Pázmány Law Working Papers
2013/16

Tihamér Tóth: Are Fines Fine? Sanctioning Infringements of the Directive on Unfair Commercial Practices in Hungary

Pázmány Péter Katolikus Egyetem /
Pázmány Péter Catholic University Budapest
http://www.plwp.jak.ppke.hu/

Tihamér Tóth[1]

Are Fines Fine? Sanctioning Infringements of the Directive on Unfair Commercial Practices in Hungary

Introduction

The Hungarian Competition Authority (Gazdasági Versenyhivatal, "GVH") has always been competent to investigate misleading and aggressive business practices with a potential impact on free and fair competition. In 1991, the very first year of its operation, the GVH established 13 infringements.[2] The first cases involved bait and switch advertising, and false information on price discounts, practices that occupied the agenda for two decades to come. Most of the companies subject to these early sanctions do not exist anymore. The big and recognizable names of the retail, telecom and financial services sectors that turn up in the hearing room of the competition authority now were first investigated only in the late nineties.[3]

A legal rule without appropriate and effective sanctions is ineffective. In the legal realm sanctions reflect the seriousness of the underlying legal norm. In Europe, imposing fines is the most common sanction when it comes to the illegal behavior of a business undertaking. After comparing the competition rules of European jurisdictions, the first modern Hungarian Competition Act of 1990 relied heavily on monetary sanctions. Introducing criminal penalties was not on the agenda. Interestingly though, some typical commercial practices, like the use of false product trademarks, misleading information on the quality of products and other, "more socialist" crimes like charging unfairly high prices or disobeying price regulations had been included in the Criminal Code ever since 1978.[4] Publicly providing misleading information was first criminalized by Section 296/A in 1994, mirroring the provision of the Competition Act. The sanction was imprisonment up to two years or criminal fines. However, unlike the competition law provision, it has never been rigorously enforced by public attorneys and thus was not taken seriously by managers and marketing professionals.[5]

In this paper I endeavor to explore what enforcement and sanction policy Hungary opted for and how it has been applied by the Competition Authority and the review courts. We will see that moderate fines are a routine consequence of unfair commercial practices in Hungary. After presenting the principles of the GVH fining code, I summarize the practice concluding that fines are not high enough to deter most types of illegal behavior. Therefore, other

[1] Pázmány Péter Catholic University, Budapest and of counsel for Réczicza White&Case LLP. The author would like to thank to Rebecca Zampieri for her useful comments. This paper is published in the framework of TÁMOP No. 4.2.1.B-11/2/KMR-2011-0002. project (furthering scientific research at the PPKE) of the Pázmány Péter Catholic University.

[2] That compares with three cartel cases and 12 decisions regarding abuse of dominant position. The total amount of fines was HUF 61 million. About half of the misleading cases, especially those relating to advertising contravening other regulations in the tobacco and alcohol sectors, were based on a general clause of the Act prohibiting a number of unfair business practices. This catchall clause did not appear in the Competition Act of 1996.

[3] The first global company that had to pay a fine was Unilever in 1992 with HUF 2 million.

[4] Sections 278-303 of the Act No. IV of 1978.

[5] In 2012 a new criminal code was adopted by the Parliament. Section 417 of the Act No. C of 2012 includes basically the same provisions. If the misleading information relates to health claims or to environmental protection issues the sentence may reach three years. However, neither the old, nor the new text covers price related information in contrast to the ingredients, origin or the quality of the product which are, at least in Hungary, less important for the average consumer than prices.

sanctions of an administrative and criminal law nature will also be discussed. Finally, the role of soft legal instruments, like commitment decisions and education with compliance programs will be explored.

The UCP Directive

Misleading advertising has been subject to European rules since the mid '80s.[6] The aim of the directives was setting harmonized rules for the common market to secure a minimum level of protection for European consumers. In addition to the substantial rules, the directive on misleading advertising also included some principles on how national institutions should enforce the national implementing measures. Member States were asked to introduce adequate and effective means to control misleading advertising to serve the interests of consumers, the general public, and competitors fairly playing the game.[7] It was left to the Member States to decide whether to empower administrative agencies to investigate conduct or to have courts adjudicate these legal issues.[8] At a minimum, these national institutions were expected to have the power to order the prohibition or cessation of the misleading advertising. National rules of procedure had to make accelerated procedures possible, for example, by way of interim measures. Though it was not obligatory, Member States could have enabled their agencies or courts to require the publication of their decisions, in whole or in part, and the publication of corrective statements.

The UCP's rules on national procedures and sanctions have not brought much novelty here in Hungary. It is still for Member States to lay down rules on penalties and procedures. They can choose between the administrative or the judicial model. The penalties are expected to be effective, proportionate and dissuasive.

Hungary opted for the administrative model meeting the above mentioned principles well before the UCP Directive was adopted. The GVH did not hesitate to launch investigations if unfair advertising was threatening competition. A pragmatic allocation of work developed with the government controlled[9] 'real' consumer protection agency focusing on other unlawful business activity endangering consumer rights beyond getting the right information. The legislature saw no reason to change this, only the allocation of cases among the authorities was re-regulated. The Competition Authority got the largest and most substantial piece of the cake involving unfair practices that may have significant impact on competition. The consumer protection agencies deal with smaller, mainly local, unfair commercial practices (*further: UCP*), while the financial supervision agency investigates minor banking and financial services infringements.

---

[6] Council Directive 84/450/EEC of September 10, 1984 related to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising. It was repealed by Directive 2006/114/EC of the European Parliament and of the Council on December 12, 2006 concerning misleading and comparative advertising.

[7] See Article 4 of Council Directive 84/450/EEC. Article 5 also mentions the potential role played by self-regulated bodies, but only as 'addition to the court or administrative proceedings'.

[8] If a Member State opted for the administrative model, it had to make sure that reasoned decisions are adopted by an independent authority and that they can be appealed before a court.

[9] The GVH has always been an independent authority, just like the German Bundeskartellamt. The National Consumer Protection Office had the benefit of supervising a country-wide network of local offices, but it was subject to frequent reorganizations and changes in government.

Sanctioning misleading practices: the early days

Protecting the process of fair competition and the interests of consumers has always been a priority of the GVH. This is evidenced by both the number of procedures and the size of the fines. In 1992, a record fine of HUF 100 million was imposed on a distance selling company for its aggressive and misleading practices.[10] A fine like this would be considered fairly high even today, disregarding the high levels of inflation in the past two decades. It was also remarkable that the GVH routinely investigated practices that were expressly prohibited by sector specific regulations. The explanation for this was that these companies achieved unfair competitive advantages as well, calling for competition law sanctions beyond the sector specific consequences. It was fairly common that competitors were policing the market, since complainants had a uniquely strong position comparable to that of a plaintiff before a court. A good example was the 'which-is-the-best toothpaste war' between Colgate Palmolive and Procter & Gamble that ended in 1994 essentially as a draw with a HUF 30 million fine imposed on both companies.

In 1996 a new competition act was adopted.[11] The most important reason for this new legislation was bringing Hungarian antitrust rules more in line with the competition rules of the common market.[12] The rules on misleading information were not changed substantially. The rules on fines were fine-tuned. The fining rules focused on the seriousness and the length of the infringement, and listed the most frequent aggravating and mitigating circumstances.[13]

The first competition act stipulated that if the harm caused by the infringement can be calculated the GVH could impose a fine trebling this amount. This provision was applied in several cases of misleading advertising where the price paid to the advertising agency was used as a base.[14] The Competition Act of 1996 deleted this rule. Taking the marketing budget as a starting point for the calculation of fines reappeared a decade later in the fine guidelines issued by the GVH.

---

[10] The term distance selling refers to buying products from a distance, for example, online or over the phone. This fine also accounted for 77% of the total fines in 1992. However, a great number of fines imposed on smaller undertakings were never collected due to lax procedural rules. Today, unpaid fines are regarded to be like taxes and are collected by the tax authority. In 1993, a car retail company was ordered to pay the same substantial fine partly because it did not inform its customers that the vehicles it imported from the U.S. did not meet the requirements set by the Hungarian transport authority and owners were required to pay additional expenses as a result to get approval.

[11] Act No. LXXXVI. of 1990 was replaced by Act No. LVII. of 1996.

[12] For the discussion of the legislative developments see T. Tóth: *Competition Law in Hungary: Harmonisation towards E.U. Membership; European Competition Law Review*, 1998/6. p. 358-369.

[13] It is worth mentioning at this point that fines have always been an optional consequence of finding an infringement. There is no obligation for the GVH to fine the responsible undertaking. Despite this, the decisions do not start with an explanation on the *existence* of the fine but simply try to substantiate its *size*. In some other fields of administrative law, like transport, the authority has no option but to impose a fine, where the fine amount is sometimes fixed by the legislator.

[14] The review courts quite often departed from this and used the alternative general approaching weighing all the pros and cons, usually reducing the fines by one-third.

With some exceptions, fines were not very serious, especially compared to the size of the undertakings. This was also reflected in the scant reasoning of their amount. The two to three sentence long texts in the end of the decision simply enumerated the relevant factors taken into account and usually did not even express which of those factors were aggravating and which were attenuating. To put it differently, fines were not calculated. Fines were the result of a complex and subjective weighing of all the relevant factors of the case. It is no wonder that judges found it easy to reduce their fine levels by one-third on average, and without much reasoning.[15] It cannot be excluded that council members anticipated and took into account this almost automatic fine downsizing and they responded by inflating the original fines.

The years 2000-2001 were important for the development of the GVH's fining policy. The Competition Council seemed to be prepared to adopt higher fines, taking its role more seriously. This change was the result of several factors. The amendment of the act introduced a 10% turnover based ceiling for fines,[16] which was not only to save the companies from fatal consequences but also served as an orientation point for the GVH and the review courts to set the right level of fines. Secondly, with the strengthening of the cartel policy additional serious infringements came to light deserving fines of a much higher dimension. This increase could have had a side-effect on the cases of misleading advertising decided by the same council members. Thirdly, the human factor was also relevant. Following the reorganization of the Competition Council, the majority of the council members were replaced by lawyers and economists willing to impose fines of a magnitude existing in the practice of most European agencies. The GVH also started to elaborate on a calculation method and publishing its fining guidelines. However, it took several years to agree on, and to implement, the new method. Deterrence and punishment were acknowledged as the main aims of sanctioning, though for some judges it took more years to make this move.[17]

Hungarian rules on fines and the practice of the GVH

The Competition Act includes general rules on fining applicable to both antitrust and cases of misleading advertising. The legal maximum of 10% of the previous business year and the non-exhaustive list of relevant circumstances, like the length and seriousness of the infringement are the most important legal rules.[18]

[15] This was done by finding certain circumstances which were not entirely taken into account by the GVH. For example, in case Vj-132/91 related to Fogyi weight loss pills, the original fine of HUF 3 million was reduced to HUF 2 million due to the information provided at the points of sale largely correcting the misleading TV ads. It is interesting to note that the Supreme Court's judgment approving the decision of the first instance court expressly states that administrative competition law fines do not have deterrent functions (judgment No. Kf.II.25.357/93).

[16] More precisely, the turnover achieved by the group of undertakings can also be taken into account if the reasoning of the decision clearly identifies that group.

[17] According to traditional wisdom, administrative law sanctions are there just to ensure that substantive administrative rules are respected and order is maintained. Some judgments of the Supreme Court expressly state that phrases like deterrence and punishment belong exclusively to the sphere of criminal law (i.e. case Vj-48/2006, number of judgment Kfv. III. 37. 154/2009/5. sz., adopted on December 1, 2009. The GVH fined Magyar Telekom for HUF 100 million, the second instance review court reduced it to HUF 70 million, and the Supreme Court approved it).

[18] Section 78 (3) lists the following as relevant factors: gravity of the violation, duration of the unlawful situation, benefit gained by the infringement, market position of the parties violating

Fining guidelines in misleading advertisement cases were published and signed by the president of the GVH and the chairman of its Competition Council in 2007.[19] The starting point of the calculation follows the logic of the antitrust guidelines[20] by selecting a basic amount that is further adjusted by other relevant factors. In UCP cases the starting point is usually the relevant costs of publishing the misleading or otherwise unfair communication. The wider and the more intensive the campaign was, the higher the fine could be. The relevant marketing budget is not an objective starting point. First, it can be manipulated by the contracting parties with a long term and complex relationship. Second, since usually only parts of the marketing campaigns are found misleading, the GVH needs to make a subjective adjustment. For example, the GVH takes just 25% of the budget as a starting point for the calculation of fines if only 25% of the messages coded in the advertisement were found unlawful. Yet, this remains the best starting point. The guidelines envisage an alternative route to approach the correct fine levels: the Competition Council may choose to take a certain percentage up to 5% of the turnover related to the product or service during the period of the infringement.[21]

If the GVH follows the marketing budget based approach, the next step is to take into account the aggravating and mitigating circumstances. By the end of this second step the amount of the fine may be increased by 100%. If the misleading practice relates to credence products[22] or expensive products where the mistake caused by the misleading act cannot be corrected in the course of frequent similar purchases, the amount of the fine can be increased. Other negative factors are the intensity of the campaign, including the temporal scope and geographical coverage. Market impacts can also be relevant, composed of the size and market share of the company, the intensity of competition on the relevant market and also roll-on effects on other related markets. Examples of circumstances that can help reduce the fine are, for example, the availability of other correct, and complete, pieces of information that the consumer may acquire before making a buying decision.

The attitude of the undertaking can also influence the size of the fines. The notice emphasizes that competition law infringements are decided on an objective legal basis, still subjective

---

the law, imputability of the conduct; level of cooperation by the undertaking during the proceeding, and existence of any repeated displays of unlawful conduct.

[19] Notice No. 1/2007(http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=42&m5_doc=4575**)**. Section 36 (6) of the competition act empowers the president of the GVH and the chairman of the Competition Council (being one of the two vice-presidents of the GVH) to jointly issue notices summarizing the basic principles of the law enforcement practice of the authority. These notices should have no legal binding force as their function is to increase the predictability of law enforcement. Despite this clear wording, the Constitutional Court and also the Supreme Court held that the GVH should act in line with its own notices, unless it provides a clear explanation for not doing so. For further details see my paper in Hungarian: *Az Alkotmánybíróság határozata a Gazdasági Versenyhivatal közleménykiadási jogáról* (explaining the Constitutional Court's decision on the competition authority's competence to issue guidelines noting the unintended impact it may have on the independence Competition Council members), *in* Jogesetek Magyarázata 2010/1, 12-19.

[20] The first antitrust guidelines were included in Notice No. 2/3003. The actual antitrust fining document is Notice No. 1/2012.

[21] This is a rarely used option. If it was to be applied, the first and second step of the calculation process would merge: the correct level of per cent is determined on the basis of the relevant aggravating and mitigating circumstances. In case Vj-67/2006, focusing on misleading labeling of Chappy dog food products, the Competition Council imposed fines reaching 1.5% of the related turnover. This was further reduced to take into account the costs related to the required new package labels.

[22] Products whose qualities are difficult to judge even after consumption. The notice is based on an expansive reading of this phrase when it mentions not only health care products but also financial services or services provided to elderly people.

intent and attitude may influence the level of fines. Correcting the mistakes made and providing compensation to the victims are the signs of a true will to change behavior for the future. On the other hand, if an undertaking commits several different types of unfair actions, it may deserve a harsher penalty.

The third step of the fining process is to consider recidivism and the effectiveness of the sanction. According to the guidelines, the amount of the fine can be adjusted in light of the size of the undertaking to achieve the right level of deterrence. It may be increased if the calculated fine seems too small for a large company and can be decreased if a single product company is caught with unlawful behavior.[23] Furthermore, if an undertaking commits similar infringements multiple times, its fine may be multiplied by that number. Note that only infringements of the past five years are taken into account for this calculation. Review courts had disagreed whether it was lawful to apply such a multiplier in the course of the complex weighing of pros and cons by a public agency. The final ruling of the Supreme Court upheld the use of a mathematical formula, like this, if the facts of that case are strong enough to support this strict approach.[24]

Some cases were decided before the publication of the guidelines where the principles of the new fining policy were tested by the Competition Council. In February 2006 the GVH imposed a enormous fine on Colgate's 'your doctor's choice' campaign also claiming that Colgate's toothpaste can provide the solution to the 12 dental related problems.[25] The reasoning followed a three-step approach. First, the costs of the campaign were chosen as a base for the calculation. Second, the relevant aggravating and mitigating circumstances were each listed, and measured with an appropriate percentage totaling 100%.[26] Third, it was considered whether the calculated fine was high enough to effectively deter, i.e. whether the application of a multiplier was needed to reflect recidivism. In this case, the Competition Council raised the starting amount by 43%. It was not increased further since the GVH considered that a fine reaching 2.5% of the turnover in the previous business year was deterrent enough.

One problem with the application of these guidelines has been that the reasoning of decisions were not detailed, often omitting the reference of this notice. One of the reasons could be that the size of the marketing budget, being the basis of the calculation qualifies usually as a business secret. Most of the cases decided by the Competition Council in 2012 refer to these guidelines as a basis for calculating the fine in the actual case. However, it is hard to track how the GVH came to the final amount, since the reasoning only lists the various factors taken into account without adding a certain weight or percentage to them.

My closing remark regarding the text of the fining guidelines is that the notice has never been reviewed and corrected in line with the practice.[27] Not even the adoption of the implementing

[23] However, this adjustment was rarely, if ever, used by the GVH. My argument in this paper that certain fines are not big enough to deter would differ if the Competition Authority had routinely analyzed how the nominal fines relate to the absolute size of the undertaking addressed by the decision.
[24] See my paper in Hungarian: *A Legfelsőbb Bíróság ítélete az OTP Bank Nyrt. és a GVH közötti perben* (analyzing the practice of the GVH and review courts in applying mathematical formula), *in* Jogesetek Magyarázata 2010/4.
[25] Vj-148/2005. The fine was HUF 257 million.
[26] This mirrored the structure of the antitrust fining guidelines: consumer harm up to 30%, competition harm up to 30%, attitude of the undertaking up to 20% and other factors up to 20%.
[27] The antitrust sister guidelines were amended several times and even withdrawn for some years before re-adoption in 2012.

measures of the UCP Directive served as an impetus to rethink and refresh the notice. One obvious change in the practice and the notice could be to herald a stricter fining policy in relation to blacklisted illegal behaviors. This, together with the frequent absence of notice by the Competition Council of its reasoning for most decisions may have led to the conclusion that the guidelines no longer reflect the general principles of the GVH and they have become *de facto* dead letter. However, this is not true if we look at the decisions of the past two years. Now the reasoning of the decisions refers to the notice of the GVH. The reader, be it the addressee or a third party in the market, can still not ascertain how exactly the GVH calculated the amount of fines. In my humble opinion this weakens the educational-deterrent effect of GVH decisions.

Current practice of the GVH

The figures of 2012 show that the average size of fines imposed in UCP cases varied in the range of tens of millions of Forints.[28] There were just two procedures where fines reached the symbolic 100 million HUF level. This amount is still far from being excessively high given the large size of the undertakings involved. There were some cases, before the UCP Directive was implemented, where the Competition Council tried to follow a stricter approach calculating and imposing fines between 100-300 million HUF. This trend changed a couple of years ago, and now recorded fines rarely reach 100 million.[29]

One field with market-wide infringements, claims misleading the origin of food products, was sanctioned with a light hand. In 2012, the GVH imposed a HUF 10 million fine on Auchan[30] and a HUF 5 million fine on Penny Market[31] referring to guidelines No. 1/2007. The fines were based on the costs related to the unlawful communication campaign. The uncertainties surrounding the exact definition of 'hungaricum' and the short, one-week period of the infringement were taken into account as attenuating circumstances. Although the decisions declare that the GVH intended to impose deterrent fines, it is doubtful whether HUF 10 million is of that magnitude. It seems that the third step envisaged in the fining guidelines was ignored.[32] In the Auchan case the reasoning of the decision even emphasizes, as an aggravating factor, that the company had recently been fined twice, for 30 million each time, for similar conduct. The HUF 5 million fine on Penny Market also seems rather small given that the company had committed several other infringements in the past and the unlawful campaign ran for almost a year and a half.

The highest fines of 2012 were imposed in two investigations targeting Vodafone and Magyar Telekom each having claimed to have the fastest and best mobile data network.[33] Following Vodafone's 'best' campaign the Deutsche Telekom owned Magyar Telekom also started to advertise that it had the fastest broad band mobile data network.[34] The Competition

[28] The Hungarian Forint (HUF) is used herein as the currency for fines. At the time of this writing, approximately 300 HUF equaled 1 EUR, and 230 HUF equaled 1 USD.
[29] Some of the potential reasons for this change include: the cases investigated now relate to smaller advertisement campaigns, the new rules of the UCP legislation may have required a more modest approach, and the frequent change of Competition Council members.
[30] Vj-17/2011, decision of August 22, 2012.
[31] Vj-18/2012, decision of March 27, 2013.
[32] A practice like this will certainly not be challenged before a court. No one will complain that the GVH does not follow its own guidelines.
[33] Cases Vj- 37/2011. and Vj- 38/2011.
[34] The legal basis of the two decisions was the Hungarian version of the UCP directive and the Act on Advertisements implementing Directive No 2006/116/EC of the European Parliament and the Council on

Council explained that in markets with just a few well known players a claim to be "number one" can also be regarded as a comparative advertisement, even though the competitors are not expressly mentioned.[35] The Council added that in a market subject to rapid and frequent technological improvements it is almost impossible to verify the truthfulness of a claim for the whole length of a marketing campaign.

Vodafone, who started the marketing war, had to pay HUF 50 million, only half of the amount imposed on the second actor, Magyar Telekom. According to the GVH, the difference is due to the different marketing budget of the companies. However, in my view, the Competition Authority should have given more weight to the fact that Magyar Telekom launched only a follow-up campaign and that Vodafone advertised itself four times longer than the market leader Magyar Telekom.

Some months later, in March 2013, the third largest operator, Vodafone was fined again. This time, HUF 30 million for claiming that between February and March 2012 its network was accessible "countrywide" and "everywhere" compared with, and in contrast to, the other two mobile service providers' networks.[36] Regarding the fines, the Competition Council recalled the serious effects due to the length of the intensive campaign and the repeat infringement.

Despite the intentions of the Competition Council reflected in its strong wording, given the previous infringements of the company and bearing in mind the usually high costs of the TV campaign, the 30 HUF million fine cannot be considered a serious deterrent at all. It is nothing more than a marketing tax that companies eager to get even a temporary competitive advantage are prepared to pay. In the field of misleading advertising the negative publicity attached to a fining decision does not seem to bite. Consumers may have been accustomed to newspaper headlines heralding that the GVH sanctioned this and that company again. Consumers may not believe in advertisement as much as the GVH is hoping they do. Or, some consumers may disagree with the sometimes stubborn interpretation of the GVH and do not feel mislead by the challenged practice. This may undermine the moral stigma effect of UCP sanctions.

Before condemning the GVH for using ever lower fines it shall be noted that there are certain types of misleading acts where the GVH does not hesitate to impose fines reaching even the maximum level allowed by the law. In addition to some health related products, cases involving lottery-like financial services[37] demonstrate service providers that seem to continuously disregard the clear and well-articulated expectations of the GVH. Recently, Orion Lux Kft. Was fined HUF 3.4 million and Euromobilien Kft.-t fined close to 1 million.[38] Their ads were deemed to be misleading because they neglected to inform clients about the entry fee that members must pay to join the consumer group. These fines do not seem to be burdensome in nominal terms but they are significant compared to the size of the companies.

---

comparative advertising. The relationship between these two types of unlawful advertising activities and the respective directives is that in order to qualify as a lawful comparative ad, it should not be misleading under the UCP Directive.

[35] Case C-381/05 De Landtsheer Emmanuel, judgment of 19. April 2007, sections 16-17.

[36] Vj-37/2012.

[37] Members of these consumer groups pay installments for a long period that forms the basis of the credit they will acquire in the future. Unlike with banks, consumers will not get the loan after the contract is concluded. The service includes a gambling element: only the lucky ones will get access to financial resources fast and conveniently. The rest of the consumer group should wait for an uncertain time period to benefit from membership.

[38] Vj-57/2011, decision adopted in September 2012.

Euromobilien Kft. had to pay the maximum 10% of the turnover in previous financial year because it was regarded as a repeat offender.

The aim of fining

Why does the GVH impose fines on undertakings? Are these fines high enough? To answer these questions we must explore the role of sanctions in the legal arena. If misleading or otherwise unfair information provided by an undertaking is capable of influencing consumer behavior there needs to be a response. Efforts need to be taken, the sooner the better, to avoid competition distortions by undermining the position of companies obeying the rules and to protect the interests of consumers. Ordering the cessation of the activity seems to be the first and most important step one anticipates from any institution empowered to enforce the UCP prohibition. However, cessation alone can hardly be called a sanction. It may not even hurt the company responsible for the misleading advertising. Something more needs to occur. The aim is, of course, not to be punitive. The aim is to re-establish the legal order and to persuade the company and other market players that the challenged behavior runs against the public interest.

In the past, the reasons for fining decisions did not include a reference to the intentions of the GVH. The first instance when the aim of fining appears in a decision was an imposition of a HUF 100 million fine on Egis in 2004. The Competition Council set the fine in order to sanction the illegal behavior and to deter other market players. One year later, in a decision addressed to the mobile telecom company Pannon, the importance of special and general deterrence was emphasized.[39]

The fining guidelines of 2007 refer to a Supreme Court opinion shared by the GVH according to which the aim of fining is to deter market players from committing unfair commercial practices that could endanger fair competition. That aim requires fines that are proportionate but still put a substantial burden upon the company thus deterring it, and other market players, from committing infringements.[40] The GVH also lists three aims that influence its fining policy: 1) special and general deterrence; 2) punishment of misbehavior; and 3) confirmation to law abiding companies of their actions.[41]

From a sanctioning policy point of view, it is essential to find and apply the legal consequence that is actually effective in changing the behavior of market players. Furthermore, it is also crucial to explain to the alleged wrongdoer and other market players

[39] Vj-170/2004. In some cases it was also not entirely clear whether deterrence is 'just' an overall policy aim of the Competition Authority or it is also one of the several elements that are considered during the calculation of the fines. For example, in the reasoning of the Free Choice case of 2010 the Competition Council 'took into account the preventive aim of fines'. However, it was not clear whether this was one of the aggravating circumstances or was nothing more than a side note. Point 39 of the antitrust fining guidelines include deterrence as a potential additional step in the calculation process: when the fines calculated on the basis of relevant turnover are deemed to be insufficient to deter a company with a considerably larger total turnover, the amount of the fine can be increased.

[40] Judgments quoted are Kf.III.27.599/1995/3, Kf. I.25.217/1993/3. és Kf.II.27.096/1995/4. However, it is fair to mention that there were other cases where the Supreme Court expressly denied the role of deterrence in competition law stating that this is an attribute of criminal law (see judgment quoted at footnote 16.)

[41] See point 4 of the Guidelines. Interestingly, the antitrust guidelines of the GVH mention just two aims. Point 10 of the Guidelines No. 2/2012 states that beyond punishment the aim is special and general deterrence. The previous antitrust guidelines included these two objects).

that the practice was indeed unlawful.[42] While there is not much debate that cartels are wrong, there are some commercial practices being punished by agencies as unfairly misleading while companies believe that they were doing nothing wrong. The main reason is that it is very difficult to define which elements, if lacking, in an advertisement would lead to a misleading omission type of infringement. It is also not easy to determine what type of misinformation may change the transactional decision of the average consumer.[43]

It may be the consequence of both inefficient sanctions and resistance on the side of companies that has led to high levels of recidivism in Hungary. Fines will not have the required educational impact when a company does not realize that it infringed the law and it manifestly disagrees with the order, firmly believing that the agency got it wrong and its advertisement was fair. Well known and respected companies frequently organizing complex advertisement campaigns top the list: Magyar Telekom, Tesco, Vodafone.[44]

If we review the size of fines imposed on these companies, there is no correlation between repeat infringements and the size of the fine. For example, fines imposed on Vodafone amounted first to zero, then: HUF 15 million in 2004; HUF 10 million and 5 million in 2005; 2 million in 2006; 20 million and 5 million in 2007; 5 million in 2008; 10 million in 2009; 5 million, 60 million and 40 million in 2010; and finally 100 million in 2011. From those fine levels we may conclude that fines reflect the size of the campaign investigated and the seriousness of the infringement rather than the repeat nature of similar infringements.

Punishment and prevention, 'the two ps', are the two most often cited justifications for causing harm to a wrongdoer. However, if we delve a little bit deeper, we may realize that it is not that easy to follow both paths. In my view, the punishment aim necessitates a more objective, behavior-based approach, while the deterrence and education way of sanctioning puts the emphasis more on subjective, personal attributes. Fining guidelines strive to reconcile these different philosophies, relying more heavily on the objective punishment concept. The calculation of the relevant turnover and most of the relevant factors are conduct based.

Actual intent and state of mind should be the starting point of any sanctioning based on the deterrence objective. However, intent and state of mind are rarely considered seriously in cases, presence is simply assumed.[45] The subjective side of the infringement story is now just one among several elements influencing the level of fines. I argue that the existence of culpability should be the very first question asked, lacking culpability the fine should be zero. It is true that competition law responsibility is an objective one. However, when we are talking about sanctions, subjective and personality-related factors should play a larger role to

[42] For sanctioning policy to be effective it is also essential that the wrongdoer expects that its conduct will be revealed and punished to a high degree. This may not happen often with secret cartels, but unfair commercial practices, especially misleading advertising, are by definition in the public domain. In these instances how well resourced and motivated the public agencies are seems to be the only issues.

[43] In Hungary, the same approach can be witnessed in the antitrust field as well. Huge fines are imposed only in hard core cartels where no businessman could really argue that he was not aware of the negative consequences of his behavior. In some UCP cases it is not easy to predict which advertisements will be challenged by the Competition Authority. The appropriate font size of letters in a TV ad, the overall message of the campaign, and the completeness of the TV ad all leave much room for debate and uncertainty.

[44] A 2011 review of the GVH practice over the past 20 years showed that Magyar Telekom was number one with 21 infringement decisions, Tesco second with 14 decisions, and Vodafone third with 13 cases.

[45] The GVH's position is that a company like that involved in the investigation should have known the consumer and competition impacts of its advertisement activity.

the extent we are claiming special and general deterrence as the main driving forces behind fines.

Without a certain level of culpability it is ineffective to impose sanctions, especially large fines on companies. Yet, fines are imposed routinely in UCP cases, without considering why and how monetary sanctions will change the world, or at least the motivations of the companies. Consequently, fines reaching some tens of millions of HUF are considered by many market players as a kind of marketing tax. They often believe that regardless how well intentioned and prudent they were, the GVH would always find mistakes.

Beyond fines – other administrative sanctions

UCP decisions of the GVH include other sanctions beyond fines. It is fairly common to order the trader to publish the operative part, or a short summary, of a decision or a corrective statement. The decisions usually explain how and when it should be done. The media, the timing and the size is usually similar to that of the advertisement found to be unlawful. Measures like this are effective in both correcting the market failure, at least *pro futuro*, and in deterring similar law infringements. An advertisement stating that the company behaved unfairly and deceived consumers strengthens the negative publicity of the GVH decision. Furthermore, the costs related to this 'public' advertisement put an additional financial burden on the company beyond fines.[46] Orders like this do create some extra work for the GVH, since the fulfillment of the obligations must be checked in the course of a special follow-up procedure, but this is a price worth paying.

Beyond corrective measures like this, the GVH does not really have other options to sanction an undertaking for UCP infringements. Just to compare, in a closely related legal area, the consumer protection agencies may choose from a wider range of sanctions. The consumer protection authority is empowered to order the undertaking to stop the distribution of the product or may even order the provisional closure of a shop if the life or health of consumers is endangered.[47]

Beyond corporate fines: individual sanctions

A global consensus seems to emerge that corporate fines alone are not sufficient to deter antitrust infringements. Thus, individual sanctions, be they criminal or administrative in nature are also a necessary element of an efficient sanction regime. The same should apply to unfair commercial practices, especially in those cases where an undertaking is a repeat infringer and the legal rule is a clear one. This last condition is crucial, since there are several UCP cases where the infringement decision is based on fairly subjective reasoning.

When considering individual sanctions, criminal law is often the first thought. However, before relying on the harshest type of legal consequence, it is worth considering other options. Disqualification of directors and individual fines can also be considered as appropriate tools to deter UCPs. In theory, decision makers also face corporate responsibility

[46] Therefore, the costs of the corrective measures should be taken into account when calculating the appropriate level of fines.
[47] Act No. CLV of 1997 on consumer protection, § 47 (1).

for the damage they have caused to the company. Unlike in other jurisdictions, there is not much case law in this area in Hungary.[48]

Hungarian administrative law is characterized by fines imposed on undertakings that are held responsible for the infringement. The same is true for competition law. There are just two possibilities when individuals may be ordered to pay a fine. First, there are procedures involving private entrepreneurs, where the undertaking is also a natural person at the same time. Second, when a decision is not implemented in due time, the GVH may order the natural person in charge, usually a director to pay fines. There is also an indirect way when the identity of 'real persons' may play a role. When it comes to the imposition of a fine, it can be an aggravating circumstance if the director of the company had previously worked with another company that was held responsible for similar unfair commercial practices.[49]

Disqualification of directors is also a sanction that exists in Hungarian corporate law. Some years ago the legislature tried to extend this to competition law. However, the proposed legal regime was found to be unconstitutional. The main argument of the Constitutional Court was that the principle of due process would be infringed when the directors had to prove their innocence before an administrative law judge in a non-adversarial process.[50] I believe that this past failure should not hinder rethinking the potential of this type of sanction. Although originally it was envisaged just for cartel infringements, it could also be applied to deter repeat UCP infringements. Just like with other more severe sanctions, it would be important to restrict them only to clear cases where individual culpability is obvious, i.e. for breaches of blacklisted clauses.

Criminal law consequences could also be reconsidered. It is not the GVH that investigates crimes, though the example of the tax and customs authority may also be cited to call for criminal investigative powers by an administrative agency. Even if the GVH does not seek such powers, it could formulate and pursue a policy of subsequently referring certain serious UPC infringements to the public prosecutors. This would especially be required for repeat infringements relating to life, health or other important public interests. I would not advise this option for those cases where the decision is highly subjective such as in telecom or banking cases where the impact of misleading omissions on transactional decisions is considered.

Beyond sanctions: Commitments

Commitment orders of the Competition Council do not establish the infringements of the law but the GVH accepts, and makes binding, the new course of business proposed by companies under investigation. These commitments often include elements that otherwise could not be directly enforced by the GVH in an infringement decision. Advertisement related commitments usually involve the provision of corrected and detailed information of consumers. In some instances banks agreed to support TV campaigns about the pros and cons of their new financial products. The point is that although commitments are not sanctions as such, they nevertheless may carry a substantial financial burden similar to fines.

[48] For an excellent overview of U.S. practice see Spencer Weber Waller: Corporate governance and competition policy, in: *George Mason Law Review, Vol. 18, No. 4, 2011.*

[49] Decision Vj-8/2005, approved by the Municipal Court by judgment No. 3.K. 33.331/2005/10.

[50] The law would have provided that the GVH automatically establish the responsibility of the managing directors for the infringement committed by the undertaking. Only then could they have had the opportunity to argue before the review court, in a special procedure without a hearing, that the action of the company was not imputable to them.

Undertakings are still pleased with this since they can preserve their goodwill this way. However, wide use of commitments could undermine deterrence efforts. If companies were to believe that it is worth risking a GVH investigation since they can merely receive a commitment order, there might be more misleading information in the public domain. It is thus important to restrict the application of this measure to cases where, for example, there has been no established pattern of behavior, or where the existence of specific sector regulations makes the application of UCP rules more unclear.

In 2013, the GVH issued guidelines explaining its approach when accepting commitments in UCP cases.[51] The GVH explained its UCP focus by recalling that most of its procedures relate to misleading advertising. Hence, the GVH was in a better position to publish guidelines in relation to these types of investigations.

The Hungarian Post Office has thus benefited recently from this type of closure when the GVH decided that Magyar Posta offered sufficient remedies to please the competition concerns raised initially by the authority.[52] The investigation began because consumers at post office desks were not properly informed about the costs of paying with debit or credit cards instead of using cash.[53] Magyar Posta agreed to employ not only verbal but also written communication that using a card in the post offices is regarded as a cash withdrawal subject to charges set by the issuer of the card.

This decision shows how difficult it may be to accept commitments in UCP procedures. Promising to discontinue the allegedly illegal action is not sufficient. The GVH is eager to get more change than simply declaring the practice illegal. It is questionable what, if anything, consumers received for added value in the Magyar Posta case since providing consumers with complete information would be a natural consequence of an infringement decision as well. The added value offered by the company was perhaps the provision of written materials beyond verbal communication which made the members of the Competition Council not sanction the company. Whether consumers are better informed now than they were before the GVH intervention, is a good question.[54]

Soft deterrence: Education – compliance

Education, raising awareness and sanctioning should go hand in hand. Most business people involved in competition law infringement are knowledgeable and profit conscious. The public agency enforcing UCP rules should do its best explaining its approach. This is a must since most of the rules, even the blacklisted core practices allow wide room for interpretation. In theory, if an undertaking cannot be aware of the exact content of a norm, then it is almost impossible to follow the rules and it is ineffective to impose fines condemning its misbehavior, at least if one intends to follow the deterrence path. Therefore, decisions should

[51] Guidelines No. 3/2012 of the GVH, published on October 2, 2012. Commitments were first introduced for antitrust issues so that the agency could flexibly solve complex problems that did not cause significant damage to the functioning of competitive markets. Despite this, the recent guidelines cover only UCP-related cases. See: http://www.gvh.hu/domain2/files/modules/module25/21547566B761BF934.pdf

[52] Vj-67/2011 decision of September 12, 2012.

[53] The GVH was not pleased that the employees of the post office are required to mention that use of plastic cards amounts to a cash withdrawal and not to a normal card payment that is usually free in Hungary, at least to the customer using the card. The GVH urged the company to provide more exact information.

[54] Consumers do not get information at the counter about how much exactly it would cost them using their card instead of paying in cash.

be well-reasoned[55] and supplemented by other soft law instruments like guidelines, guidance, press releases.

The GVH performs in this respect fairly well. Although business and marketing people may disagree with the conclusions of the authority,[56] the decisions and even the termination orders are well reasoned. The rules of the game should be clear to a large extent for those familiar with the practice of the GVH, even though one might not like some of these rules. The Competition Authority is also active on the policy making and education stage. It frequently issues guidance or press releases if a general unfair market practice is identified. For example, communicating certain financial services as if the members of consumers groups were receiving credit services.[57]

Another example for educating the public is the case of Hungarian products. Slogans like 'Hungarian product', 'Hungarian quality' or the use of the Hungarian tricolors are frequently used by supermarkets to promote the sale of food products. Based on its experience gained in the course of its procedures, the GVH issued a press release explaining its approach.[58]

Corporate lawyers and attorneys with competition law experience should also do their best to extend the scope of compliance programs to cover UCP issues as well. Companies involved in the telecom, banking, retail and consumer products business will face competition law issues and visit the hearing rooms of the competition agency earlier and more often in cases of a misleading advertising rather than antitrust. Company managers should be educated to know the risks of their unfair marketing efforts.

Conclusion

In light of the inherently subjective nature of some marketing practices qualified as unfair commercial practice, I advocate a step-by-step approach with more efficient fines and targeted individual sanctions to better serve the aim of deterrence. In the first place, it would be more effective not to impose sanctions at all if the company has committed an unlawful act for the first time.[59] An exception could exist by taking into account material and personal factors. From a material point of view, the infringement of established rules, especially those included in the blacklist of the UCP Directive deserves sanctioning compared to violations of less clear rules. On the subjective side, the size and past practice of the undertaking should also be considered before the imposition of a fine.[60] It would be sufficient to make guidelines for the company and other players[61] in the market how the GVH interprets the content of a general rule. If a similar infringement occurs within a reasonable period of time, like five

[55] This is true not only for infringement decisions but also for those decisions finding no unlawful behavior. Both types of decisions help establish the line between acceptable and impermissible actions.
[56] The overly long procedures may also create great uncertainty in the market.
[57] Relying on its established practice, the GVH decided also to publish a communiqué explaining its approach and warning consumers on March 26, 2010. See: http://www.gvh.hu/gvh/alpha?null&m5_doc=6428&pg=58
[58] Q&As, October 26, 2011, See http://www.gvh.hu/gvh/alpha?null&m5_doc=7360&pg=58. The GVH recalls that even price sensitive Hungarian consumers tend to choose products of Hungarian origin if the price difference is not significant.
[59] There is a similar, often neglected rule in Hungary. Section 12/A of the Act No. XXXIV of 2004 on small and medium sized enterprises requires public administrative bodies not to impose monetary sanctions on first-time SMS offenders, unless life, health or environment is endangered.
[60] The definition of SMS could serve as an objective threshold for this purpose.
[61] In this respect it is a difficult question whether competitors of the undertaking subject to the investigation should be expected to read and understand a decision not addressed to them. The GVH seems to expect also other undertakings to be aware of its decisions.

years, a monetary sanction capable of determent should be applied. That would be, for some companies, in a higher range than the tens of millions of HUF fines imposed recently. The size of the company should be better reflected in the amount of the fine, even if the relevant marketing budget continues to serve as the starting point of the calculation. Third, the decision makers should also face individual sanctions if their companies do not learn from history and commit repeat infringements endangering social and human values like health. Decision makers could also face criminal law sentences as an ultimate consequence.