of the law.[19]

> *Where, regarding a conduct investigated in a competition supervision proceeding initiated pursuant to Article 67(2), the party offers commitments to bring its conduct in a specified way in line with the applicable legal provisions and if the efficient protection of the public interest can be ensured in this manner, the competition council proceeding in the case may, in its decision, oblige the party to abide by such commitments without establishing the existence or the absence of an infringement in such decision. If the party has in the meantime ceased the conduct investigated, a commitment may*

16 Cases Gf.30046/2023/11 (High Court of Appeal of Szeged), paragraph 97.; Gf.30149/2022/21 (High Court of Appeal of Szeged), paragraph 112.

17 Nagy Csongor István: Competition Law in Hungary, Kluwer Law International, Hága, 2016., 117-124.

18 This is a functional equivalent of Article 9 of Regulation 1/2003. The currently effective provision of Section 75 was inserted in the CA in 2005 by Act LXVIII of 2005. However, the original text of Section 75 already contained a similar possibility, entitled "suspension of the proceeding". According to the original provision, the proceeding could be suspended if the conduct at stake endangered the freedom and fairness of competition only to a minor extent and the defendant assured that it would refrain from the pursuance of the conduct and take the appropriate measures to prevent the emergence of damages, provided there was such a peril.

19 As to the Hungarian decisional practice on commitments see Nagy Csongor István: Kötelezettségvállalások a GVH gyakorlatában, Gazdaság és Jog, 2011., 19(10), 3.; Nagy Csongor István: Commitments as Surrogates of Civil Redress in Competition Law: The Hungarian Perspective, European Competition Law Review, 2012., 33(11), 531.; Marosi Zoltán - Barnabás Gergely: The Issue of Consumer Compensation Before Antitrust Authorities: Commitments, Cooperation and Competence: The Hungarian Experience, World Competition, 2024., 47(1), 125.

be undertaken to comply with transparent and verifiable rules of conduct which assure that such conduct is not repeated.

Although Section 75(1) of the CA contains no statutory exclusion, there are certain matters where the acceptance of commitments is ruled out due to the nature of the violation. The HCA's decisional practice is consistent in rejecting commitments in matters involving clear violations of competition rules. This principle was confirmed, among others, in Case *Vj-118/2007/21 UniCredit*[20] and in Case *Vj-137/2008/33 Allianz*. If it is obvious that the conduct at stake falls foul of competition law, the HCA will not accept commitments, but it will carry the case through and impose an appropriate penalty. It seems that the exclusion is not based on the size and weight of the detrimental consequences but on the salience of the violation. It would impair the authority of competition law if clear, bad faith and malicious infringements were left without an adequate penalty.[21]

As a corollary, hard-core violations, such as cartels, cannot benefit from commitments. In Case *Vj-18/2008 MIF*, where the HCA condemned Hungarian banks for fixing the domestic multilateral interchange fee and treating, in this regard, the two card companies alike, the HCA made it clear that the restrictive conduct was of such a nature that it was not to be penalized with prospective future commitments but with the declaration of illegality and an appropriate sanction.[22]

This approach is also reflected in the HCA's Notice on Commitments.[23]

12. The GVH does not consider cases to be suitable for commitment stipulated in point 7. a) of this Notice in which the conduct under investigation is considered to be the most serious and most harmful from the point of view of competition law. This includes the conduct under investigation which may constitute an infringement under Article 13(3) [currently Article 12] of the Competition Act – cartel or any other agreement or concerted practice aimed directly or indirectly at fixing purchase or selling prices (…) – except of concerted practices which are novel, in particular if these are committed by small and medium-sized enterprises (SMEs). Namely, in cases falling within the scope of Article 13(3) [currently Article 12] of the Competition Act, a leniency application may be submitted.

Outside of the scope of the above exclusion, the HCA has developed a unique

20 The HCO held that the posterior remedy did not ensure the effective safeguarding of public interest, because the conduct the defendant sought to remedy violated a clear and obvious legal requirement, which was set out in the HCO's decisional practice and confirmed by the courts.

21 Nagy Csongor István: Kötelezettségvállalások a GVH gyakorlatában, Gazdaság és Jog, 2011., 19(10), 3-4.

22 Paragraph 228.

23 Notice No 1/2018 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on commitments pursuant to Article 75 of the Hungarian Competition Act (consolidated version with amendments made by Notice No 1/2021).

decisional practice on the basis of Section 75 of the CA, often using this regulatory tool as a surrogate for private enforcement. In numerous cases it accepted commitments that aimed at providing a civil law remedy or a similar restitutive effect.[24] These commitments remedied the detrimental consequences of competition violations from a civil law perspective and, as far as technically possible, provided compensation for the victims (occasionally, if the individual harms could not be identified properly, in the form of "fluid recovery" or "cy pres"[25]). It is to be noted that the HCA's remit also extends to unfair commercial practices[26] and most commitment decisions have been adopted in this field.

One set of offerings that an undertaking may make to avoid liability is restitutive commitments, i.e. commitments to restore the initial status in a broader sense. According to the HCA's Notice on Commitments, the offered advantage

> *may take the form of, for example: (…) the commitment compensates the harm suffered by consumers and business partners in connection with the conduct subject to the proceeding, as well as the posterior compensation of the competitive disadvantage. In this case, the commitment shall actually be suitable for remedying individual damages available to consumers and business partners without costly and time-consuming procedures (e.g. refund, provision of the right of withdrawal or other benefits).*

The clearest case of restitution is refunding. This occurred, for instance, in Case *Vj-10/2009 Megasztár*[27], in Case *Vj-16/2008 K&H Bank* and in Case *Vj-16/2017 OTP*. In Case *Vj-41/2006/60 OTP*, the competition procedure was instituted because the defendant (a bank) abused its dominant position by increasing pre-redemption fees. The bank refunded the difference to those customers who redeemed their debts in full or in part at the applicable pre-redemption fees, the legality of which was questionable under competition law.

In certain cases, the initial status was restored and the detriment, in essence, lifted by granting the consumers the right of unilateral cancellation or termination. This happened in Case *Vj-118/2007/20 UniCredit*, where the bank was investigated for not

24 On commitment decisions see Bassola Bálint - Kékuti Ákos - Marosi Zoltán: Versenyjogi vádalku? – A kötelezettségvállalás intézménye kritikus szemmel, Magyar Jog, 2011., 58(12), 722.

25 "Fluid recovery" is used in US class action matters where the provision of individual recovery for all class members is impossible or unfeasible, e.g. class members cannot be identified. In such cases the court may order that the recovery awarded shall be devoted to the "next best use". See e.g. State of California v Levi Strauss & Co., 41 Cal.3d 460 (1986); Six Mexican Workers v Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990). As to "cy pres", see Albert A. Foer: Cy pres as a remedy in private antitrust litigation, in Albert A. Foer - Randy M. Stutz (eds.): Private Enforcement of Antitrust Law in the United States, Edward Elgar Publishing, 2012., 349-364.

26 This is based on the Hungarian legislation (Act XLVII of 2008) implementing the Unfair Commercial Practices Directive. The HCO has "the power to proceed against infringements of the prohibition of unfair commercial practices where the commercial practice is capable of materially affecting competition." Section 10(3) UCP Act.

27 Paragraph 20.

disclosing certain important contractual terms to the consumers. As a result of the commitment decision, the consumer was granted the possibility to quit the contract.

In some cases the HCA obliged the undertakings to do what they promised to do. In these matters, the undertakings made certain allegations concerning their products' characteristics, which subsequently turned out to be false. The commitments ensured that the undertaking concerned would "keep its word" and act in compliance with the commercial communication. In Case *Vj-135/2007 T-Kábel Kft.*, the cable-television operator declared that the channels in the undertaking's portfolio were available in digital picture and voice quality, while the set-top-boxes used by the firm could not be connected to digital television devices. After the institution of the procedure, the company undertook to make available the set-top-boxes that were compatible with digital television devices. A similar pattern emerged in Case *Vj-63/2010 Digi Kft.* and in Case *Vj-7-37/2011 Invitel*, which were also terminated with commitment decisions. In Case *Vj-118/2007/20 UniCredit*, the enterprise, among others, agreed to compensate those customers who broke up their fixed deposits. In Case *Vj-75/2012 TEVA*, the undertaking bound itself to reimburse those consumers who paid a price higher than the one advertised and to make up for the difference between the advertised price and the price actually paid.

An interesting question of the policy concerning commitment decisions is whether the restoration of the initial status and a comprehensive civil law remedy are the pre-conditions of accepting commitments. In some matters the HCA suggested that failing this the enterprise cannot bring its conduct in conformity with the law, as required by Section 75 of the CA. And indeed, if interpreting Section 75 literally, the conclusion may be reasonably drawn that the illegal plight ends only when the detrimental consequences are lifted. One of the conditions of accepting the proffered commitments is that the "party offers commitments to bring its conduct in a specified way in line with the applicable legal provisions". The mere fact that the undertaking stops violating the law certainly does not imply that it brings its conduct in conformity with the law, at least not retrospectively, since it is required, by law, to compensate for the losses it caused. According to this interpretation, the undertaking is required to also bring its past conduct in conformity with the law by providing compensation for the detriment caused.

Such a strict and inflexible approach would be very counter-productive in matters where civil law redress cannot be provided simply because the injured persons cannot be identified. The insistence on a civil law remedy would make commitments unavailable in cases where it is impossible or unfeasible for the undertaking to compensate the victims. Fortunately, the decisional practice of the HCA avoided this trap. In Case *Vj-19/2009 OTP*, it was needless to provide for a civil remedy because the bank compensated its complaining customers on a voluntary basis. Nevertheless, in Case *Vj-148/2006/49 Tesco* and in Case *Vj-189/2007 Raiffeisen*, there was no voluntary compensation, and the HCA did not treat this as the pre-condition of accepting commitments.

Before July 1, 2014, if the undertaking failed to execute the commitment decision, the HCA could impose a fine[28] and could launch a procedure to have the commitments enforced. Both tools were used in Case *Vj-157/2007/58 "N&P KEGYELET 2006"*. The currently effective provisions of the CA, however, contain a "fork in the road" rule. If the undertaking fails to do what it promised (commitments), the HCA can either impose a fine for the breach of the commitments or withdraw the commitment decision and re-start the competition procedure against the undertaking (which may, of course, result in the imposition of a fine).[29]

It is an interesting question whether the undertaking's legal obligation (commitment) to compensate implies that the injured persons have a legally enforceable right to claim the promised compensation. Section 6:2(3) of the Hungarian Civil Code[30] provides that a legally enforceable obligation may emerge also from an administrative decision (and from a rule or law or a court decision), if the decision provides so and defines the obligor, the obligee and the service (i.e. the behavior to be performed in the fulfilment of the duties). Commitment decisions arguably meet these requirements, hence, they confer legally enforceable rights on the victims of the competition violation and the injured persons may sue if the undertaking does not execute the commitment. Unfortunately, there is no judicial practice in this regard.

4. Collective Redress

Hungary introduced opt-out class actions in 1996 in the CA and then in 1997 in the Consumer Protection Act.[31] This means that Hungarian legislation was among the few legal systems that pioneered in collective redress and was among the very few that had an opt-out system in place in the 1990s.[32] Besides this, an opt-in joint action scheme was introduced by the new Hungarian Code of Civil Procedure,[33] taking effect on 1 January 2018, as regards certain subject matters (consumer protection, employment matters, and environmental damages). These may not be used in competition matters, as they refer specifically to consumer protection law infringements and not to consumer matters in general (which could, theoretically, also embrace competition

28 See the then-effective provision in Section 76(4)(a) CA.

29 Section 75(6) CA, Section 78(1a) CA.

30 Act V of 2013 on the Civil Code (in Hungarian: "2013. évi V. törvény a Polgári Törvénykönyvről").

31 Act CLV of 1997 on consumer protection (in Hungarian: "1997. évi CLV. törvény a fogyasztóvédelemről").

32 Nagy Csongor István: Collective Actions in Europe: A Comparative, Economic and Transsystemic Analysis, Springer, 2019., 73-85.

33 Act CXXX of 2016 on the Code of Civil Procedure (in Hungarian: "2016. évi CXXX. törvény a polgári perrendtartásról").

violations committed to the detriment of consumers).

The original provisions on collective redress authorized the HCA, the economic chamber, and the organization protecting the interests of consumers to launch civil proceedings on behalf of a group of persons harmed by a competition law violation. The currently effective rules limit standing to the HCA.

This is in line with the general European approach. There is a clear tendency to reserve "hard cases" (which are difficult to manage or raise higher risks of abuse) for public entities and recognized civil organizations. Such cases involve opt-out proceedings and cases where it is difficult to define a group.[34] In Finland, solely the Consumer Ombudsman has the power to institute a collective action.[35] Polish law confers standing on class members and the regional consumer ombudsman (a public body).[36] In Sweden, collective proceedings may be initiated by group members (private group action), civil organizations (NGO action) and administrative agencies (public group action).[37] Portuguese law also defines standing widely: citizens, associations, foundations and municipalities (for the protection of citizens living in their territory) may institute an action. In Spain, standing is conferred on group members, consumer organizations and public entities.[38] In Denmark, the group representative is appointed by the court, who may be a group member, an association, a private institute or other organization or an administrative agency (e.g. the Consumers Ombudsman). Under Danish law, the court has the discretion to decide whether the case should be tried in the opt-in or the opt-out scheme. If the proceeding follows the opt-out pattern, only an administrative agency may be appointed as a group representative (the court decides whether the collective proceeding is managed in the opt-in or the opt-out system).

According to Section 85/A of the CA,[39] the HCA may launch civil proceedings for the protection of consumers' civil claims if an undertaking violates a legal provision that falls within the HCA's competence and that concerns numerous consumers identifiable on the basis of the circumstances of the violation. Accordingly, the pre-conditions of collective action in competition matters may be boiled down to two major substantive requirements: numerosity (the violation concerns numerous consumers) and definability (the victims of the violation are identifiable on the basis of the circumstances of the violation).

The Hungarian Competition Authority may initiate litigation in the public interest to enforce the civil claims of consumers where an infringing practice of an undertaking

34 Nagy (footnote 32) 95-96.

35 Section 4 of the Finnish Act on Class Action.

36 Section 4(2) of the Polish Act on Pursuing Claims in Group Proceedings.

37 Sections 2(3) and 3-6 of the Swedish Group Proceedings Act.

38 Paul Llewellyn: Class actions in the EU, International Comparative Legal Guide, 2005., 21-22.

39 Originally, this provision was located in Section 92 CA.

which falls within the competence of the Hungarian Competition Authority concerns a large group of individuals that can be defined relying on the circumstances of the infringement. Litigation pursuant to this Article shall be conducted in accordance with the provisions of the Act on the Code of Civil Procedure regarding actions in the public interest.[40]

The HCA may start proceedings if it has already launched a competition procedure concerning the violation and, if it requests, the court has to stay the proceedings pending the competition procedure.

The Hungarian Competition Authority is only empowered to initiate such litigation after it has initiated a competition supervision proceeding for the conduct in question. If the competition supervision proceeding is in progress, the court shall suspend its proceeding upon the request of the Hungarian Competition Authority until the conclusion of the competition supervision proceeding.[41]

A collective action may be launched only within three years of the violation being committed; however, this time limit does not apply while the competition procedure is pending.

No litigation may be initiated after three years have elapsed following the date when the infringing conduct was committed. Failure to observe this time limit shall result in forfeiture of the right to initiate litigation. If the conduct is continuous in nature, the time limit shall begin at the time when the conduct is terminated. If the infringing conduct is committed through a failure to terminate a particular situation or state, the time limit shall not begin as long as such situation or state prevails. When counting the time limit set for the initiation of litigation, the duration of the competition supervision proceeding shall not be taken into account.[42]

This procedure is based on the opt-out principle, although the statute does not specifically provide for the right to quit the group.

The court may be requested to judge the common issues as far as possible jointly. If the legal basis (violation) and the amount of the loss (quantum) can be clearly established concerning the consumers injured by the violation, without taking the individual circumstances into account, the HCA may request the court to enjoin the undertaking to satisfy these claims. Otherwise, it may request the court to establish the violation concerning the group members, so individual consumers will be able to rely on this declaratory judgment in their individual actions and will have to prove merely the amount of the loss they suffered and the causal link between the violation and the individual loss.

The court, in its judgment, has to specify those consumers who benefit from the declaration of illegality and who are entitled to monetary relief as well as the data nec-

40 Section 85/A(1) CA.

41 Section 85/A(2) CA.

42 Section 85/A(3) CA.

essary for their identification, and it may authorize the HCA to publish the judgment. If the undertaking fails to honour the judgment and satisfy the consumers' claims, the latter may seek enforcement of the judgment. When launching the enforcement procedure, the court has to examine whether the applicant is covered by the judgment's group definition.

> *Where, with respect to the consumers affected by the infringing conduct, the legal basis of the claim and the amount of damages if a claim is made in this respect, or the content of the claim where other claims are raised, can be clearly established without considering the individual circumstances of the consumers affected, the Hungarian Competition Authority may request the court to oblige in its judgment the undertaking in question to satisfy those claims, or to otherwise establish the infringing nature of the conduct with an effect applying to all of the consumers indicated in the claim. If the court established that the infringing nature affected all of the consumers indicated in the claim, then these consumers shall only prove the amount of the damage, the content of any other claims and the causal link between the infringing conduct and the damage suffered or any other claim if they initiate litigation against the undertaking concerned.*[43]
>
> *If, in addition to establishing the infringing nature of the conduct, the court also obliged in its judgment the undertaking to satisfy a particular claim, the obliged undertaking shall satisfy the claim of consumers belonging to the eligible persons defined in the judgment in accordance with the judgment. In the absence of voluntary compliance, the entitled consumers may request the judicial enforcement of the judgment. The court shall assess the consumers' eligibility on the basis of the conditions specified in the judgment in the course of its proceedings for the issuance of an enforceable document.*[44]

It is not obvious if the judgment's res judicata effect extends to group members. The statutory text does not provide for this specifically. It deals only with the case where the HCA is successful. It does not address the case of plaintiff failure. Nonetheless, group members are not parties to the collective action, hence, absent a specific provision, they should not be covered by the res judicata effect. Last but not least, the collective action does not affect the consumer's right to pursue their claims individually. All these suggest that while group members may "use" the judgment if the group representative prevails, they are not necessarily covered by the res judicata effect. However, this has not been tested before courts.

Although the HCA has made use of this mechanism with the purpose of ensuring

43 Section 85/A(4) CA.

44 Section 85/A(6) CA.

a civil remedy,[45] it has been rarely used to claim monetary relief.[46] This may be due to two circumstances. First, it is a general European experience that administrative authorities are not the keenest initiators of collective actions. The number of cases launched in systems where public authorities have standing has been generally low. Second, until 2010, a one-year long limitation period applied to the collective actions launched by the CA, which proved to be stiflingly short. From 2011, the limitation period was changed to three years.[47]

5. Concluding remarks

Hungarian competition law has come a long way in making competition rules' private enforcement a reality. The legislative and regulatory efforts started way before the Private Enforcement Directive and have resulted in various unique statutory and regulatory constructions, which contributed to the European discourse in the field. The shifting of the burden of proof by means of a presumed 10 % price increase in cartel matters, the use of commitment decisions to ensure civil remedies and the opt-out collective action are all patterns developed in the local "regulatory laboratory" and are worthy of consideration in the search for an effective private enforcement system in Europe.

45 See, for instance, Case Gf.40232/2016/9, where the HCA requested the court to declare the contracts concluded by the enterprise invalid, however, the High Court of Appeal of Budapest established that the HCA cannot enforce invalidity claims by means of the collective mechanism.

46 For the exception, see Case Gf.40336/2008/7 (Budapest High Court of Appeals). See Tóth Tihamér: The Interaction of Public and Private Enforcement of Competition Law Before and After the EU Directive—a Hungarian Perspective, Yearbook of Antitrust and Regulatory Studies, 2016., 9(14), 64–65.

47 Section 134(1) of Act CLVIII of 2010.

András Tóth

The application of EU competition law in light of the case law of Hungarian administrative courts

1. Introduction

The enforcement of European Union competition law in Hungary over the past 20 years is a rich subject in Hungarian court practice. This chapter is therefore limited in scope in two ways: on the one hand, it focuses only on some questions of European competition law (procedural issues, such as reasonable time or limitation period, which have also been the focus of case law in recent years, are not addressed)[1], and on the other hand, it does not deal with private enforcement. Still, the practice of Hungarian administrative courts covers a wide variety of issues as regards the substantive issues of European competition law, even in such sophisticated matters as the extension of the category of by-object restrictions, regarding which, incidentally, Hungarian cases have offered the Court of Justice of the European Union the opportunity to elaborate in preliminary rulings.

2. Scope of the review of competition authority

1 In this respect, see in detail: András Tóth: Az Európai Unió versenyjogának magyarországi érvényesülése. A közigazgatási bíróságok gyakorlata, Jogtudományi Közlöny, 2023/9, pp. 387-398; András Tóth: Jogalkotói beavatkozások a versennyel kapcsolatos magyarországi közérdekérvényesítés hatékonysága érdekében, Versenytükör, vol. XIX. issue no. 2023/1, pp. 43-54; András Tóth: Észszerűen az ésszerű idő követelményéről versenyügyekben, Gazdaság és Jog, 2022. January-February, pp. 3-11.

decisions and the standard of proof

The quasi-criminal nature of competition law has brought into focus the full scope of judicial review, since proceedings before the competition authority do not have to comply with Article XXVIII (1) of the Fundamental Law of Hungary if the court can fully review the decision of the Hungarian Competition Authority (hereinafter the "GVH") on both factual and legal issues, and can annul the decision of the competition authority, or even make a decision itself.[2] In its judgment no. Kfv.III.37.582/2016/16, the Hungarian Supreme Court (the Curia) has shown that the full review as described above certainly affects and influences the standard of proof. In this context, the Curia relied heavily on European case law.

According to the European Union case law[3] (also relied upon by the Curia[4]), it is the duty of the authority to prove the infringement and, in case of any doubt, to take it into account in favour of the undertaking. The standard of proof beyond reasonable doubt does not preclude the use of chains of circumstantial evidence, nor does it preclude the use of legal presumptions, provided that these presumptions remain within reasonable limits.[5] In the Curia's view, even in competition cases, it does not mean that legal presumptions cannot be established within reasonable limits or that reasonable doubt cannot be excluded through a chain of circumstantial evidence as to the "guilt" of the plaintiffs concerned.[6]

The standard of proof is that the authority must provide accurate and consistent evidence to prove that an infringement took place, but not all evidence need to satisfy these conditions for all elements of the infringement. It is sufficient if the evidence relied on by the authority, taken as a whole, satisfies this requirement. *"It is not unlawful for an authority to clarify the facts only to the extent necessary for its decision, to take evidence only on the relevant facts and circumstances, to refrain from taking expert evidence on matters not necessary for clarifying the facts [...] but to allow the parties to exercise their rights as parties, to make its decision by evaluating and weighing their statements, observations and relevant evidence."*[7]

In view of the well-known nature of the prohibition of anti-competitive agreements and therefore the secret nature of their implementation, the authority cannot be expected to provide documentary evidence that explicitly proves contact between

2 Decision 30/2014 (IX. 30.) AB of the Constitutional Court of Hungary, point 65 of reasoning.

3 Judgment of the General Court (Second Chamber) of 3 March 2011 in Case T-110/07, Siemens AG v European Commission [ECLI:EU:T:2011:68]; Judgment of the Court of Justice of the European Union of 14 October 2004 in Case T-61/02, Commerzbank v Commission [ECLI:EU:T:2004:303].

4 Decision Kfv.II.37.672/2015/28. of the Curia.

5 Decision Kfv.III.37.582/2016/16. of the Curia, 140.

6 Ibid., 138.

7 Decision Kfv.II.37.827/2015/19. of the Curia, 48.

the undertakings concerned. In any event, the fragmentary and sporadic elements at the disposal of the Authority may be supplemented by inferences capable of reconstructing the relevant circumstances. Thus, the existence of anti-competitive conduct or agreements may be inferred from certain coincidences and indications which, taken together, may, in the absence of any other coherent explanation, provide evidence of an infringement of competition rules.[8] However, if the Commission establishes its finding of an infringement on evidence which is, in principle, sufficient to prove that the infringement has occurred, as the Constitutional Court of Hungary has also held in its judgment of 30/2014 (X. 30.), the CJEU considers that the fact that the undertaking concerned invokes the possibility that there may have been a circumstance which could have affected the probative value of that evidence is not sufficient to require the Commission to prove that the specific circumstance could not have affected the probative value of the evidence.[9] On the contrary, except where the undertaking concerned is unable to provide such evidence because of the conduct of the Commission itself, it is for the undertaking concerned to prove, to the requisite legal standard, first, that the circumstance relied on by it existed and, second, that the specific circumstance cast doubt on the probative value of the evidence relied on by the Commission.

If the authority relies solely on the market conduct of the undertakings concerned to prove the existence of an infringement, it is for the undertakings to show that there is a plausible, reasonable explanation for their conduct other than the infringement. However, a different explanation by the undertakings is only relevant if the authority relies solely on the conduct of the undertakings in the market, i.e. such an explanation becomes irrelevant if the existence of an infringement is not only presumed but also supported by evidence. According to the Curia, *"the decision [of the authority] can only be found to be unfounded if the applicants, by their properly proven and duly substantiated allegations, raise reasonable doubt as to the defendant authority's reasoning in a logical chain, i.e. they provide a more reasonable explanation for their conduct other than the existence of anti-competitive conduct."*[10] In other words, if the court considers the conclusion drawn from the assessment of the plaintiff's evidence to be more reasonable on the facts, this also constitutes a rebuttal of the defendant's arguments. This standard has been taken over by the Curia in its entirety from EU case law based on the Constitutional Court's decision no. 30/2014 (X. 30.).[11] According to the CJEU, if the Commission finds an infringement of the competition rules on the assumption that the facts established cannot be explained by anything other than the existence of anti-competitive conduct, the EU court must annul the decision

8 Fn. 3., T-110/07, 48.

9 Judgment of the Court (Third Chamber) of 22 November 2012 in Case C-89/11P, E.ON Energie AG v European Commission [ECLI:EU:C:2012:738], 74-76.

10 Decision Kfv.37.646/2015/14. of the Curia.

11 Fn. 2., 46.

in question, where the undertakings concerned put forward arguments which put the facts as established by the Commission in a different light and thus enable the Commission's explanation of the facts at the time when it established the existence of the infringement to be replaced by another plausible explanation. In such a case, the Commission cannot be considered to have provided evidence of the existence of an infringement of competition law.[12]

On the basis of the above, if the plaintiff's explanation is more reasonable, the defendant's reasoning is necessarily unreasonable. The Curia later added that *"[...] The court is obliged to choose from among several acceptable explanations the one which it can reasonably justify, and it may do so on the basis of reasonable and rational reasons arising from its own conviction, which reasons must be stated in its judgment. [...]".*[13] If the substantive arguments raised by the applicant have been addressed by the reviewing court and have also been rejected by reasoned, rational and logical argumentation, the legality of the judicial discretion cannot be called into question. In this context, the Curia emphasized that *"the prohibition of reconsideration must be understood as meaning that the reviewing court may not make a decision on the basis of a reassessment in which it does not take into account the arguments of the grounds for the decision and does not assess them but reassesses the facts by means of an independent reasoning and deduction independent of the defendant's decision. It must be borne in mind that the principle of full review does not mean that the judge should reassess the evidence without taking account of the decision of the defendant."* [14]

The authority may admit any evidence on the basis of the principle of freedom of proof. As regards the probative value to be attributed to evidence, the only important factor to be considered in the free assessment of evidence is its credibility. Particular importance should be attached to whether a document is closely connected with the facts or whether the facts have been established by direct testimony of a witness to those facts. In addition, a statement which is contrary to the interests of the declarant, such as a statement by a leniency applicant, should normally be considered as particularly reliable evidence.[15] In the case of a statement by such an undertaking, it cannot

12 Judgment of the Court (Fourth Chamber) of 28 March 1984 in joined Cases 29/83 and 30/83, Compagnie royale asturienne des mines SA and Rheinzink GmbH v Commission of the European Communities [ECLI:EU:C:1984:130], 16.; Judgment of the Court (Fifth Chamber) of 31 March 1993 in joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A. Ahlström Osakeyhtiö and Others v Commission of the European Communities [ECLI:EU:C:1993:120], 126-127.

13 Fn. 5., 140.

14 Ibid. 142.

15 See: Judgment of the Court (Fifth Chamber) of 25 October 2005 in Case T-38/02, Groupe Danone v Commission of the European Communities [ECLI:EU:T:2005:367], 285.; Judgment of the General Court (Second Chamber) of 25 October 2011 in Case T-348/08, Aragonesas Industrias y Energia, SAU v Commission of the European Communities [ECLI:EU:T:2011:621], 100.

be excluded that it may present distorted evidence and therefore, in assessing the probative value of such a statement, it is necessary to consider also the purpose for which the statement was made by the notifying party, whether the statement is credible and accurate, whether it is convincing, whether the statement is not only incriminating for other undertakings and, if the other undertakings contest the statement, whether other evidence is necessary to support the infringement. [16]

In court practice, the credibility of a witness's testimony is not undermined if, taking into account the passage of time, there are some minor inaccuracies, and the declarant is unable to recall all the factual details of the implementation of the cartel, but his statements are coherent and clear.

According to the case law, it is sufficient for the authority to prove that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded without expressly objecting to them, thereby sufficiently proving the participation of that undertaking in a cartel. Where such participation in such meetings is proven, it is for that undertaking to provide evidence to show that its participation in those meetings was without any anti-competitive intent and to show that it informed its competitors that the intention to participate in those meetings was different from its own.[17]

3. Applicability of criminal procedural safeguards in competition cases

The Constitutional Court, in point 102 of its decision no. 30/2014 (X. 30.), referring to the judgment of the Court of First Instance in *AC-Treuhand AG v Commission*[18] , underlined that competition proceedings are essentially administrative in nature and that, consequently, the general principles of Community law and in particular the principle of criminal law do not necessarily have the same scope as when they are applied to a situation covered by criminal law in the strict sense.

3.1. Nullum crimen, nulla poena sine lege

16 Fn. 3., T-110/07, 64-66., 100.; Fn. 15., T-348/08, 105.

17 Judgment of the Court (Sixth Chamber) of 8 July 1999 in Case C-199/92P, Hüls AG v Commission of the European Communities [ECLI:EU:C:1999:358], 155.; Judgment of the Court (Sixth Chamber) of 8 July 1999 in Case C-49/92P, Commission of the European Communities v Anic Partecipazioni SpA [ECLI:EU:C:1999:356], 96.; Judgment of the General Court (Fifth Chamber) of 28 April 2010 in Case T-452/05, Belgian Sewing Thread (BST) NV v Commission of the European Communities [ECLI:EU:T:2010:167], 37.

18 Judgment of the Court of First Instance (Third Chamber, extended composition) of 8 July 2008 in Case T-99/04, AC-Treuhand AG v Commission of the European Communities [ECLI:EU:T:2008:256], 113.

The Constitutional Court, in its analysis of the judgment of the Court of First Instance in *AC-Treuhand AG*, concluded that the principle that offences and penalties must be defined by law also applies in competition matters and that this principle in general requires, inter alia, that all Community legislation, in particular that which imposes or allows the imposition of penalties, must be clear and unambiguous, so that legal persons may know their rights and obligations and act accordingly without any risk of ambiguity.[19] The Constitutional Court, also taking into account the case law of the CJEU[20], has held that the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*) cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability by judicial interpretation.[21] No matter how clearly a legal provision, including criminal law, is worded, the role of judicial interpretation will always remain indispensable, and it will always be necessary to clarify ambiguities and adapt the text to the changing circumstances.[22]

In a specific case, the Constitutional Court therefore held that the case law on the single complex infringement (as the manner in which the restrictive conduct was expressed)[23] was not unpredictable, but was in fact largely reasonably foreseeable,[24] because the EU's practice in this respect had been known prior to the defendant's conduct giving rise to the conviction.[25] Also on the basis of EU competition law practice, and taking into account the foreseeable theory of economic unit, the Constitutional Court held that the GVH may take into account as an aggravating factor the previous anti-competitive conduct of an undertaking belonging to the same group of undertakings.[26]

3.2. Application of the presumption of innocence in competition cases

19 Fn. 2, 102.

20 Judgment of the Court (Grand Chamber) of 28 June 2005 in joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri A/S, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others, KE KELIT Kunststoffwerk GmbH, LR af 1998 A/S, Brugg Rohrsysteme GmbH, LR af 1998 (Deutschland) GmbH and ABB Asea Brown Boveri Ltd v Commission of the European Communities [ECLI:EU:C:2005:408].

21 Fn. 2, 112.

22 Decision 3100/2015 (V. 26.) AB of the Constitutional Court of Hungary, 71.

23 Fn. 2, 113.

24 Ibid., 114.

25 Ibid., 116.

26 Fn. 22, 78-79.

Both the Constitutional Court[27] and the Curia[28], referring to the case law of the CJEU[29], have held that, in view of the nature of the infringement and the gravity and nature of the sanctions attached to it, the presumption of innocence applies, inter alia, to proceedings for infringement of competition rules applicable to undertakings which may lead to the imposition of fines or periodic penalty payments, and that the presumption of innocence, which is enshrined in particular in Article 6 ECHR, must therefore be respected.[30] The presumption of innocence is a general principle of EU law which is now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union.

The Constitutional Court, referring to the case law of the CJEU[31], held that, subject to the presumption of innocence also applicable in competition cases in the field of competition law, in the event of infringement disputes, the burden of proving the infringements established by the Commission and of adducing evidence capable of establishing the facts constituting the infringement in the manner required by law lies with the Commission. Furthermore, also as a consequence of the presumption of innocence, if the court has doubts, it must be interpreted in favour of the undertakings to which the decision finding an infringement is addressed. [32]

At the same time, in the context of the presumption of innocence, the Curia stresses that *"the very fact that the principle of the presumption of innocence applies in proceedings concerning infringements of competition rules by undertakings which may lead to the imposition of fines or periodic penalty payments,*

- it does not follow that the rules on criminal procedure may also apply. [...] an infringement of competition law is not a criminal infringement, it is not a conviction of persons [...][33]

- applicants subject to the procedure do not have to cooperate with the authority in the procedure, nor do they have to provide a reasonable, rational explanation for their

27 Fn. 2, 46.

28 Fn. 4, 112.

29 Fn. 17, C-199/92P, 149-150.; Judgment of the Court (Sixth Chamber) of 8 July 1999 in Case C-235/92 P, Montecatini SpA v Commission of the European Communities [ECLI:EU:C:1999:362], 175-176.

30 Fn. 3, T-61/02, 61.

31 Fn. 9; Judgment of the Court of 17 December 1998 in Case C-185/95, Baustahlgewebe GmbH v Commission of the European Communities [ECLI:EU:C:1998:608], 58.; Judgment of the Court (Full Court) of 6 January 2004 in joined Cases C-2/01P and C-3/01P, Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG [ECLI:EU:C:2004:2], 62.

32 Judgment of the Court of 14 February 1978 in Case C-27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities [ECLI:EU:C:1978:22], 265.

33 Fn. 4, 123.

conduct that is not contrary to competition law."[34]

3.3. Ne bis in idem

In its decision no. 8/2017 (IV. 18.), the Constitutional Court stated that Article XXVIII (6) of the Fundamental Law does not *per se* prohibit the conduct of several proceedings of different functions, belonging to different branches of law, against a person for the same unlawful act and the application of legal consequences as a result of these proceedings. The constitutional guarantee embodied in the principle of *ne bis in idem* explicitly protects the individual against the abusive exercise of the State's criminal power. In considering whether or not the procedure or sanction under scrutiny is "*criminal*" in nature, the decisive factor is not the legal classification of the procedure in question, but the function of the procedure and the legal consequence.[35] A proceeding is criminal in nature if it seeks to hold a natural person liable for an unlawful act committed by that person, provided that the legal consequence to be applied in the course of the proceeding is punitive, that is to say, that it is retaliatory in nature and in effect, and is a preventive measure.[36] The Constitutional Court, referring to the judgment of the CJEU in the Volkswagen case[37], held that an administrative fine, even if it is classified as an administrative sanction under national law, constitutes a criminal penalty where it has a retaliatory purpose and reflects a high degree of severity.

The CJEU has also pointed out in case C-117/20 *bpost*[38] that proceedings for the same facts do not necessarily violate the *ne bis in idem* principle if there is proper communication between the authorities involved, the two proceedings are conducted in a coordinated manner and the total sanctions imposed are proportionate to the gravity of the infringement committed.[39] In essence, this requirement was applied by the Constitutional Court in its decision no. 1/2024 (I. 9.), when it found an infringement of the fundamental law by omission, because the legislature had not regulated organizational arrangements for cooperation between all the authorities acting within the system of powers established under Act XLVII of 2008 on the prohibition of unfair commercial practices against consumers.

In contrast to the *bpost* judgment (where the telecom regulator and the compe-

34 Fn. 7, 49.

35 Decision 1/2024 (I. 9.) AB of the Constitutional Court of Hungary, point 75 of reasoning.

36 Ibid.

37 Judgment of the Court (First Chamber) of 4 May 2023 in Case C-97/21, MV-98 [ECLI:EU:C:2023:371].

38 Judgment of the Court (Grand Chamber) of 22 March 2022 in Case C-117/20, bpost SA v Autorité belge de la concurrence [ECLI:EU:C:2022:202].

39 Decision Kfv.III.37.366/2023/7 of the Curia.

tition authority acted in parallel), the *Nordzucker* case[40] involved parallel actions by two national competition authorities. Here, the ECJ held that in such a case the two competition authorities pursue the same public interest objective of ensuring that competition in the internal market is not distorted by anti-competitive agreements, decisions by associations of undertakings or concerted practices, i.e. the cumulation of sanctions is not justified because it is not one that pursues additional objectives.[41]

4. Effect on trade between Member States

In the vertical restraint case on alarm devices[42], the accuracy of the relevant market definition for the purposes of trade between Member States was questioned. The Competition Authority, although it was not bound by the ECJ case law[43], applied the relevant European Commission notice, which requires a market share of at least 5% of the relevant market players as a perceptible threshold of involvement for trade between Member States (which is a criterion for the application of EU competition law).[44] [see Regulation No. 1/2003, Article 3(1)].[45] However, the ECJ ruled very early on that an agreement covering the whole territory of a Member State by its very nature has the effect of partitioning markets on a national basis.[46] Later, the ECJ confirmed that an agreement with an anti-competitive object by its very nature, and irrespective of any actual effect, appreciably restricts competition.[47] On this basis, the GVH should not have had to prove the 5% threshold, since vertical price fixing constitutes a restriction of competition by object[48] which, if it covers the whole territory of a Member State, af-

40 Judgment of the Court (Grand Chamber) of 22 March 2022 in Case C-151/20, Bundeswettbewerbsbehörde v Nordzucker AG and Others [ECLI:EU:C:2022:203].

41 Ibid., 57.

42 Decision VJ/97-282/2016 of the GVH.

43 Judgment of the Court (Grand Chamber) of 14 June 2011 in Case C-360/09, Pfleiderer AG v Bundeskartellamt [EU:C:2011:389], 21.; Judgment of the Court (Second Chamber) of 13 December 2012 in Case C-226/11, Expedia Inc. v Autorité de la concurrence and Others [EU:C:2012:795], 29.

44 Bernadette Zelger: EU competition law and extraterritorial jurisdiction - a critical analysis of the ECJ's judgment in Intel, European Competition Journal, vol. 16., 622.

45 Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 52. a).

46 Judgment of the Court of 17 October 1972 in Case 8-72, Vereeniging van Cementhandelaren v Commission of the European Communities [EU:C:1972:84].

47 Fn. 43, C-226/11, 36.

48 See: Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 4-13.

fects trade between Member States and thus establishes the applicability of EU competition law. Thus, the GVH relied on the estimates of the market participants contacted, all of which estimated the market share of the undertaking concerned at above 5%, the threshold for appreciable effects. According to the Curia, however, the definition of the relevant market cannot remain at the level of generality, because, according to the relevant case law of the Curia and the Constitutional Court, in competition cases, as administrative cases of a criminal nature, "*a higher degree of proof must be expected than that required by the general obligation of the public authorities*".[49] The reason for this, according to the Curia, is that it serves the higher court's requirement that the "*facts of the case should not be based on mere speculation and conjecture, but on uncontradicted evidence from which a well-founded conclusion can be drawn as to the fact of the infringement.*"[50] However, the purpose of determining whether trade between Member States is affected is not to determine the fact of the infringement (the actual liability), but the choice of the law applicable.[51] This requires a sensitivity test and an examination of whether the 5% threshold is met, which of course cannot be done without an examination of the relevant market. However, in this context, the relevant market test could only be linked to a finding of criminal liability if the application of EU competition law had more serious consequences. However, this did not happen for two reasons. On the one hand, the Authority imposed a single fine for the application of Hungarian and EU competition law, and on the other hand, Article 3(2) of Regulation (EC) No 1/2003 explicitly states that no conduct may be prohibited under national competition law that would not be prohibited under Article 101 TFEU, i.e. that Article 101 is subject to harmonisation in the EU. On this basis, linking trade between Member States (as a choice of law criterion under EU competition law) to the *in dubio pro reo* principle clearly makes it difficult to enforce EU competition law in Hungary.

5. Single continuous, complex infringement

In its judgment of Kfv.II.37.672/2015/28, the Curia also clarified single and continuous infringement by referring to the case law of the CJEU. An infringement of Article 101 TFEU may not only be the result of an isolated act, but also of a series of acts or even of continuous conduct. [52]

Where the different acts form part of a "single plan" in the common market be-

49 Decision Kfv.IV.37.739/2021/12 of the Curia, 82.

50 Ibid.

51 Pieter Van Cleynenbreugel: Article 101 TFEU and the EU Courts: Adapting Legal Form to the Realities of Modernization? Common Market Law Review, vol. 51, 1394.

52 Judgment of the General Court (Eighth Chamber) of 19 May 2010 in Case T-19/05, Boliden AB, Outokumpu Copper Fabrication AB and Outokumpu Copper BCZ SA v European Commission [ECLI:EU:T:2010:203], 60.

cause of the same anti-competitive object, the authority is entitled to impose liability for these acts in proportion to their contribution to the infringement as a whole.[53] The mere fact that each undertaking participates in the infringement in its own particular way does not affect the finding that the infringement is of a single and continuous nature.[54] Thus, an undertaking may be held liable for the cartel as a whole even if it is established that it participated directly in only one or a few of its constituent elements, where, on the one hand, it knew or ought to have known that the collusion in which it participated, in particular through meetings organized on a regular basis over a number of years, was part of an overall scheme intended to distort competition and, on the other hand, that overall scheme included all the constituent elements of the cartel.[55] According to the Curia's reference[56], it follows from European case law[57] that where an undertaking takes part in an anti-competitive infringement consisting of several elements by engaging in a specific conduct captured by Article 101 (1) TFEU, the infringement is not compatible with Article 101 (1) TFEU. An undertaking may be held liable for the conduct of the other undertakings during the period of its participation in the same infringement if it is established that it knew or could reasonably have presumed that the other undertakings were engaging in infringing conduct and was willing to accept the risk of that conduct.

According to the Curia, the most important circumstances for establishing the unity of an infringement include the existence of an overall plan (the unity of wills created, the future conduct to be adopted on the market), the high degree of identity of the participants, the proximity of the products concerned, and the similarity of the means and mechanisms used.[58] However, the identification of the overall plan as an agreement at will seems, on the basis of Hungarian case law, to lead to a misleading link with restrictive agreement, which is not the only form of single and continuous infringement, as there is a complex type of agreement including concerted practices.[59] In light of this, it is not clear why the Curia[60], after having found that the parties' co-

53 Judgment of the Court (Fifth Chamber) of 7 January 2004 in joined Cases C-204/00P, C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P, Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del Tirreno SpA v Commission of the European Communities [ECLI:EU:C:2004:6], 258.

54 Judgment of the Court of First Instance (Third Chamber) of 8 July 2008 in Case T-53/03, BPB plc v Commission of the European Communities [ECLI:EU:T:2008:254], 259-260.

55 Fn. 17, T-452/05, 31-32.

56 Fn. 4.

57 Fn. 17, C-49/92, 203.

58 Decision Kf.II.37.959/2018/14 of the Curia, 72.; Decision Kfv.IV.37.288/2022/13. of the Curia, 126.

59 Fn. 58, Kf.II.37.959/2018/14., 73.

60 Ibid., 66.

ordination included the exchange of business secrets and that they agreed on purchase prices and the allocation of markets, came to the conclusion that a single and continuous infringement had not happened.[61] On the other hand, it concludes that "a single and continuous infringement could have been established, in the view of the Curia, if it could be shown that, in full consensus, the undertakings concerned, accepting the common objective, adjusted their market conduct and measures to it."[62] In the lead accumulator case, the parties reached an agreement and coordinated their conduct with a view to setting up a single and continuous cartel. In essence, they were the instances of creating a potential overall plan and not the subsequent series of infringements that would form a whole along its lines. Since the overall plan was not followed by subsequent collusive arrangements, agreements and concerted practices, there was nothing to unify (the restrictive agreement was still in place), but not because they did not adapt their subsequent market conduct to it. Also, according to European practice, there should be no difference between a single and continuous infringement and the general competition law assessment of cartels.[63] However, if market conduct is not a condition for agreements with restrictive aims[64], it should not be a condition for single and continuous infringements either. Thus, in the lead accumulator cartel case, the specific conduct aimed at creating a potential single and continuous infringement, which was stalled in its implementation (the Curia refers to this ambiguously as "in the absence of an agreement")[65] at the level of a stand-alone cartel infringement, but it does not follow that the single and continuous infringement is conditional on the subsequent market conduct corresponding to it, but instead on the implementation of unlawful coordination or agreements in accordance with the overall plan.

Unfortunately, this misunderstanding was later confirmed in the cash register cartel case,[66] in which the undertaking concerned participated in the initial agreement but not in the subsequent concerted practice. The Curia attached importance to the fact that the Authority's decision distinguished between the initial agreement and the subsequent concerted practices and interpreted the Authority's decision as mean-

61 Ibid., 72.

62 Ibid., 73.

63 Christian Bergquist: A Single and Continuos Infringement, European Competition and Regulatory Law Review, 2021/4, 383.; see also: Fn. 54, 249.

64 Fn. 17, C-49/92, 123.; Judgment of the Court of First Instance (Second Chamber) of 8 July 2004 in joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, JFE Engineering Corp., formerly NKK Corp., Nippon Steel Corp., JFE Steel Corp. and Sumitomo Metal Industries Ltd v Commission of the European Communities [ECLI:EU:T:2004:221], 181–185.; Fn. 53., 261.; Judgment of the Court (Sixth Chamber) of 11 January 1990 in Case C-277/87, Sandoz prodotti farmaceutici SpA v Commission of the European Communities [ECLI:EU:C:1990:6], 261.

65 Fn. 58, Kf.II.37.959/2018/14, 73.

66 Decision Kfv.V.37.465/2022/6 of the Curia.

ing that a single continuous infringement existed only in the case of these concerted practices, whereas the Authority also found a complex infringement, which obviously would not have been possible only in the case of concerted practices. Although not invoked, the Curia applies the presumption of concerted practices and its rebuttal. Accordingly, there is a rebuttable presumption that the market undertakings participating in the coordination, provided that they remain active on this market, will take into account the information exchanged with their competitors in order to determine their market conduct.[67] It is then for the undertaking concerned to prove that the concerted practice has not affected its conduct on the market in any way,[68] for example by demonstrating that it has systematically applied a rebate above the relevant ceiling.[69] The Curia held that, since the company concerned had not engaged in the agreed conduct, it could not be held liable for the concerted practice. In so doing, however, the Curia itself justified the conclusion that the agreement constituted an overall scheme of complex infringement, in which case, however, as stated above, there should be no relevance of the concerted practice. However, in this particular case, the company concerned took part in another meeting, which unfortunately the court did not consider relevant. In addition, according to European case law, the dissociation must be clearly expressed and obvious to the other infringers.[70] In its absence, the practice has been that a passive presence could be seen by others as an encouragement and approval. Even so, the Curia held that the undertaking concerned could rebut the presumption of concerted practice by proving that it had not behaved in accordance with the overall plan on the market. This is, however, presumably the result of the ambiguous wording of the lead accumulator case as described above. In that case, the conduct was caught at the level of a potential overall plan (coordination and agreement with an anticompetitive object in itself), but in the cash register cartel case the overall plan (agreement at will) was established and was followed by coordination.

For the purposes of a single and continuous infringement, the European case law cited above suggests that subsequent market conduct is no more relevant than for cartel infringements in general. For a single and continuous infringement to exist, it is not necessary that the market conduct conforms to the overall plan, but that there are further agreements or concerted practices that fit into it, as the Curia rightly concluded in the lead accumulator case. However, contrary to what was stated in the cash register cartel case, it is not sufficient, on the basis of European case law, to overturn the participation in the coordination merely on the basis that the company concerned did not

67 Fn. 17, C-49/92, 121.

68 Judgment of the Court (Second Chamber) of 5 December 2013 in Case C-455/11 P, Solvay SA v European Commission [ECLI:EU:C:2013:796], 43.

69 Judgment of the Court (Fifth Chamber) of 21 January 2016 in Case C-74/14, "Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba [ECLI:EU:C:2016:42], 49.

70 Ibid. 46.

engage in the corresponding market conduct. The Curia's decision in the medical device cartel case, which explicitly states that a comprehensive plan does not imply that the participants have actually concluded an agreement, but that the intention to engage in future conduct on the market is sufficient, can be seen as an adaptation of the Curia judgment in the cash register case and a return to the Curia's judgment in the lead accumulator case.[71] According to the Curia, in order for the conduct at issue to constitute a single infringement, it is necessary, in the light of the Polypropylene case (C-49/92), to have (i) an objective element, that the subject matter of the discussions is the same, they take place over the same period and they are linked by a common purpose, and (ii) a subjective element, that the participants must be aware that they are part of a wider process of coordination.[72]

6. Expanding the category of by-object restrictions

At the European level the Hungarian courts have also contributed[73] to the question of the assessment and expandability of the category of restrictions of competition by referring two decisions of the GVH in the 2000s to the ECJ for a preliminary ruling, which was able to provide important guidance on the issue.[74] Clearly, the issue is one of the most sophisticated in European competition law. Hungarian jurisprudence has not only contributed to the development of the ECJ's practice on restrictions of competition by object but has also been consistently applied since then. The Curia – in line with the practice of the CJEU[75] - emphasizes that the analysis of the economic and legal background, which is aimed at establishing the degree of harm necessary to establish the existence of a restriction by object, must be clearly distinguished from the market effects analysis of the restrictive effects on competition, and that this line of inquiry is of a different nature from the actual market effects analysis, and therefore should not be confused with the conditions for establishing an infringement on the basis of effects (e.g. for the assessment of the degree of harm, the economic context may include a description of the functioning and structure of the relevant market, from which economic relationships can be identified, but does not require a detailed

71 Decision Kfv.I.37.452/2023/3 of the Curia, 172.

72 Ibid. 221.

73 See: András Tóth: Versenyjogi útkeresés a célzatos versenykorlátozások terén és a magyar ügyek szerepe, Magyar Jog, 2021/9., 493–503.

74 Judgment of the Court (First Chamber) of 14 March 2013 in Case C-32/11, Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal [ECLI:EU:C:2013:160]; Judgment of the Court (Fifth Chamber) of 2 April 2020 in Case C-228/18, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others [ECLI:EU:C:2020:265].

75 Judgment of the Court (Fourth Chamber) of 30 January 2020 in Case C-307/18, Generics (UK) Ltd and Others v Competition and Markets Authority [ECLI:EU:C:2020:52], 104.

market impact analysis based on numerical data).[76]

In its 2019 judgment, the Curia challenged why it constitutes a restriction of competition if an online seller (previously a legally non-existent sales channel) does not receive a discount that physical shopkeepers are entitled to enjoy because of the financial outlay they have to make.[77] The Curia identified dual pricing as a legally undefined category, which can be understood as meaning that, in its view, the case at hand did not fall within the scope of the prima facie restriction of competition by object described in point 52(d) of the Vertical Guidelines.[78] On the basis of the above, it can be understood that the Curia explicitly identified the dual pricing, which the GVH also considered prima facie, as falling outside the targeted category and indicated that its classification as a restriction of competition could only be established if the GVH gave a reasonable justification as to why the applicants could have an interest in restricting competition. Taking into account the intention of the parties has already been mentioned in European competition case law as one of the non-mandatory but possible criteria for broadening the by-object category.[79] Also as a criterion within the scope of the extension of the by-object category (although this decision of the Curia does not refer to European case law, but its content is identical to the test of the degree of harm described there), the guidance of the Curia provides that the GVH "must define dual pricing as an infringement of competition law, define the elements of the offence, and provide an account of the legal provisions, legal documents, other legal facts and circumstances taken into account in the definition. It must also provide an answer as to the legal basis and conditions under which the restrictive nature of a newly introduced advantage can be said to exist, if the advantage in question was not previously available to the person concerned under any conditions."[80]

As from 2022, the Vertical Guidelines also refine their wording on dual pricing.

76 Fn. 71, 186.

77 Decision Kf.VI.37.870/2018/9 of the Curia (or the so-called vertical contact lens case No. VJ-55/2013).

78 An agreement that the distributor will pay a higher price for the products it intends to sell over the internet than for the products it intends to sell traditionally.

79 Judgment of the Court (Third Chamber) of 4 June 2009 in Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit [ECLI:EU:C:2009:343], 27.; Judgment of the Court (Third Chamber) of 6 October 2009 in joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v Commission of the European Communities and Commission of the European Communities v GlaxoSmithKline Services Unlimited and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities [ECLI:EU:C:2009:610], 58.; Fn. 74., C-32/11, 37.; Judgment of the Court (Third Chamber) of 11 September 2014 in Case C-67/13 P, Groupement des cartes bancaires (CB) v European Commission [EU:C:2014:2204], 54.

80 Fn. 77, 71.

The starting point has been to exempt the requirement that a buyer should pay a different wholesale price for products sold online than for products sold offline (dual pricing). This is because dual pricing can provide an incentive for a return on investment in online or offline sales channels, unless the wholesale price makes online sales unprofitable or financially unsustainable, or where dual pricing limits the quantity of products available to the buyers for online sales.[81]

The Curia's practice has detected an extension of the category of by object restrictions in the HR cartel case as regards the no touch[82] and public procurement clauses[83]. With regard to the no touch clause, the Curia emphasized its relative effect compared to the no poach clause, namely that the employee concerned was excluded from employment only in the case of the particular intermediary firm and not from all intermediary firms, as in the case of poach, and therefore the prima facie effect of the purposefulness was not apparent.[84] A similar conclusion was reached in the case of the public procurement clause, in respect of which it was not shown whether the agreement promoted greater participation in public procurement and thus whether it stimulated or weakened competition.[85]

The Curia also criticised the failure to meet the test for the extension of the category of restriction of competition by object (sufficient degree of harm) in the case of the cartel for the procurement of medical equipment. [86]

7. Summary

The criminal nature of competition law has focused on the full scope of judicial review, in the context of which the Hungarian courts have worked on the standard of proof in competition cases in the light of European case law. The reference of Hungarian courts to European case law is also evident in the applicability of criminal proce-

81 Guidelines on vertical restraints, 209.

82 The members of the PESA undertake not to directly offer a job to any of the staff they have seconded to a particular client under any circumstances. See: Decision Kfv.II.37.762/2022/24 of the Curia, 17.

83 When participating in a public procurement procedure, the candidate member may not use the data or CVs of employees of other companies without the knowledge and consent of the employer. It is also obliged to disclose to the employer member any information that comes to its knowledge relating to the public procurement procedure that concerns the employees of the other member.

84 Fn. 82, 313.

85 Ibid. 317.

86 Fn. 71, 195.

dural guarantees in competition cases. A particular highlight in this respect is the fact that the Constitutional Court has considered EU competition law as a constitutional support for the predictability of Hungarian competition practice. The Hungarian case law has not only contributed to the development of the ECJ's practice on restrictions of competition by object but has also developed a strong jurisprudence on this sophisticated issue (the extension of the category of restriction of competition by object).

In competition cases before 2010, Hungarian case law had helped to improve the EU's interpretation of antitrust law by referring cases to the CJEU for preliminary rulings, but after that it could not contribute as the courts did not refer cases to the CJEU.

The numerous examples given in the study illustrate that EU case law followed by the GVH and incorporated into Hungarian administrative law through its decisions is largely accepted and followed by the Hungarian courts.

Examples include – without aiming to give an exhaustive list – the requirements placed on the standard of proof, the scope of review and the criminal law safeguards, in which cases the Curia, together with the Constitutional Court, has fully accepted the practice of the CJEU, thus promoting the effective enforcement of EU law.

However, such positive examples are not the only ones to be found when looking at the transposition of EU practice by judicial fora, as the study also highlights a number of errors of interpretation. At the different levels of judicial review, there are several decisions that differ from EU case law, with the obvious problem that these decisions do not allow the full effectiveness of the prohibition in the EU competition rules, which the CJEU strictly follows when reviewing Commission decisions. It would be even more important to keep the EU case law in mind when reviewing decisions of the GVH, because if we follow the reasoning of the Constitutional Court that EU case law allows us to largely foresee domestic practice on a particular issue, then, if we reverse this, it is clear that not following EU case law can lead to legal uncertainty.

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