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SERIAL OFFENDERS: INDUSTRIES PRONE TO ENDEMIC COLLUSION

-- Contribution from Hungary --

-- Session IV --

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SERIAL OFFENDERS: A DISCUSSION ON WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION

-- Hungary --

1. Introduction

1. Under the Hungarian Competition Act (HCA – Act LVII. of 1996 on the Prohibition of Unfair and Restrictive Market Practices) the Gazdasági Versenyhivatal (GVH – the Hungarian Competition Authority) has the power to enforce those competition law provisions within its competence that represent the public interest and that increase long-term consumer welfare and competitiveness.

2. The most egregious infringements are the hardcore cartels which are purely anti-competitive in nature, having as their aim the restriction of competition (as opposed to those where the restriction of competition is a secondary effect), and which at the same time result in no efficiency or welfare gains. Typically such behaviour includes price fixing, the sharing of markets or customers, and bid rigging. In such cases the scores given by the GVH will be the highest possible. Cartel agreements, the so-called hardcore competition restrictions are extremely harmful for the economy and therefore fighting cartels is one of the GVH's top priorities. In the last 15 years the GVH investigated more than 100 cases where potential cartel infringements arose.

2. Tools for fighting cartels in Hungary

3. In order to effectively fight against cartels and to detect and investigate secret cartel agreements, the GVH adopted its Leniency Programme and published its Notice on leniency in 2004, following the well-functioning leniency programme of the European Commission, with the aim of providing incentives to the parties to cartels to put an end to their participation in cartels. Additionally, in 2009 the rules of the Leniency Programme were incorporated into the Hungarian Competition Act in order to provide more legal certainty for the undertakings.

4. Unlike in Western Europe, in Hungary the leniency programme does not work with great success, therefore in 2010 the GVH introduced its informant reward system since the authority noticed that people who have been fired are willing to provide details on cartels and the role of their former employers. Under the informant reward scheme, the person providing indispensable information on a hard-core cartel is given a reward amounting up to 1% of the fine imposed on the cartel. To be precise, in the last five years the GVH received 2-3 leniency applications, while 20 informant applications are received annually. Two informant rewards have been given so far.

5. The latest tool introduced by the GVH in order to fight, inter alia, cartels is the settlement introduced in 2014. Since under the HCA it is applicable only in cases where the investigation started after 1 July 2014, the GVH has not issued any settlement decision yet.

6. Since 2005 the Criminal Code also prohibits i/ any agreement that restricts competition in a public procurement or concession tender procedure by fixing the prices and other contractual terms and conditions or by market sharing for the purpose of manipulating the outcome of the tender, ii/ concerted activities and iii/ participation in decision making by an association of undertakings in order to restrict competition. Under the Criminal Code, the abovementioned conducts qualify as crimes punishable with imprisonment of one to five years.

3. Endemic sectors in Hungary

7. In Hungary sectors subject to repeated collusion are the construction sector, cement sector and food retail sector. We are going to give more details on the Hungarian construction industry.

4. Enforcement practice of the Hungarian Competition Authority in the Hungarian construction industry

8. The GVH investigated several cases in the construction sector in the last 15 years, all of them were bid-riggings in public procurements. The GVH issued 14 decisions between 2004-2014 concerning bid-riggings in public procurements in the construction sector and imposed fines amounting to approximately 75 million EUR.

- i) Vj/138/2002 Case: The GVH found that three undertakings involved in making bids for tenders related to road constructions in Budapest had followed a restrictive business practice i.e. a concerted action aimed at restricting competition in the offering phase of a public procurement procedure. The GVH imposed fines on 3 undertakings amounting to 950.000 EUR and terminated the proceedings against 5 undertakings.
- ii) Vj/154/2002 Case: Collusion in the bidding process between three undertakings in the public procurement process. The GVH found that the two undertakings concerned had concluded a consortium agreement before the second round of the tender on the construction of an informatics centre which provided the losing party, in case the other was the winner, with a subcontractor assignment and financial compensation. The reasons for the conclusion of the agreement were on the one hand that the headquarters of one of the undertakings was in a city far away from the place of the construction, and on the other hand that the other undertaking could not meet the financial capacity and ability requirements and other criteria without cooperating with another undertaking. The GVH imposed 600.000-600.000 EUR on two of the undertakings concerned and terminated the proceedings against the third one due to the absence of infringement.
- iii) Vj/27/2003 Case: the GVH established that the undertakings which submitted bids in response to an invitation to tender issued in 2002 in the framework of public procurement procedures, had previously agreed between themselves on the identity of the bidder acquiring the construction works contract for particular motorway-sections. In some cases they had even agreed that the winners would let the others in as subcontractors. Every large undertaking that could be expected to meet the conditions to be fulfilled by candidates set out in the invitation was a party to the cartel agreement. The total of the fines imposed amounted to approx. 28.2 million EUR.
- iv) Vj/28/2003 Case: The GVH established that the undertakings concerned had concluded an agreement before the second round of the tender on the renovation of the seat of the Hungarian Pensions Insurance Authority, which provided the losing party, in case the other was the winner, with a subcontractor assignment and financial compensation, while the third undertaking, in return for withdrawing its objection to not having been invited for the public procurement, was

involved in the agreement of the other two undertakings. The total fines imposed amounted to approx. 2.35 million EUR.

- v) Vj/126/2003 Case: The GVH, in the absence of the establishment of the infringement, terminated its proceedings in relation to tenders on the renovation and construction of a tramway in Budapest.
- vi) Vj/135/2003 Case: The GVH, in the absence of the establishment of the infringement, terminated its proceedings in relation to tenders on the construction of the sewage system and waste management of Szeged, Csongrád county.
- vii) Vj/74/2004 Case: The GVH established that the agreement concluded between the two undertakings concerned in a public procurement procedure for building a specific block of flats restricted competition. Therefore, the GVH imposed a fine of approx. 66.000 EUR on one of the undertakings, however, it did not fine the other undertaking in compliance with the leniency policy of the GVH since it informed the GVH on the agreement on sharing the market.
- viii) Vj/111/2003 Case: The GVH, in the absence of the establishment of the infringement, terminated its proceedings in relation to tenders on the thermal project of a city in Hungary.
- ix) Vj/25/2004 Case: The GVH established that 8 out of 11 undertakings concerned had infringed the law when they agreed on 19 road constructions in a public procurement procedure. The GVH imposed fines amounting to 2 million EUR on 8 of the undertakings, while it terminated the proceedings against 3 undertakings.
- x) Vj/56/2004 Case: The GVH established that the practice of the 14 undertakings concerned, continued in the framework of a cartel, was likely to restrict competition in the road- and bridge-building market and the market of renovations in Hungary, and imposed a total fine of approx. 5.3 million EUR on the defendant undertakings. The Competition Council took into account as an aggravating circumstance that the said collusion between undertakings in the road- and bridge-building and the renovation industry had become customary in practice in 2001 and 2002; furthermore, this behaviour seriously injured the customers' interests.
- xi) Vj/130/2006 Case: Recidivist road construction companies were continuously concerting their practices within the framework of an overall plan. Strabag Zrt. and Egút Zrt. had concluded restrictive agreements with the aim of winning public procurement tenders published for road-construction works in two counties in Hungary. Colas Dunántúli Zrt. and He-Do Kft. had done alike in order to win the tender published by the municipality of Heves town for road-construction works. The GVH imposed a total fine of approx. 10 million EUR on three undertakings but did not fine the other undertaking because of its leniency application helping the GVH in revealing the cartels.
- xii) Vj/174/2007 Case: The GVH conducted proceedings against 17 undertakings for a violation of the prohibition of agreements restricting competition. The GVH established as a fact that five undertakings in the construction industry had been involved in bid rigging between 2004–2005. The undertakings concerned colluded and agreed to share the market according to a set of principles and in certain cases even agreed on the winner itself in connection with invitations to tender for public procurement procedures for renovating, reconstructing and repairing railway lines in Hungary. While the fifth undertaking was also involved in the bid rigging, it was not fined as it had submitted a leniency application to the GVH. The GVH imposed total fines of approx. 25.6 million EUR on the four undertakings fined.

- xiii) When determining the amount of the fine, the GVH took into consideration that the fine to be imposed has to have a deterrent effect. The GVH considered as an aggravating factor that the restrictive practices revealed – market sharing and price fixing committed within the framework of public procurement procedures – qualified as extremely serious infringements of the law, took place for a long period of time and covered the whole territory of Hungary. In the case of Szentesi Kft., which belongs to the Strabag-group, the GVH took into consideration that the other members of the undertaking-group involving the infringing undertaking have already been parties to similar collusions on several occasions.
- xiv) Vj/65/2012 Case: The GVH established that the undertakings concerned had agreed on their tendering prices in public procurements. The GVH imposed a total fine of approx. 500.000 EUR on the undertakings concerned.
- xv) Vj/48/2013 Case: The GVH established that the three undertakings concerned had agreed on the winner of the public procurement published by the council of Nagylóc and that two of the undertakings concerned had also agreed on the public procurement of the council of Szécsényfelfalu before entering their bids. The GVH imposed a total fine of approx. 137.000 EUR on the three undertakings.

5. Why does the construction sector seem prone to endemic collusion?

9. From the abovementioned decisions of the GVH we can make the following conclusions. The main reason why this sector attracts cartels can be attributed to the particular characteristics of the sector. Tenders are the common procedure to select the companies for constructions what leads to information transparency. The relevant market is transparent and the leading officers of the undertakings know each other well. Additionally, the relevant product is homogeneous and the parties have very similar cost structures. There is not too much room for innovation or for distinguishing oneself from competitors; consequently, parties can only compete on price and this leads them to share the market instead of competing. The cultural background should also be mentioned, namely the fact that when there was no market economy in Hungary, agreeing on the output or sharing the market was a normal practice and this still has an effect on business relations and conducts, even after two decades.

10. It can be seen from the practice of the GVH that public procurements determine the sector where endemic collusions arise. The GVH has also dealt with several cartels in public procurements in other sectors in addition to the cartels listed above.

6. Fines

11. In case of competition law infringements related to public procurements the GVH bases the calculation of each fine on – as relevant turnover – three times the amount of the winning bid and considers aggravating and mitigating circumstances.

12. Since the adoption of the amendment of the Hungarian Competition Act, the GVH is entitled to calculate the maximum of the fine on the basis of the net turnover of the group of undertakings which is specified in the decision and of whom the undertaking on which the fine is imposed is a member. It can be seen in the enforcement practice of the GVH that this new rule has had a severe deterrent effect on the undertakings that used to take part in cartels in the construction sector. Before the adoption of this rule it was a common practice that the assets of the undertaking committing the infringement, which was a member of a group of undertakings, would be transferred to another undertaking member of the group, with the consequence that the fine could not be enforced. However, through the adoption of this new rule,

the group of undertakings cannot escape from the fine and the number of cartels in the construction sector has reduced significantly as a result.

7. Approach of the GVH to recidivist companies

13. The GVH has always acted vigorously against recidivist companies. Under the GVH's notice on the method on setting fines in antitrust cases, in case of a repeated infringement – if the previous conduct, the current conduct, the statement of facts and the evaluated circumstances show significant similarities – the amount of the fine calculated on the basis of the abovementioned facts will increase by 100% (for instance, if a third – very similar – repeated unlawful conduct is identified, the basic amount of the fine will increase threefold). In other cases the fine will increase by a lower rate, corresponding to the degree of recidivism (the degree of similarity). It can be seen from the cases above that the GVH considers habitual and repeated recidivism as a significant aggravating factor when determining fines.

14. The GVH has noticed repeated (three or even more times) infringers in the construction sector, such as STRABAG, EGÚT, Hidépítő Rt., Betonút Szolg. & Építő Rt.

8. Conclusions

15. On the basis of the enforcement practice of the GVH the main reason why the construction sector attracts cartels can be attributed to the particular characteristics of the sector, namely that the relevant market is transparent, leading officials know each other well, the undertakings have similar fixed costs, the product is homogenous and there is not too much room for innovation. The cultural factor stemming from the socialist regimes should also be mentioned.

16. To address the problem, the personal liability of the officials of the undertakings might be a good incentive for the leading officers of the undertakings not to take part in illegal activities, however, in Hungary no personal liability has yet been established in any case.

17. There is a need for a uniform leniency regime in the EU, more cooperation with other authorities and more detected cartels to reduce the illegal conducts in these sectors.