Pázmány Law Working Papers
2013/17

Tihamér Tóth: The reception and application of EU competition rules in Hungary: an organic evolution

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

The reception and application of EU competition rules in Hungary: an organic evolution

Tihamér Tóth[1]

INTRODUCTION

The first modern Hungarian competition act adopted in 1990 was based on to a great extent on the German and EC competition rules. The Hungarian Competition Authority (the *Gazdasági Versenyhivatal*, GVH), an independent agency entrusted with the public enforcement of competition law has been striving to establish a highly regarded status not only in the Hungarian public administration system but also at European level. The Europe Agreement and the preparation for EU membership made law approximation inevitable. In this chapter I will present how Hungarian competition rules and the practice of the competition authority were influenced by the EC and later the EU *acquis*. The legally binding obligation to bring domestic competition rules in line with Community standards turned later into a process of drawing inspiration not only from EU hard law but also from soft law instruments in cases where Hungarian competition rules were applied. According to a statement of the GVH which has been on its website since 1 May 2004,

> 'EU accession brought significant changes in the competition rules concerning undertakings - now the Community competition rules are directly applicable to Hungarian undertakings as well. At the same time these rules were not completely unknown for the Hungarian undertakings and enforcers. To fulfil the obligation of approximation of the law, undertaken in the Association Agreement, the Hungarian competition law continuously followed and took over the most important norms and principles of the EC competition rules, furthermore the approximation of Hungarian competition law with the Community norms is continuous from the accession.'[2]

In the first part of this Chapter study we will demonstrate the merits of this statement by looking at how the GVH prepared both itself and the business sphere during the pre-accession period for the EU membership era. Second, we will analyze the most important changes in legislation following EU accession and also the most important features of law enforcement to show how autonomous the legislative and enforcement activity of a new Member State can be. The functioning and the leading role of the European Competition Network (ECN) in promoting a soft form of harmonization, known as 'convergence', will be presented.

The temporal scope of this study ends on 30 June 2012, thus covering the experience gained during the first eight years of EU[3] membership. As to the material scope, I will focus on antitrust issues of anti-competitive agreements and abuse of dominance, but I will have a quick look at concentrations between undertakings (mergers and acquisitions, M&As) and also unfair commercial practices, such as the deception of consumers. As far as institutions

[1] Assistant professor Pázmány Péter Catholic University and of counsel at Réczicza White & Case LLP Budapest. I am grateful to Pál Szilágyi, Ernő Várnay and Márton Varjú for their 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] http://www.gvh.hu/gvh/alpha?do=2&pg=69&m5_doc=4259&m103_act=7&st=1&m5_lang=en

[3] For the sake of convenience, I will always refer to EU rather than EC or Community law.and I will use the current post-Lisbon numbering of the relevant Treaty articles (Article 101 TFEU being Article 81 EC and Article 102 TFEU being Article 82 EC)

and procedural rules are concerned, I will focus on the GVH, but the activity of administrative and civil courts will also be touched upon.

THE LONG ROAD TO EU MEMBERSHIP

Before presenting the most important features of Hungarian competition law following EU accession, it is important to take a look at some historic events in order to understand the evolution of the competition law regime in Hungary. Recalling the legal obligations to adopt EU-like competition rules and also the voluntary openness of the GVH to absorb EU experience helps us to understand why 1 May 2004 did not have a dramatic effect on Hungarian law, at least from a competition law perspective. If we disregarded the diplomatic and constitutional battle relating to the Implementing Rules of the antitrust provisions of the Europe Agreement, it could be concluded that Hungary, and more precisely the GVH, had been a diligent, open-minded student of the EU Commission.

Harmonized legislation and enforcement

The story started with the signature of the Europe Agreement (EA) in December 1991.[4] By that time, the GVH had already completed its first year of enforcing Act LXXXVI of 1990, the first modern act on competition law in Hungary. The EA included two competition related provisions. Articles 67 and 68 EA mentioned - among others - competition law, where approximation was needed 'as far as possible'. Article 62 EA incorporated rules for agreements and abuses affecting trade between the contracting parties akin to those in EU law, and also provided that 'implementing rules' should be adopted by the Association Council.[5]

On this basis, busy work started to bring the Hungarian competition act in line with EU rules and to adopt the implementing rules of Article 62 EA. In the meantime, the Commission issued its White Paper on the preparation of the associated countries for integration into the internal market[6]. This document, which paved the way for accession, emphasized the underlying importance of law harmonisation in all fields of competition law as the only way to achieve a level playing field with Member States where the direct applicability of EU competition rules made legal approximation unnecessary.

After thorough negotiations between the Commission's DG Competition (or DG IV as it was known at that time) and the Hungarian representatives, in November 1996 the Association

[4] The competition chapter of the EA took effect already in 1992 thanks to a so called Interim Agreement covering the trade related elements of the EA.

[5] Article 62 reads as follows:

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Hungary:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Hungary as a whole or in a substantial part thereof;

(iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community.

[6] Adopted by the Commission on 3. 5. 1995.

Council adopted the Implementing Rules of the antitrust part of Article 62 EA.[7] Article 1 IR provided that antitrust cases which may affect trade between the Community and Hungary, shall be settled according to the principles contained in Article 62(1) and (2) of the Europe Agreement. The competence of the Commission and the GVH to deal with these cases shall flow from the existing rules of the respective legislation of the Community and Hungary, including where these rules are applied to undertakings located outside the respective territory. Both authorities were to settle these cases in accordance with their own substantive rules. This seemed to suggest that neither the EA, nor the IR were believed to establish a new set of directly applicable competition rules to be enforced either by the GVH or the Commission. However, Article 6 IR also made it clear that the competition authorities shall ensure that the principles contained in the block exemption regulations in force in the Community are applied in full. The IRs were incorporated into the domestic law system in an Annex of a Government Decree.

In the same year, the new, 'harmonized' competition act was adopted by the Parliament, replacing the previous competition act from the year 1990.[8] The new act was welcomed by the EU Commission which praised Hungary's ability to cope with the EU membership criteria. No wonder: the 1996 Act introduced a Brussels-type exemption system, featuring both individual and block exemptions, and also imported the general prohibition of vertical restraints.[9] In the meantime, much has changed in European competition law. First, the more economic approach adopted by the Commission towards vertical restraints resulted in a scenario very similar to that which existed in Hungary under the 1990 Competition Act.[10] Fortunately, the eight Hungarian block exemption decrees were tailored more to the Hungarian legal traditions based on defining black-listed restraints, rather than to the Brussels straightjacket approach focusing on white clauses. The changes in the policy on vertical restraints made harmonization fairly difficult.

As noted by Katalin Cseres, the interactions between EU institutions and new Member States were characterized by a strong top-down approach which was inherent in, but perhaps not indispensible to, the process of accession of these countries to the EU.[11] The far-reaching harmonisation did not generate serious academic debate, though it could have been questioned to what extent a national competition law regime should 'copy-paste' the integration oriented Community competition law system. Approximating Hungarian competition law to that of the EC lead to significant changes int he treatment of agreements between producers and distributors. Restrictions in vertical distribution agreements are usually not seen as evil by domestic competition regimes, whereas EU competition law prohibts all kinds of territorial restrictions which would hinder parallel trade between Member States. Still, the work was done and the favourable results in the diplomatic sphere were not jeopardised by negative experiences in the application of the new harmonized

[7] This was one year after the deadline foreseen by the EA. The Implementing Rules on State aid provisions have never been adopted, due to the resistance of the Hungarian government to introduce the strict EU rules before accession and also because of the constitutional and diplomatic problems experienced with the antitrust IRs.
[8] Act LVII. of 1996(HCA).
[9] Previously, only price-related vertical restraints were prohibited in Hungary, and all other vertical restraints fell outside the prohibition.
[10] Act LXXXVI of 1990. The roots of the "old" Hungarian competition law stem back to the years between the two world wars. As Ferenc Vissi, ex-president of the GVH put it: 'Does it make sense to condemn all vertical restraints and then (block) exempt 90% à la Brussels, or to accept 90% and condemn only 10% à la Budapest?' – quoted by Barry Hawk: System failure: vertical restraints and EC competition law; CMLR 32 973-989, 1995, p. 980.
[11] Cseres, p. 23.????

competition act. The performance of the GVH applying that act proved to be a positive development in the assessment of Hungary's preparedness to join the Union.

On 15 June 1997, the Commission presented its opinion on candidate countries' preparedness to join the EU. This was the first time that associated countries received an 'official' evaluation on how far they had progressed with law harmonization.[12] The opinion on Hungary was especially favourable and the new competition act was acknowledged to 'represent a significant step towards achieving the necessary approximation of legislation in the field of antitrust'.[13] As for institutional questions, the skills and the efforts of the GVH were praised as representing a significant step towards credible competition law enforcement. Procedural rules, in particular due process and third party rights, satisfied the requirements as well. Further refinements were recommended only in the field of procedures and merger control.

The GVH has always been open to following European case law and the practice of the EU Commission. Even when it had no legal obligation to do so, it often relied upon the judgments of the EU Courts and Commission guidelines. For example, in case Vj-4/2003 its decision not to challenge the distribution agreement between the No. 1 mobile operator and its dealers was expressly based on EU law and the Commission's vertical guidelines.[14] The Competition Council argued that the business relationship between the parties can be characterized as a genuine agency agreement not falling under the scope of Article 101 (1) TFEU.

Subsequent amendments of the Hungarian competition act also reflected a pro-European approach. Even in areas where there was no formal law harmonization obligation, the Hungarian legislator, relying on the proposals elaborated by the GVH, imported certain procedural instruments which worked well on the European level. With the 2000 amendment, the possibility to issue a preliminary position by the Competition Council was created, mirroring the Commission's statement of objections, and rules on dawn raids were introduced.[15] In order to strengthen anti-cartel activities, a new well-resourced Cartel Department was also established. At this time when cartels became the most important enemy at the European level, the policy of the GVH also followed this line.

The constitutional battle: a war without winners

The so far harmonious process of legal harmoniation with the potential of future accession was disupted by a judgment of the Constitutional Court. After spending two years discussing a submission prepared by Barna Berke, at that time a university lecturer[16], the Court delivered a judgment which provoked the amendment of the Implementing Rules (IRs) to the competition provision of the EA. The judgment on the substance[17] declared that in

[12] See in detail about the processes and institutions of legal approximation in Hungary R. Sommsich`s Chapter in this volume.
[13] Commission Opinion on Hungary's Application for Membership of the European Union, point 3.1 (English internet version page 48.)
[14] The decision was addressed to Westel Rt., now called T-mobile and was delivered before Hungary's EU accession.
[15] Act No. CXXXVIII of 2000.
[16] Dr Berke became the chairman of the Competition Council and a vice-president of the GVH in 2000.
[17] 30/1998. (VI.25.) AB decision. In a previous judgement delivered in 1997 (4/1997. (I.22.) AB decision) the Constitutional Court declared that it has the power to check the conformity of international agreements with the

implementing Article 62(1) and (2) EA the Hungarian authorities should not apply directly the criteria referred to in Article 62(2) EA. The government decree incorporating the IRs as its annex were held partly incompatible with the Constitution.[18] The decision on the annulment of this part of the decree was postponed until 31 December 1999 to give sufficient time for the legislator to reconcile the conflicting provisions. The Parliament failed to meet this deadline, still the Constitutional Court awaited the adoption of the new IRs by which Hungary stepped on a different route than the rest of the associated countries.

The Constitutional Court explained that on the one hand neither Article 62 EA nor the IRs has direct effect, and that Article 1 IRs do not simply mention the GVH as the competent Hungarian authority for maintaining contact with DGIV, but also obliges the competition authority to apply the criteria mentioned in Article 62 EA. Also, the lack of direct effect does not mean that this article poses no obligation on Hungarian authorities at all. Quite the contrary, cases falling under the EA are subject to *dual regulation*. The GVH must interpret the Hungarian Competition Act in the light of criteria arising from the application of (former) Articles 85 and 86 of the EC Treaty. If no EU-conform interpretation is possible within the boundaries of domestic law then Article 62 EA will be infringed. In competition cases, the GVH may not apply Article 62 EA, which lacks direct effect, but must rely on the Hungarian provisions. Since EUy law principles determine the interpretation and the application of domestic law, the decisions of the GVH *vis á vis* undertakings are therefore determined indirectly by these criteria. As to the notion of what constitute these criteria the Court pointed out that they encompass the whole of EU competition law. The significant importance of the EU Court's judgments and the decisions of the Commission were underlined.

The Court objected to the fact that EU norms were simply referred to in both the EA and the IRs *without* being subject to the usual *transformation procedure* required in the dualistic Hungarian legal system. Since neither the EA nor the IR differentiated between criteria existing at the date of the signature of the EA and norms to be created in the future, the GVH was obliged to take into account all criteria *without respect to their date of adoption*. Article 1 IRs were declared incompatible with the Constitution because it prescribes the direct application of *future* Community norms the creation of which cannot be influenced by the Hungary as an association state. Article 6 IRs was found incompatible with the Hungarian Constitution because it clearly obliged the GVH to apply the EU *block exemption regulations*, which under EU law are directly applicable in the Member States requiring an agency of an association state to disregard the usual requirement of a transformation process applicable to norms of international law. This meant an infringement of 2.§(1) and (2) of the Constitution according to which the Republic of Hungary is an independent, democratic state governed by the rule of law.

As I have argued elsewhere,[19] the problem with the Court's approach was that it took a decision on the meaning of an international agreement unilaterally, while it is an established principle of public international law that provisions of international treaties must be interpreted by common accord of the parties. At that time, it was far from clear how the EU Commission intended to interpret the IRs, and the GVH did not consider itself bound at all to apply EU rules directly or indirectly. Also, it was not excluded for the Constitutional Court to

---

Hungarian Constitution even after they had been signed and properly transformed into the Hungarian legal order.

[18] More precisely, the annex of the decree, the first and second paragraph of Article 1 and Article 6 on group exemption regulations, were found to go against constitutional principles.

[19] T. Tóth: Competition law in Hungary: with harmonisation towards E.U. membership; E.C.L.R 1998/6.

develop an interpretation of Article 62 which would have been compatible with the requirements of the Constitution.

Following intense negotiations with the EU Commission, the Decision 1/02 of the Association Council adopted the new Implementing Rules of Article 62 EA, mirroring the approach of the European Economic Area's competition rules.[20] The new rules went beyond what was expected by the Constitutional Court: they, being more than simple interpretation tools, created new substantial competition rules for cases affecting intra-Community trade. Just like under the EEA Agreement, the general competition law provisions following Articles 101 and 102 TFEU were supplemented by EU regulations and notices which took effect once they were put on a list annexed to the agreement.
As a result of the Constitutional Court's decision which took Article 62 EA and the relevant IRs seriously, competition law had thus been duplicated in Hungary even before when that duplication becomes inevitable after a state`s accession to the EU.. The IRs were promulgated by Act X of 2002 which took effect on 1 April 2002 and had been in force for about two years before the accession of Hungary to the EU. This unique event, however, had no direct effect on how competition law was applied before 2004. There is no evidence of competition cases which were exclusively decided under this law. There were only a handful of cases where this law was invoked as a parallel legal base to the applicable Hungarian rules, all of which were decided in 2006, two years after EU accession when duplication was already part of the system.[21] This contributed, however indirectly, to the success of the accession process: the GVH was forced to engage in wide ranging public education to explain how the new set of rules affect The business environment in Hungary.

VOLUNTARY LEGAL APPROXIMATION FOLLOWING MEMBERSHIP

On the day of the accession to the European Union, the Europe Agreement and the implementing act lost their binding effect. Hungary was no longer under an obligation to harmonize its competition law provisions with EU law. Interestingly, in this field EU accession resulted in fewer obligations than existed under the associated state status. There was no obligation anymore to mirror EU principles in domestic law; EU law applied with its full stringency. Just to note, the Accession Treaties contained no derogation whatsoever as far as competition rules addressed to undertakings were concerned. Due to the new EU implementing regulation, Regulation 1/2003/EC, the nature of the obligation was changed, the emphasis shifting from law harmonization to convergent law enforcement at the EU level. This did not mean, however, that domestic substantial competition rules were 'de-harmonized'. In the interest of economic operators and also to make the life of the GVH easier, national competition rules continued to rely on EU principles. Hungary could have adopted, for example, block exemption regulations exempting from the prohibition certain competition restrictions not affecting the functioning of the common market, or to phrase parallel block exemptions in line with the particular demands of the business environment in Hungary. This sovereign approach emphasising the distinctness of competition policy and enforcement in Hungary has never materialized.

[20] The new text was based on the initiative of the Hungarian government. The Commission services were obviously not enthusiastic about the idea of having unique Hungarian-IRs different from all the other IRs adopted in other candidate countries.

[21] The obvious reason for this was that the EA competition law act was applicable for conduct that occured before May 1, 2004. These competition restrictions were investigated and ruled on some months or even years later, at a time when the act was not in place any more.

The Competition Act of 1996 has been amended several times since 1 May 2004. There were two driving forces: first, national procedural rules had to be laid down to ensure the smooth functioning of Regulation 1/2003/EC. Second, the desire to maintain a high level of convergence with EU norms was still present. As to the first set of amendments, provisions had to be made, for example, to allow for the closure of a case if the EU Commission starts a procedure concerning the same market conduct.

In the autumn of 2005, the exemption system[22] was terminated, and detailed rules on legal professional privilege were introduced into the HCA, codifying the case law of the EU Court.[23] Evidently, Hungarian harmonization efforts did not only take as a basis EU legislation and soft law but also the case law of the EU Courts. Another example worthy of mention is the definition of dominance introduced to the HCA in 1996 copying the definition provided by the Court of Justice.[24] In 2009, detailed provisions on leniency applications were introduced and the substantive merger test was brought in line with EU rules. These amendments were not driven by legal obligations but by a more practical need to avoid the parallel existence of two diverging sets of competition rules. Despite the general tendency in Hungarian legislation to 'copy-paste' EU rules, it is worth mentioning that the somewhat different domestic rules on the *de minimis* exception survived.[25]

In European competition law, harmonising legislation is important, but consistent enforcement practices and jurisprudence are even more so. Below, we will show that the overall attitude of the GVH has always been EU-friendly - the Competition Council based its decisions on the principles of the EU courts' case law and the soft law documents issued by the EU Commission. A divergent interpretation of EU and Hungarian competition norms was the exception to the rule, a consequence of human factors rather than the result of conscious resistance.

THE EUROPEAN COMPETITION NETWORK: CONVERGENCE IN POLICY AND ENFORCEMENT

The procedural reform which took shape in Regulation 1/2003/EC led to the creation of the European Competition Network (ECN). The ECN, even though it has its own organic structure, work plan and achievements, is in no way an international organization. It is the label for the various types of informal cooperation activities of the EU Commission and the

[22] Before the amendment, agreements restricting competition but meeting the exemption criteria were declared legal by a decision of the Competition Council at the request of the undertakings concerned. The EU changed its system of Article 101 (3) TFEU with an effect of May 1, 2004, most Member States followed the move. Following the reform undertakings are expected to self-evaluate their agreements relying on expert legal and economic advice.

[23] The conditions for legal professional privilege were set out in paragraphs 21 and 23 of the judgment in Case 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575.

[24] Judgment of the Court of 14 February 1978 in case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*; [1978] ECR 207.

[25] The Hungarian legislator codified an earlier version of the EU Commission's de minimis notice. The rule is that under 10% market share anti-competitive agreements are legal except for hard core price fixing and market allocation cartels. EU rules include a higher ceiling for vertical restraints (15%) but also have more exceptions to this preferential treatment, like vertical resale price maintenance or absolute territorial protection offered to a trader.

national competition authorities (NCAs) relating to the application of Articles 101 and 102 TFEU. The ECN is one form of network governance intending to achieve convergence in policy and law enforcement. In a broad sense, it also includes the activity of the more formal Advisory Committee which, among other tasks, gives its opinion - which is later published in the Official Journal - on draft EU Commission decisions and legislation. The ECN is not simply a shorthand for the co-operation between agencies investigating individual cases but the system also allows the enforcers of EU competition rules to pool their experience and identify best practices. Within this club, the EU Commission still plays the leading role by setting the principles of EU competition policy and enjoys a power of a somewhat hierarchical nature: if it opens proceeding in a case, all other NCAs will be relieved of their competence to apply EU law in the same subject.

Regulation 1/2003/EC mentions the 'network' only in its preamble.[26] Point 15 of the preamble declares that the Commission and the competition authorities of the Member States should together form a network of public authorities applying EU competition rules in close cooperation. For this purpose, the regulation sets up arrangements providing for the 'free movement' of information among the agencies including confidential information, subject to certain conditions. There are also various rules on the allocation of cases within the network. The functioning of the ECN is elaborated in a soft-law document. The Commission's notice on cooperation within the Network of Competition Authorities formed part of the regulatory package adopted in 2003-2004.[27]

From a legal point of view, it is important to mention that the notice includes an annex in which the competition agencies of Member States acknowledge the principles of the cooperation notice and will abide by those principles, especially those relating to the protection of the interests of applicants for leniency. Not only the Commission, but also the overwhelming majority of Member States, consider that it is in the public interest to grant favourable treatment to undertakings which actively co-operate with it in the investigation of cartel infringements, in the form of reduced fines. As point 38 of the notice acknowledges, in the absence of an EU-wide system of fully harmonized leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is, therefore, in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article 101 TFEU.

It is one of the principles of the ECN that where an NCA deals with a case which has been initiated as a result of a leniency application, it must inform the Commission and may make the information available to other members of the network. Regulation 1/2003/EC stipulates, however, that information submitted by a leniency applicant will only be transmitted to another member of the ECN with the consent of the applicant. The co-operation notice provides that network members will encourage leniency applicants to give such consent. Information relating to cases initiated as a result of a leniency application will only be made available to those NCAs that have committed themselves to respecting the principles set out in the notice. The list of these agencies is published on the website of DG Competition.[28]

---

[26] The Commission's implementation of regulation No 773/2004/EC relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (today Articles 101 and 102 TFEU) does not even mention this phrase.

[27] 2004/C 101/03

[28] **http://ec.europa.eu/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf**. The list contains 27 Member States with 37 agencies (the U.K. has for example seven regulators that may apply EU competition rules). In Hungary the GVH was properly authorized by the government to sign this annex.

If we consult the GVH's latest report to the Hungarian Parliament, we can observe that in 2010 there were 31 Advisory Committee meetings, but the GVH participated only 8 times, with three occasions relating to Commission investigations and five concerning drafts of legislation.[29] The GVH was more active in the ECN working groups. Case handlers of the GVH and sometimes members of the Competition Council contributed to the formation of European competition policy in 13 groups.

The nature of activities can be understood if one looks at the ECN`s website operated by DG Comp.[30] What is perhaps the most obviously successful aspect of the work carried out inside the ECN was the elaboration of a model leniency program to improve the handling of parallel leniency applications in the ECN.[31] The legally non-binding document sets out the main procedural and substantive rules which the ECN members believe should be common in all programs. For cases concerning more than three Member States, it introduces a model for a uniform summary application system for immunity applications. The process leading to the adoption of the document and its aftermath is identical to the formal adoption of an EU directive. This is a hallmark of soft-harmonization of quasi-legal issues, such as the practice of enforcement agencies and soft-law guidelines. In Hungary, the 2009 amendment of the competition act incorporating detailed provisions on leniency implemented the provisions of the model leniency program that had not yet been in place by that time.

Developments in some Member States as regards leniency was a good opportunity for the ECN to herald the unity of competition agencies in Europe. To answer the growing concerns over demands by civil judges to force access to leniency documents as part of the files in damage actions, the network adopted a resolution determined to defend the effectiveness of leniency programmes by limiting access to these documents.[32]

In another detailed report, the ECN gave a summary on how actively competition agencies enforce competition law in the food sector across Europe.[33] One of the driving forces behind this could have been the need to demonstrate to politicians and the public that competition law is being applied to fight increasing food prices. The report includes 11 Hungarian cases, 5 of which concerned the enforcement of a special trade act with a prohibition on abuse of significant market power. It is remarkable that in the 6 antitrust procedures mentioned the GVH applied not only Hungarian but also EU competition law. The annex of the report may also be used to reveal how actively NCAs enforce EU competition rules as compared to relying on their own domestic rules. The percentage of the application of EU law as compared to the application of national competition law in the Member States in food sector related antitrust cases was 75% in Belgium, 50% in Finland and Denmark, 25% in Italy and the Czech Republic and zero in Cyprus, meaning that the Cypriots preferred to make use of their national competition law provisions. The relatively low level of cases involving the

[29] Report to the Parliament about the GVH's activities in 2010, can be downloaded at the authority's website, www.gvh.hu.

[30] The ECN has always been looked at with some suspision by business and legal advisors. In order to please these stakeholders of European competition policy, the ECN decided to publish more of its work online. Outsiders interested in the work of the ECN can nowdays read the ECN Brief in English.

[31] Text available in three languages at: http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

[32] Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012: Protection of leniency material in the context of civil damages actions. Text available at: **http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf**. The document relies on the message of a Court judgment in case C-360/09, *Pfleiderer AG v Bundeskartellamt.*

[33] http://ec.europa.eu/competition/ecn/food_report_en.pdf

application of EU law can also be the result of the low level of intra-EU trade in certain areas of the food sector. Of the large Member States France had a figure of 54% in 11 cases, Germany 85% with 14 procedures. Greece reported the most food-sector related antitrust procedures and in each of the 18 cases EU competition law was applied parallel to Greek law. The stand-alone enforcement of EU rules at a national level was fairly rare, with the exception of the Netherlands where each of the five cases reported were decided solely on an EU legal basis.

.

According to recent statistics in the period between 1 May 2004 and 31 August 2012, there were 1531 investigations into cases of which the Network has been informed and 615 draft decisions have been submitted by NCAs to the EU Commission.[34] In the first category, the Commission is ranked first with 226 procedures started, closely followed by France with 211 cases, Germany is the third with 155. Hungary ranks 6th with 87 procedures based on EU competition law. This reflects the GVH's pro-European attitude to enforce European competition rules parallel to Hungarian competition law. When we look at the number of draft decisions, Hungary is last on the top 10 list with 22 envisaged decisions. The reason for this wide gap between these two rankings may be that most antitrust procedures are initiated on a parallel legal basis as a matter of routine, but later the jurisdictional scope is narrowed either by the case handlers or the Competition Council.

TO APPLY OR NOT TO APPLY? THAT IS THE QUESTION...

The non-application of EU competition rules: the negligent approach

Before May 1, 2004 national competition authorities that were empowered to enforce EU competition rules had a choice to apply their national, EU or both sets of competition rules. Regulation 1/2003/EC made it clear that whenever trade between Member States may be affected, Articles 101 and 102 TFEU have to be applied by national competition agencies and courts. The practice of the GVH made it clear, however, that this is a vague legal concept that can be interpreted fairly widely.

The GVH was never really enthusiastic about enforcing Article 62 EA and the corresponding implementing act. This is shown, for example, by case Vj-89/2003 on licensed hunting where the decision of the Competition Council adopted in December 2004 imposed a fine of HUF 150 million (a record level as regards associations of undertakings at that time) on the Product Council of Wild Animal Products and Services for the fixing of a minimum price for hunting rights between the years 2003 and 2004. Since the illegal activity was continued after EU accession, the investigation could have, or should have, been carried out notonly on the basis of Article 62 EA and the Implementing Act but also Article 101 TFEU. The '"onsumers' affected by this cartel were mainly foreign hunters, predominantly with EU citizenship. Despite the fact that the geographic market covered the whole territory of the country and the obvious relationship with trade between Member States, the decision was based only on Hungarian national competition rules.

[34] http://ec.europa.eu/competition/ecn/statistics.html#2

Another case where only Hungarian law was applied related to a PP cartel with evident dimensions in the EU internal market. [35] The companies involved had their seats outside of Hungary.. Although the illegal activity also continued during the time the new competition act implementing the Europe Agreement was still in force, the decision was based only on Hungarian law.[36] The decision was challenged before the court but the question of the legal basis was not among the pleas raised. The same approach can be witnessed in the Vj-101/2004 Hungarian monocalcium-phosphate cartel decision adopted in June 2005. Although the cartel was a genuine European one - both *Kemira Oy* and *Tessanderlo NV* were non-Hungarian business entities - and the activity was terminated only at the end of 2003, the legal basis of the decision were exclusively the Hungarian competition rules.

In 2006, the year in which the first decision applying EU competition law was adopted, the GVH issued fining decisions in several bid rigging cases relating to information technology procurements. In none of those decisions was the existence of EU competition rules mentioned. This attitude did not change later. In case No Vj-81/2006, decided in December 2007, the GVH investigated a market allocation agreement between a Hungarian company and the Hungarian subsidiary of *Olympus*. Although the purchaser of the medical equipment was one single hospital, the Competition Council acknowledged that the agreement may have affected a wider European market due to the characteristics of the product. Despite this, EU rules were not even mentioned in the decision.

The GVH was, as a rule, reluctant to invoke the European legal basis when it dealt with public procurement cartels. In case Vj-130/2006, the Competition Council made no reference at all to rules other than Hungarian ones, even though the practices covered a long time period up to 2006. Despite this, the core arguments of the decision adopted in January 2009 relied on EU jurisprudence as regards the notion of a single and continuous infringement of competition rules.[37] The first instance review court agreed with this test, but held that in the present case it was not sufficiently proven by the GVH, and therefore annulled the decision.

Similar issues arose in procedure Vj-26/2006, which closed with a negative decision imposing fines in November 2007, where the GVH applied only Hungarian rules to a vertical agreement restricting the resale price of *Garmin* PNAs and the market leader *I-GO* software. Although it was quite obvious that the agreement affected products manufactured abroad and distributed all over Europe, the decision failed to refer to the competition rules of the EU or those of the Europe Agreement. A possible explanation for this practice, arising from the context of this case, is that the legal basis of the procedure is mainly determined by the case handlers who decide about the initiation of the procedure. Although the Competition Council may alter the legal basis for the procedure, it is reluctant to do so. Arguably, in cartel cases it is immaterial which legal base is chosen, but in case of vertical competition restrictions, the stricter rules of the EU may lead to either a different outcome or to the same outcome but with a simpler reasoning. Under the Hungarian rules, a *de minimis* exception applies to all vertical restrictions, whereas the EU rules exclude all RPM agreements. Although the parties

[35] Case Vj-102/2004 related to the Hungarian part of the global cartel on the gas-insulated switch (GIS) market The same product market and the same cartel were also investigated and later sanctioned by the EU Commission.

[36] The decision also relied on the previous competition act adopted in 1990, since the cartel was operating before 1997 as well.

[37] The decision quotes cases T-2/89 Petrofina SA vs Commission (judgment of October 24, 1991), T-12/89.Solvay et Compagnie SA Co. vs Commission (judgment of March 10, 1992) and Commission decision 2003/207/EC in case COMP/E-3/36.700 (24 July 2002).

did indeed argue that their agreement fell under the Hungarian *de minimis* exception, the Council felt sufficiently confident to prove illegality based on the more lenient Hungarian competition provisions, arguing that the agreement was not a genuinely vertical one, since tthere was also a horizontal aspect between wholesale distributors.

The same approach prevailed in a decision of September 2009 adopted in case Vj-166/2006 concerning the distribution of *Mitac Mio* products in Hungary. Although it was obvious that the RPM strategy was part of a broader European, or at least Central-European plan, the GVH did not extend the investigation to apply EU competition rules.

Why was the GVH not diligent enough in this respect? Even if it was a formal mistake by the GVH to ignore the Europe Agreement rules, their application would not have led to a different result. The ignorance of the Competition Council was by no way a sign of a kind of anti-European attitude, since the reasoning of the decisions followed the EU case law.. On the positive, the application of harmonized national competition law by the GVH committed to European integration proved to be sufficient to close cases with decisions in line with EU competition law principles, even without applying the special set of competition rules created under the umbrella of the EA. It might be argued that the diplomatic and legislative efforts to adopt the new Implementing Rules were futile, the GVH managed to achieve the required EU-compatible results by applying Hungarian competition law.

The non-application of EU competition rules: conscious non-application

A second group of GVH decisions involves cases where the reasoning of the decision dealt with the interpretation of the 'may affect trade between Member States' clause, however, EU law was finally not enforced due to the lack of the inter-state affect. The first such case involving Article 101 TFEU was procedure Vj-52/2005 where the GVH imposed fines of billions of HUF on several insurance companies, car dealers and their associations for adopting anti-competitive agreements and for collusive behaviour. The decision was based exclusively on Hungarian competition law, but the Council devoted a separate chapter in its reasoning to explain why EU competition provisions and Article 62 EA combined with the Act implementing Decision 1/02 of the Association Council would not apply. The line of reasoning produced in this decision was followed in subsequent decisions of the Competition Council..

First, the GVH quoted the relevant Treaty articles underlining that EU law should be applied only when trade between Member States is affected. When interpreting this clause, the Council referred first to seminal judgments from the EU Court, among others *Consten & Grundig*, *Hugin* and *Ambulanz Glöckner*.[38] The GVH was prepared to take into account the Commission's guidelines adopted in this field.[39] However, there were much more direct references to EU judgments, and the rules in the guidelines regarding *de minimis* effects which have a regulatory character going beyond the scope of EU court judgments were not mentioned at all. The agreements in question required a fairly complex competition law assessment. The Council held that the potential effects on the insurance markets are relevant, since it is unlikely that the car-repair market was characterized by inter-state trade. The

[38] 56. and 58/64. Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission (ECR 1966., p. 299.); C-22/78 Hugin v. Commission (1979) ECR 1869, para 17. and C-475/99 Ambulanz Glöckner (2001) ECR I-8089, para 47.
[39] 2004/C 101/07

Council believed that even on the insurance market there were no significant effects, given the nature of the activity and that only Hungarian companies that were formulating their business policy on a domestic basis were subject to the investigation

Another example from the early years is the decision adopted in case Vj-69/2005, relating to the abuse of a local telecom operator. Although the case handlers started the investigation on the basis of both EU and Hungarian competition rules, the Competition Council, referring to point 3.2.6 of the Commission's guidelines[40] explained that due to the local nature of the conduct trade between Member States was not affected. The operative part makes no reference to this special 'termination', the abuse of dominance was established without any reference to the applicable legal basis.[41]

In January 2007, the Competition Council imposed fines on two foreign currency exchange offices for the coordination of setting the price of foreign currency.[42] Although the procedure was started on a three distinct legal basess, including the Hungarian competition act, the act implementing the EA and Article 101 TFEUlaws, in the end the Council established the infringement only under Hungarian law. It argued that the collusion did not cover the whole territory of the country as had been suspected by the investigators, nor did the colluding companies achieve significant turnovers, and the geographical scope covered only one street in Budapest. Without disagreeing with the findings of the Competition Council, it needs to be pointed out that even a local cartel can be relevant for the proper functioning of the common market if the non-domestic nature of the product (foreign currency) and the serious nature of the infringement (price coordination) are established. It is true that the geographical market was local, but if we recall that Váci Street is the primary shopping area for tourists in Budapest, the EU-link becomes fairly obvious. The effects of the cartel were felt mainly by foreign citizens, especially by tourists from EU Member States. Nevertheless, , we may also conclude that involving EA or EU law directly would not have made a significant change in the determination of the case by the Competition Council.

Applying EU law directly

It was more than two years after accession that the Competition Council first relied on EU law, alongside national competition law to establish an infringement in a case (Vj-180/2004) relating to certain advertising restrictions imposed by the Hungarian Bar Association on its members. In June 2006, the GVH imposed a rather symbolic fine of HUF 5 million, the operative part of the decision simply declaring that the rules were anti-competitive without specifying which set of competition rules were applied. Only the reasoning of the decision made it clear that the decision was based on both Hungarian and EU competition norms. In order to underpin the application of EU rules, the Competition Council made references to the case law of the Court of Justice and also mentioned the relevant points of the Commission's applicable guidelines. The tenor of the EU Court's *Wouters* judgment[43] was

[40] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)

[41] This was due to the traditional Hungarian way of phrasing the operative part of decisions without identifying the provision of the law that was infringed by the illegal conduct. This can be identified only in the reasoning.

[42] Vj-83/2005.

[43] C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap*; 2002 ECR I-01577.

explained in detail, since the case related to rules of a professional association covering the whole territory of a Member State. The decision included a part discussing EU law and a part relying on Hungarian in the latter of which reference to the points made regarding *Wouters* in the first part was avoided.[44]

One month after the Bar Association decision, the Competition Council imposed its highest ever fine for an abuse of dominance. *MÁV*, the state-owned Hungarian railways company had to pay HUF 1 billion for restricting access to its network thereby impeding competition following the liberalization of the freight transport sector under EU law. In this decision, the relevant legal basis was mentioned in the operative part of the decision. Furthermore, not only Article 101 TFEU but also the Europe Agreement rules were precisely referred to for the period before 1 May 2004. The reasoning devoted a separate chapter to the interpretation of the inter-state commerce clause of Article 101 TFEU. It was obvious that the conduct of an incumbent monopoly was capable of affecting the structure of competition in a recently liberalized market and also directly hindering the entry of new, foreign competitors. The Competition Council also noted that the somewhat differently phrased provisions of the IRs and the TFEU, the former referring to trade between 'Hungary and the Community' whereas the other to 'trade between Member States', have to be interpreted identically. The Council later quoted several judgments from the EU Courts when it explained the notions of dominance and abuse. The explanatory part of the decision made no real distinction between the different competition rules which were applied. It relied heavily on EU court judgments and established the applicability of Hungarian rules referring to these. It was also taken for granted that the Europe Agreement rules have to be applied in the same manner.

In November the same year, another EU-related cartel decision followed. The Competition Council fined several egg producing companies and their association for information sharing, limitation of imports and promotion of exports in order to secure stability in the Hungarian egg market. In addition to the EU rules the competition rules of the Europe Agreement and Act X of 2002 implementing Article 62 EA were also invoked. The operative part of the decision simply declared that the activities were anti-competitive; the legal basis for this statement was explained only in the reasoning. Point 465 made it clear that the findings of the Competition Council were based on the Europe Agreement for the period between 1 April 2002 and 30 April 2004, Article 101 TFEU from 1 May 2004 and the Hungarian Competition rules for the whole duration of the infringement. The reasoning of the inter-state commerce clause of Article 101 TFEU was rather short. The Council devoted just one sentence to explain that this criterion was met since the conduct covered the whole territory of the country, protecting the interests of all Hungarian egg producers, and from time to time also directly restricting trade with other EU countries. Neither the Commission's guidelines nor the case law of the EU Court were referred to.

The structure of the decision followed a pragmatic approach. Due to the almost identical wording of these three sets of competition rules the Competition Council noted that there is no need to analyze their applicability separately but regarded them practically as if they were

[44] When both national and EU competition rules are invoked, the reasoning requires extra effort from the law enforcer. That is perhaps one of the reasons why the GVH did not find it necessary to invoke EU rules in addition to the Hungarian competition law provisions. In this case the Council first explained how the elements of Article 101 (1) were met and why paragraph (3) was inapplicable. The relevant provisions of the Hungarian competition act were analyzed after that, almost duplicating the text of the decision.

one. This 'single competition law' approach dominated most of the decisions adopted later on, just like in a a decision adopted in November 2007 imposing the highest fines of that year. . The French owned newspaper distributor company and the Hungarian Postal Services were fined HUF 936 million because they allocated market segments between themselves. The operative part of the decision was again 'neutral', while the reasoning part explained that there was no need for two separate analyses since the two laws are almost identical. However, there was no mentioning of the Europe Agreement's competition rules whatsoever.

In a decision adopted in September 2009 the Competition Council referred to the infringement of EU competition rules in the operative part of the decision.[45] Case Vj-18/2008 involved almost every Hungarian bank and the two global payment card companies, *Visa* and *MasterCard*. The GVH held that their agreement to establish and calculate the multilateral interchange fee (MIF), as a kind of internal cost element affecting the final fee charged to customers was in violation of both Hungarian and EU competition rules. The relevant provisions of the Europe Agreement were not mentioned. The problem of card fees kept many European competition agencies busy at that time, even though the inter-state nature of the MIF was far from obvious in the Hungarian case, since the agreement related only to cards issued in Hungary and the basic agreement had been adopted a long time before, in the mid 90s. The European dimension of the problem was emphasised by the fact that the European Commission was also conducting a parallel investigation regarding the inter-state aspects of *Visa*'s rules. Regarding the applicability of Article 101 TFEU, the GVH held that trade between Member States was affected since the agreement covered the whole territory of Hungary, most of the companies concerned belonged to multinational groups and the income generated was significant.

This case can be seen as an example of how national competition agencies may develop the interpretation of EU competition rules. The Competition Council decided that the MIF agreement was not only anti-competitive in its effects but also by its aim. This was a new approach, indirectly endorsed by the EU Commission during the obligatory consultation process under Regulation 1/2003/EC.[46] Previous Commission decisions had found agreements of this type to be an infringement of competition only after a careful analysis of their effects[47], even though the latest decision addressed to *MasterCard* considered that the aim-path was also not impossible to follow.[48] Relying on the special, facts of the Hungarian MIF case suggesting a serious cartel conspiracy, the Competition Council decided that not only the effect but also the aim of the conduct was anti-competitive.

The first public tendering cartel case where the GVH established the infringement of EU competition rules was decided in June 2010. Procedure Vj-174/2007 related to the allocation of a number of railway renovation works among construction companies. Just to note, the

[45] As noted above, the operative part of the decisions of the Competition Council identify usually the conduct held illegal without mentioning the appropriate legal basis.

[46] Article 11(4) provides that 'no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action'.

[47] See for example 2001/782/EC Commission decision adopted on 9 August 2001, COMP/29.373 (Visa I.) (OJ L 293., 2001.11.10., 24-41. p.)

[48] On 19 December 2007, the Commission adopted Decision C(2007) 6474 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (COMP/34.579 – MasterCard, COMP/36.518 – EuroCommerce, COMP 38.580 – Commercial Cards.

operating part followed the traditional approach and did not contain any reference to the legal basis relied upon. Points 181-197 of the decision imposing record fines were devoted to the analysis of why and how trade between Member States may have been affected by the collusion. To compare, in the MIF decision the Competition Council made considerably less effort to discuss the jurisdictional issue. The reasoning followed both the structure and the content of the Commission's notice on the interpretation of 'may affect trade between Member States'.. Firs, the notion of 'trade between Member States', second, the 'may affect' clause, and third, the significance of this effect, were analyzed. The connection to the internal market was also obvious because the railway projects were financed from European sources, thus the mark up achieved by the cartel was paid indirectly by European taxpayers.

Another case where the Competition Council based its reasoning on soft law document issued by the EU Commission was case Vj-195/2007. In February 2010 the GVH imposed fines on the French owned Hungarian Newspaper Distributor company and several newspaper publishers also under foreign ownership. The infringement involved a special market allocation arrangement involving a non-compete clause attached to the privatization of the newspaper distribution business of the Hungarian Post in 1998. The remarkable feature of the decision was that the core of the reasoning relied on a soft law document issued by the Commission in the merger field. The communication on ancillary restraints of March 2005[49] sets out conditions under which the Commission will evaluate a non-compete provision not as a form of cartel but as a natural attribute to the authorized concentration. The Competition Council ruled that since the conditions contained therein were not met, the agreement was a naked cartel worth punishing.

Conclusion on the parallel application of European and national competition laws

The GVH has always been the frontrunner among new Member States as far as the number of procedures initiated under EU antitrust rules is concerned. This result, however, needs to be reconsidered in the light of number of investigations that were actually closed with a decision establishing an infringement, since a fair number of the procedures were closed without an adverse finding against the companies involved. To provide a full picture, we also need to consider those cases in which EU law could have, or should have been applied instead of the GVH 'negligently' applying domestic rules only. This is especially problematic in cartel cases in which the GVH rejected to realize that the appropriate legal basis for its decisions should also have involved EU rules.

Arguably, this can be considered an insignificant procedural mistakenot having a discernible effect on the outcome of the investigations. Given the large number of EU-related procedures and the general approach of the Competition Council to refer to EU case law in its reasoning, we cannot even claim that this was an indication of the GVH protecting domestic competition policy priorities and competition enforcement prerogatives from European influences. The commitment to EU competition law and policy of the Competition Council is reflected in its reliance on EU case law, even before EU accession materialized.

This non-consistent approach can be witnessed, for example, by three decisions adopted between December 2007 and December 2008, each relating to fee regulations adopted by associations of undertakings.

[49] HL C 56, 2005. 3. 5., pp. 24-31

In December 2007, the Competition Council fined the Chamber of Hungarian Architects for fixing minimum fees for their members. The decision is rich in references to EU competition law documents and jurisprudence. Based on the EU Court's *Wouters* judgment and point 53 of the Commission's relevant notice, the Council was confident that EU law should be applied since the decision covered the whole territory of the country and the market share of the association was above 5% (membership for architects was mandatory). The Council quoted several seminal EU Court judgments when it analyzed the personal and material scope of EU and Hungarian competition laws. It carefully distinguished state-related regulatory measures from actions by associations of undertakings restricting competition. The GVH also relied on the Commission's decision adopted three years earlier on a similar action by the Belgian chamber of architects.[50] The reasoning combined both sets of rules; no distinction was made between EU and domestic competition rules.

One year later, in a similar case, the Competition Council declined to apply EU competition rules against the tariff table adopted by the Association of Hungarian Journalists. It was argued that the effects were not appreciable, mostly due to the fact that the market players are Hungarian speaking (and writing) journalists. The decision did not explain in detail why the effects were not significant; it did not even refer to the relevant Commission notice. The decision did not specify the market share of the journalists who were members of the association, but we can estimate it to be at least 30-50%, well above the 5% mentioned in the Commission notice. This decision is an indication that the Competition Council may not be applying EU law consistently.

In September 2008, the GVH provided an example of its third approach towards price fixing regulations by associations. In case Vj-1/2008 against the Association of Hungarian Property Brokers the GVH failed to touch upon the possibility of applying EU law, and based the decision and its reasoning entirely on domestic competition rules. This 'negligent' approach did not mean however, that the GVH's eyes were shut to the relevant EU practice. When the Council analyzed the nature of the conduct, it referred extensively to the relevant EU decisions providing sufficient grounds for its own decision.

The above overview of cases demonstrated that the depth of the reasoning by the Competition Council of the requirement in EU competition law that the agreement or behaviour 'may affect trade between Member States' was not consistent enough. In some instances it was dealt with in a couple of sentences, while in other cases it took several pages to elaborate a position in this regard. Interestingly, the Council was prepared to rely on the soft-law document(s) issued by the Commission as a legal basis. This is true not only for those parts of the notice which quote previous EU Court judgments but also for the special *de minimis* exception which was elaborated by the Commission itself (the 5% market share and the 40 million euro turnover threshold). This proves that the GVH was prepared to bring its practice in line not only with hard EU laws but also with the policy of the EU Commission expressed in the form of various soft law documents.

The practice of the GVH relating to the application of EU law in its decision, an element potentially open to challenge in judicial reivew, has not been addressed in applications for judicial review against GVH decisions, leaving Hungarian adminastrative courts unable to address this fundamental jurisdictional issue.

[50] 2005/8/EC Decision by the Commission adopted on 24 June 2004 (COMP/38.549)

SELECTED COMPETITION LAW ISSUES

After presenting the attitude of the Competition Council towards applying EU law I would like to analyse a set of dedicated substantive and procedural issues where the influence of EU competition law can be witnessed.

Anti-competitive agreements

If we can trust the search engine of the GVH's official website, there is only evidence for 12 cases in which EU law was applied alongside the provisions of Hungarian competition law.. Four of them were hard core cartel cases in the grain mills, railways construction, railway freight transport services and the newspaper distribution sectors. Two decisions found decisions by associations of undertakings (hairdressers and construction engineers) unlawful; the rest related to more complex issues like the organization of bank card payment services.
As to the infringements committed by associations of undertakings, we have already noted that the GVH's practice of either invoking or ignoring EU law was rather unpredictable. One reason, but not an explanation, could have been that the Competition Council adopts its decisions sitting in panels of three or five council members, the composition of which changes from procedure to procedure. To avoid inconcistent application of competition rules extra effort is required by the Counicl. In the above mentioned Chamber of Hungarian Architechts, the weak point was that it condemned only the obligatory fee structure of the association and declared the amended, now recommended, fees in its reasoning lawful. Whilst the Chamber is entitled under legislation to set recommended fees, under EU law which was applied in the case, the GVH should have come to a different conclusion under the case law of the EU Court.[51] The case law is quite clear - also referred to by the Council in other decisions on associations - that even recommended prices of associations are usually regarded as anti-competitive. On this basis, the GVH should have declared the relevant act of Parliament incompatible with former Articles 3, 10 and 81 EC and establish the infringement of EU competition rules for the recommended fees as well.

Abuse of dominance

The only decision of the GVH's practice where EU law was applied in an abuse of dominance matter was delivered in case Vj-103/2004. The GVH investigated certain practices by *Hewlett-Packard* restricting competition on the after-sales markets. As regards the conduct relating to chips for ink cartridges, the procedure was terminated with reference to Article 11(6) of Regulation 1/2003/EC since the EU Commission opened its own proceeding on this subject. The GVH continued its investigation concerning the wording of the warranty used by *HP*, and expressed its concerns under Article 102 TFEU and the special Hungarian provisions on misleading communication as the warranty was not sufficiently clear about the consequences of users opting for non-*HP* cartridges. Since there was no proof of *HP* actually refusing to provide a guarantee, the case was somewhat hypothetical, and the

[51] It is a well established principle under EU law that national legislation promoting private competition restrictions cannot limit the scope of EU competition law provisions (i.e. C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, judgment of the Court of 9 September 2003, 2003 ECR I-08055).

Competition Council was satisfied with a commitment offered by *HP*. According to the procedural rules of that time, the GVH terminated the procedure as after a follow-up investigation it was satisfied with the remedies introduced by *HP* which corrected the wording of its warranty to make it clear that the guarantee is not automatically invalid if non-*HP* cartridges are used.

In its decision, the GVH referred to the Commission's notice on the interpretation of 'may affect trade between Member States' to prove the EU-wide dimension of the case. The reasoning of the decision is not sufficiently elaborated, mainly due to the early closing of the procedure. The Competition Council seemed to believe that *HP* was in a dominant position in the distinct secondary after-market for *HP* printers. When *HP* tried to argue that there is only one market affected where it faces fierce competition, the Council referred to the EU Commission's XXV Report on Competition[52] to underpin its position without specifying the details of that reference. It is noteworthy that in later cases the EU Commission refused to investigate cases like this, arguing that printer aftermarkets are not separate relevant markets.[53] The Council saw it otherwise, emphasizing that average Hungarian costumers are not aware of this. However, its conduct - refusing to provide guarantee services if damage was caused by non-*HP* cartridges - was held to be reasonable. It is not clear whether the termination of the procedure was due to the commitment or whether it would have been terminated anyway as regards the abuse of dominance, and the commitment served to please only the concerns relating to misleading communication. In conclusion, this was a case where, although the outcome of the procedure was not at odds with EU law, the reasoning of the GVH showed some divergence from the EU practice.

The nature of Commission comments: access denied

One of the first cases where the Competition Council applied EU law directly related to a vertical exclusive agreement concerning the provision of entry and exit ticketing system related services provided for *Arena*, a major venue for sport and concert events in Budapest. In the reasoning of the decision, the Council expressly mentioned that it took into consideration the remarks provided by the EU Commission as required by Regulation 1/2003/EC and the cooperation notice[54]. In the course of the judicial review of the decision the judge demanded access to this document from the EU Commission which, in the opinion of the GVH, was not part of the case file since documents relating to the interpretation of EU rules originating in the ECN belonged to the category of intra-institutional documents, which, like a draft decision, were not subject to the access to files rules.[55] Interestingly, this claim was not raised by the plaintiff, but arose from the judge wanting to inform the EU Commission of the case and was eager to see the postal address of the relevant Commission services from the file. Crucially, the judge contested the interpretation of the GVH of the EU provisions. The more far-reaching implication of the case could have been that whenever the

[52] http://ec.europa.eu/competition/publications/annual_report/1995/en.pdf

[53] As early as 1991 the Commission explained in closing the *Info-Lab/Ricoh* case that there is no dominance issue in printer markets (1991 Competition Policy Newsletter, p. 35)

[54] Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03, OJ 2004 C 101/43.

t[55] Article 15(2) of 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 2004 L123/18.) provides that the right of access to the file shall not extend to internal documents of the Commission or of the competition authorities of the Member States. Furthermore, the right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

Competition Council expressly mentions a document in the decision, it would mean that it was used as evidence; therefore parties - or at least the judge - should have access to it in order to examine its content. The Competition Directorate strongly opposed this possibility since this kind of transparency could undermine the trust required for cooperation within the ECN. The lessons of this case were perhaps one of the reasons why Commission case handlers in future cases avoided preparing written replies to the Competition Council's preliminary position and preferred to explain their views over the telephone. The Competition Council drew the conclusion that it should no longer refer in its decisions to the obligatory consultation within the ECN. In the *Arena* case, the judge decided not to force the GVH to provide the documents, since the plaintiff did not question the decision based on this argument and the court came to know the Commission address from another source.. To my knowledge, this procedural issue has not been raised again in procedures for judicial review.

Parallel investigations

In order to avoid conflicting decisions in the ECN, Regulation 1/2003/EC, just like the previous implementing regulation provides for the priority of Commission investigations over investigations conducted by national authorities. Launching an investigation based on Articles 101 or 102 TFEU forces national competition authorities to terminate their procedure, to avoid parallelism - at least with the EU Commission. In theory, but not in practice, nothing prevents the NCA continuing the procedure under its own national legislation. One interesting transitional exemption to this 'the Commission takes the case' rule concerned activities predating the country's EU accession.
There were cases where the same global, or at least European, cartel was being investigated by both the GVH and the EU Commission. In such cases the GVH had to limit itself to deciding on the anti-competitive effects predating accession, whereas the Commission dealt with post-accession issues.
The Gas insulated switch-gears (GIS) cartel was a good example of parallel procedures before the Commission and the GVH. The GVH under its stricter procedural rules had to close the case earlier and could not await the outcome of the Commission's procedure. There was a potential for diverging outcomes, since the co-operation procedure adopted by Regulation 1/2003/EC applied only to investigations conducted under EU substantive rules. Fortunately, both agencies came to the same conclusion, unsurprising for the GVH as it relied heavily on EU case law when it established the existence of a single and continuous cartel agreement. There were some minor differences of opinion relating to the companies investigated (the GVH did not extend its procedure to Japanese companies not exporting to Hungary) and the personal liability for the conduct of a subsidiary. The fines imposed by the GVH were based on the theoretical turnover that each company could have realized in.

In a third procedure running parallel before the Czech competition agency the same companies were fined for their conduct following an approach like that of the GVH. At the request of the Czech review court the EU Court sitting in grand chamber ruled that in the context of a proceeding initiated after 1 May 2004, Article 101 TFEU does not apply to a cartel which produced effects in the territory of a Member State prior to the accession of that state to the European Union.[56] Furthermore, the opening by the European Commission of a

[56] Judgment of the Court (Grand Chamber) of 14 February 2012 in case C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže,* not yet reported.

proceeding against a cartel under Chapter III of Regulation 1/2003/EC does not cause the competition authority of the Member State concerned to lose its power - by the application of national competition law - to penalize the anti-competitive effects produced by that cartel in the territory of that Member State during periods before EU accession. The Court argued that since the Czech Republic was already a Member State of the Union when it adopted its decision it was required to comply with the principle of *ne bis in idem*. According to settled case law[57] this principle precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalized or declared not liable by a previous unappealable decision. After analyzing the Commission's decision the Court concluded that this does not cover any anti-competitive consequences of the said cartel in the territory of the Czech Republic in the period prior to 1 May 2004, whereas the decision of the *Úřad pro ochranu hospodářské soutěže,*the Czech competition agency, imposed fines only in relation to that territory and that period. The Court ruled that the *ne bis indem* principle was not infringed. The application of this principle is subject to the threefold condition: identity of the facts, unity of offender and unity of the legal interest protected. In this case the unity of the facts element was lacking. This means that one single cartel-like conduct may result in more than one cartel infringement depending on the geographic markets and jurisdictions concerned.

It is interesting to observe that the Court had no problem with interpreting *ne bis in idem* as a European principle at the request of a national court reviewing a decision adopted by an NCA under national law and in a procedure regulated by domestic rules. Arguably, competition agencies were bound to respect this principle even before EU accession as part of their obligations under public international law.

A missed chance: the elimination of the exemption regime

The EU accession of Hungary coincided with the structural reform of the application of Articles 101 and 102 TFEU. Due to the negative experience with the individual exemption system based on voluntary notifications, the EU decided to create a legal exception regime instead.[58] It was argued that with so many new Member States, the notification system could no longer be sustained. As Ian Forester put it: 'Procedurally, the Commission's intervention [to exempt an agreement from the prohibition] was indispensable, although practically it was unavailable.'[59]

A notification system can have two main positive features. It provides businesses with legal certainty in projects requiring investment and gives the competition authority an opportunity to influence the market *ex ante* by obliging the notifying parties to correct their arrangements

[57] See for example joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59; joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 338 to 340.

[58] At that time it was heavily debated, especially by German commentators (i.e. Wernhard Möschel: Systemwechsel im Europäschen Wettbewerbsrecht? Zum Weissbuch der EG-Kommission zu den Art. 81 ff. EG-Vertrag; JZ 2000, 61-7) whether such a change was possible at all given the wording of Article 101 (3) which seemed to back an interpretation according to which a decision by the law enforcer was needed to give effect to the derogation contained Article 101 (3) TFEU. This issue has not been seriously raised before EU courts since then.

[59] Ian Forester: Modernization of EC competition law; Fordham International Law Journal [Vol.23:1028, 2000], p. 1034

so as not to infringe the competition rules. To avoid the sudden influx of notifications, carefully worded block exemption rules and a disincentive to notify non-problematic agreements are needed. The introduction of time limits, stipulating the legal consequences of a failure to act, is also essential.

The exemption system in domestic law worked quite well in Hungary before EU accession; the negative experience of the Commission was not present at national level. The extension of the prohibition on all vertical restraints and the introduction of the exemption system did not flood the Hungarian competition office with hundreds of notifications.[60] Besides the adoption of block exemption decrees by the Government this was the result of the lack of any incentive to notify. Unlike in the EU, the exemption could be granted retroactively to the conclusion of the agreement. However, the scarcity of notifications had the disadvantage that the competition office did not have the opportunity to collect much market information. From this point of view, harmonising block exemptions was premature, since the competition agency had insufficient experience from individual exemptions to generalize them in the form of block exemptions.

One of the last exemptions was granted in case Vj-207/2004. The vehicle manufacturing group *Rába* and the market leader *Matáv* group (today *T-Com*) concluded an exclusive IT agreement for 9 years in November 2004. The procedure was initiated based on both Hungarian and EU law. The case handlers argued that the complex agreement does not fall under the block exemption regulations but should benefit from an individual exemption. The report of the case handlers made no distinction between EU and Hungarian competition rules. This was one of those cases where the Competition Council faced the difficult situation of how to close a procedure running under a dual legal basis. According to Regulation 1/2003/EC, the GVH was not entitled to exempt the agreement relying on Article 101(3) TFEU, whereas under Hungarian law it still had this opportunity. The best choice would have been to adopt two decisions in the same procedure: one exempting the agreement under Hungarian competition law and another terminating the procedure based on Article 101 TFEU with the reasoning that there are no more reasons to continue the investigation. The *Rába* decision followed a different path. The Council's reasoning on the individual exemption was very short, not even mentioning whether the legal basis was EU or national rules, just as it did in the operative part which simply provided for an exemption of the anti-competitive agreement until May 2006. This exemption period of less than 2 years was explained with reference to a draft piece of legislation that foresaw the termination of the exemption regime. The Competition Council intended to avoid adopting a binding decision for a time period when individual exemptions will no longer be available. This was a message that deliberately discouraged companies asking for a last minute exemption of their agreements. As a matter of fact, the GVH was not flooded with requests like this.

In another decision adopted in the same year in case Vj-178/2004, the GVH exempted an agreement under Hungarian competition law for a period until 2008. In this case, the concerns addressed in the previous *Rába* decision were not raised at all. The final paragraph of the reasoning warned the undertakings, however, that the decision evaluated the agreement only under Hungarian law and that the decision gave no relief from EU competition law obligations.

[60] During 1999, the Competition Council decided on 15 cases concerning agreements restricting competition, of which only 4 proceedings were initiated by notifications. Beside the three negative clearance decisions, there was only one exemption decision.

From a procedural law perspective, this was indeed a suboptimal solution - no wonder the national exemption regime did not survive the demise of its European counterpart. There was no legal obligation to terminate the exemption regime but there were strong practical arguments to this end. Nevertheless, this was a strategic decision that may have adversely affected the interests of Hungarian companies. They lost the chance of getting a positive decision providing legal certainty for them in cases where they had invested in a new form of distribution or adopted co-operation agreements with restrictive clauses.

Although the exemption system was ultimately terminated, it is worth noting that a hidden form of exemption still remained in domestic law. The GVH may start an *ex officio* procedure investigating any potential anti-competitive agreement, for example after a formal complaint by one of the undertakings concerned, so that they could end up either with a non-infringement decision or an order terminating the procedure due to lack of evidence proving the suspected infringement; of course there is also the chance of a negative decision with some fines. A non-infringement decision provides the parties with a kind of safe harbour that the GVH does not and probably will not consider their agreement as unlawful behaviour.

A good example of this approach was the case relating to the joint distribution of certain optical lenses. In its decision Vj-142/2007 the Competition Council declared that an agreement between *Hoya Lens* and its Hungarian distributors was neither a concentration nor an anti-competitive agreement. The procedure was conducted under Hungarian law, although it is obvious that optical lenses are imported into Hungary from other EU Member States. The decision is a good example of the combined reading of the domestic equivalents of paragraphs (1) and (3) of Article 101 TFEU. The Council did not refer to either of the exemption criteria, but ruled that the restrictions form an inherent part of the agreement. Bans on participating in other distribution networks and rules on the distance between *Hoya* shops were declared not to restrict competition.

Leniency harmonization

Rewarding ex-cartel members for their active co-operation is the usual way how competition agencies track dawn secret agreements. The GVH issued its first leniency guidelines in 2003.[61] The legal basis was a provision in the competition act stipulating that cooperation should be one of the factors to be considered when a fine was to be imposed. It was an unusual soft law instrument, since the competition act declared that communications issued by the GVH should be based on the practice of the competition office and not have binding force. Leniency was a new phenomenon, the guidelines included new rules as opposed to the settled practice of the GVH, and the GVH, including the independent Competition Council, had to make it clear that it would consider the communication binding in order to guarantee the success of the leniency policy. The communication was based on the similar guidelines from the EU Commission, both regarding the conditions for lenient treatment of whistle blowers and the levels of the fine reduction. This is an obvious example of an instance in which European soft-law influenced the content of a similar national soft-law instrument.

The guidelines were supplemented on the occasion of EU accession to help de-cartelize Hungarian markets by providing for an even more lenient approach for a transitional period. However, the larger discounts available for a couple of months did not lead to more leniency

[61] Communication No. 3/2003. of the GVH (amended by communications 1/2006. and 2/2009.). published at: http://www.gvh.hu/domain2/files/modules/module25/9386607B9C942473.pdf

applications. Either the Hungarian market was free of cartels, or the companies affected were not afraid of getting caught by the competition watchdog under the provisions of competition law. By this time, the GVH had already built up a reputation for deliberate and strict cartel enforcement: the well-skilled investigators of GVH Cartel Task Force had been operating for some years; the first successful procedures had been closed, dawn raids became part of the daily routine, and in July 2004, two months after EU accession the Competition Council delivered its first record-breaking, billion-forint fine in a cartel case. The decision relating to the construction of new motorways made it clear to the public that the GVH was prepared to investigate big cartels even if they had some political flavour.

Leniency was never a success story in Hungary. That was neither because of the wording of the rules nor due to the unreliable practice of the GVH. On the contrary, the Competition Council always respected the investigators` preliminary decision as regards zero or reduced fines, even in cases where it was not sure whether the undertaking really deserved the lenient treatment. A possible explanation is that sanctions affecting only undertakings did not prove to have a sufficient deterrent effect on the individuals operating that undertaking, or at least not sufficient enough to override decade long friendly relationships existing between competitors in the same sector of the economy. Most leniency applications were handed in by foreign companies, usually as an afterthought to their identical application in Brussels.

No wonder that the leniency rules were subsequently modified. In 2009, a new set of rules entered into force. The most important substantial and procedural provisions were codified in the competition act itself. An application form with explanations and a communication from the GVH provide for the soft-law element of the regulation. These rules also relied on the outcomes of the so-called model leniency program elaborated in the framework of the ECN.[62] This is a unique legislative method of achieving a real European approach in a specific field of law. The stakeholders requested a unified European set of rules to encourage leniency applications and indirectly further destabilize cartels affecting European consumers. No one-stop-shop solution was worked out; an application handed in Brussels has no legal effect in procedures before national competition agencies based on either EU or domestic competition laws. This is a second best solution, where each competition agency will have almost identical rules to provide for preferential treatment of confessing undertakings. When a cartel covers several Member States parallel application forms have to be put on the tables of each affected competition agency to ensure the same treatment. International law offices thus continue to enjoy a competitive advantage. Should this harmonized and decentralized system produce undesirable effects, centralized EU rules may prove to be the optimal solution.

The imposition of fines

Another area of convergence may be found in the formulation of fining policy in Hungarian law. Fines in antitrust cases are the most important deterrent sanctions. Their level is essential. Should the allocation of cartel cases among ECN members really work, the outcome of similar investigations in financial terms should be the same. Equal treatment demands that the sanctions imposed on a company should not differ according to the identity of the competition agency. For the sake of consistency and the integrity of the system, national competition authorities should not be allowed to adopt significantly differing fines for the same, or for the same type of, infringement. Regulation 1/2003/EC does not contain rules regarding the harmonization of sanctions, let alone monetary penalties. There were

[62] **http://ec.europa.eu/competition/ecn/model_leniency_en.pdf**. The programme was amended in 2012.

some efforts within the ECN to achieve soft harmonization, but this is an area where significant differences can be witnessed among various Member States.

The GVH published its first ever fining guidelines in 2003.[63] It is remarkable that the communication was not a simple copy of the relevant Commission document.[64] On the contrary, the GVH decided to work out its own calculation method. The preparation of the guidelines that led to a significant increase in cartel fines involved the study of similar documents from various jurisdictions, of which the EU model was just one. The basic amount of the fine was calculated based on a certain percentage of the turnover affected by the cartel (the so called relevant turnover). At this time, the Commission's fining method started, with a range of euro-based fines depending upon the seriousness of the infringement. The GVH was wise enough not to follow the EU concept, because the new Commission fining guidelines adopted in 2006[65] also opted for this approach, which was also in place in some other Member States such as the Netherlands and Germany.[66] Despite the similarities, cartel fines in Hungary never approached the level of Commission sanctions. That is only partly due to the obviously different scale of infringements investigated at Member State level versus those at EU level. Even the percentages imposed in terms of the relevant turnover do not match each other, which can be considered a potential malfunction of the decentralized law enforcement of EU competition rules. Heavy cartel fines in Hungary reaching unprecedented levels in terms of domestic administrative sanctions amounted to 6-7% of the relevant turnover, whereas the EU Commission's model allows for a 50% starting position which in practice turns out to be somewhere around 20%, still three times higher than the Hungarian average.

The fining guidelines were withdrawn in 2009 due to the uncertain practice of review courts and also with reference to the emerging European best practice resulting in higher fines for cartels. It took for the GVH two years to publish the new guidelines. It can be expected that this will not lead to a significant increase in - not to mention a harmonization of - fine levels to the EU average.[67] The new guidelines provide for the trebling of the former fine levels only in the case of public procurement cartels. Price fixing or market allocation affecting private commerce will be fined by the GVH at approximately 6-8% of the relevant turnover, a figure far below that applied not only by the EU Commission but also by many other Member States which have decided to adopt fining regimes capable of reaching levels close to those of Brussels.

Control of concentrations

Cartels and other anti-competitive agreements and abuses of dominant positions are subject to parallel investigation by national competition authorities based on EU and on almost identical national competition laws. When independent companies merge or acquire controlling stakes in each other, competition law control is organized following a different concept. Subject to

[63] Communication 2/2003 as amended by 2/2005: http://www.gvh.hu/domain2/files/modules/module25/pdf/print_4566_h.pdf

[64] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (98/C 9/03), OJ 1998 C 9.

[65] **Guidelines on the method of setting fines** imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. OJ C 210, 1.09.2006.

[66] NMA Fining Code 2007 (**http://www.nma.nl/en/images/NMa%20Fining%20Code%20200723-196203.pdf**) and Bekanntmachung Nr. 38/2006, (http://www.bundeskartellamt.de/wDeutsch/download/pdf/06_Bussgeldleitlinien_Logo.pdf).

[67] forras

the exceptional possibility of case transfers, there is a clear division of work between Brussels and national agencies, based upon the relevant turnover achieved by the parties. Large concentrations capable of affecting the functioning of the single market are handled by the EU Commission according to an EU regulation, whereas transactions below this level are subject to competition clearance at national level subject to the substantive and procedural provisions of domestic competition laws.

Due to this clear allocation of powers a Member State may even decide not to have a domestic system of merger clearance. This was the case in some countries even in the nineties where the EU Commission had the power to analyze national transactions referred to it by a national competition authority not reaching the thresholds of the Merger Regulation (this was the so called Dutch clause). Even if a system of merger control is maintained at national level, which is the case in each and every Member State today, except for Luxembourg, the substantial and procedural rules may be quite divergent. Despite this, we may conclude that most national regimes copied the most important features of EU competition law, including the substantive test according to which mergers are authorized or prohibited, as well as some procedural issues such as the existence of Stage 1 and 2 procedures reflecting the seriousness of emerging competition problems and the system of remedies to cure these market issues. The reason for this was that businesses logically preferred to have similar merger control rules at both European and national level.

Hungarian merger rules were brought in line with EU law under the association agreement gradually. The dominance test was imported with an option for conditional clearance subject to undertakings provided by the merging parties and later the two stage procedure was also established on Hungarian grounds. When the EU decided to amend its substantive test to bring it more in line with the US approach, the Hungarian legislator also followed the move after a couple of years, just like most other Member States.[68]

The practice of the Competition Council also harmonises with the European approach. Itil preferred to rely on well established EU practice when interpreting the substantive rules of national law. As a result, the outcome of a merger notification should not depend upon whether it is notified in Brussels or Budapest. The remaining differences relate to timing, with national procedures taking sometimes much longer, and perhaps to the depth of investigations into problematic mergers. This is unsurprising considering that the EU Commission employs two dozen PhD economists under the chief economist, whereas the bureau of economists in Budapest has much more modest capabilities to deal with economic evidence on a daily basis.

It is also worth mentioning that the functioning of the ECN requires, or at least gives the opportunity for the GVH to look into hundreds of notifications relating to procedures conducted in Brussels. This is a good source to collect market information or even to influence the outcome of European procedures affecting national interests. For example, when a concentration mainly affects the Hungarian market, as happened when *MOL* sold its natural gas business to *E.ON*, the Commission officials conduct their competition analysis in close co-operation with the GVH.

A unique area: unfair commercial practices

[68] The Hungarian merger test is not identical to the European one. Pál Szilágyi highlights the difference in his article 'The ECJ has spoken: Where do we stand with standard of proof in merger control? (Re: Sony Case), European Competition Law Review, 2009/12.. However, practice proves that differences are rather theoretical.

Unfair commercial practices are not regarded as part of EU competition law. However, in some Member States, like in Hungary, the term 'competition law' always referred to rules on unfair trade and commercial practices as well - rules protecting not only competition as such but also traders and consumers directly. The reason why we need to devote some thought to this topic is twofold. First, the activity of the GVH in general is heavily influenced by cases belonging to the unfair practice area of competition law, with a steady 50% of cases each year decided on this legal basis. Second, and more importantly, the substantive rules on unfair commercial practices were harmonized at EU level in 2006 when the so called UCP Directive[69] took effect. Basically, it includes straightforward prohibitions on unfair commercial practices, its annex, also called 'the black list' covering 31 types of marketing conduct that are considered illegal. Member States enjoy some freedom only as regards the institutional and procedural arrangements of the system established by the Directive.

Given that the substantive rules are more or less the same all over the EU, it would make sense to look at how national authorities enforce and interpret these rules. It is assumed that we are not yet at a point when national authorities would adopt the same decision when considering for example a European-wide TV advertisement. The possibility of allowing an advertisement in the Netherlands, not challenged in most Member States but prohibited and fined in Hungary - all this based on the same UCP directive – is at odds with the requirement of legal certainty. Even the specific black-listed practices may attract different interpretation in different states, not to mention the general clauses prohibiting misleading advertising, if they might influence the transactional decisions of the average consumer. By examining the GVH's practice and the jurisprudence in judicial review against GVH decisions, it is safe to assume that maintaining a coherent approach in the enforcement of the law could represent a challenge within a single jurisdiction. European-wide coherence cannot be achieved without a more formalized co-operation between agencies applying national laws that implement the UCP directive. Even though there are regulations on the relations between these agencies, their cooperation is far less developed than that of antitrust authorities in the framework of the ECN. There are two obvious differences compared with the antitrust enforcement regime. The EU Commission cannot play a leading role in this realm since it has no power to enforce unfair commercial practice prohibitions; it may only promote cooperation among the national agencies entrusted with the application of the Directive. Second, enforcement at national level presents a colourful picture: competition agencies, consumer protection bureaus or civil courts may all be authorized to apply the rules. This inevitably leads to considerable differences as regards the rigour and intensity of the enforcement of the Directive. The legal environment is more challenging for companies in Member States like Italy, the UK or Hungary, where the competition authorities were given jurisdiction to enforce the law.Despite these difficulties, a prospective European forum for UCP-agencies could be called to life to develop guidelines based upon the common experiences which would contribute to coherent system of enforcing the Directive in Europe to serve not only consumer interests but also those of businesses.

THE COURTS AND EU COMPETITION LAW

[69] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22.

Administrative courts

The GVH's collaborative pre-accession attitude had the favourable side-effect that the administrative judges that regularly sat in judicial review proceedings against the decisions of the Competition Council became accustomed to the frequent reference to the jurisprudence of EU Courts and to Commission decisions and soft-laws.[70] Therefore, in line with our conclusions relating to the performance of the GVH, it can be argued that EU accession had no dramatic effect on how Hungarian or later EU competition law was applied by administrative courts. As a matter of fact, judicial review proceedings were closed only on very rare occasions (in less than 10% of the cases challenged) with the court disagreeing on conceptual grounds with the assessment of the GHV. In most instances, the lawfulness of GVH decisions turned on procedural issues or on lacking relevant proof for the infringement.

The single most important consequence of EU accession in judicial review against competition decisions was the availability of the preliminary ruling procedure to the EU Court on matters of interpretation of EU competition law. However, neither administrative nor civil courts were particularly active in this field. In most, cases the courts were able to refer to earlier judgments from the EU Courts dealing with the same legal issue making the reference to the EU Court under Article 267 TFEU unnecessary. The first Hungarian cartel preliminary reference[71] related to a decision by the GVH adopted in December 2006 in which the GVH imposed a record fine of 28 million euros on motor-insurance companies and dealers pushing up car-repair costs in exchange for car-buyers being sold insurance products from the insurance companies involved. The domestic courts, first instance and in appeal, agreed with the conclusions of the GVH. An interesting feature of the case is that the GVH decided not to apply EU law due to the lack of an effect on inter-state trade as required by Article 101 TFEU. The substantial issue raised was whether the interpretation by the GVH of the difference between competition restrictions by aim or by effects was correct. The judgment of the EU Court is expected in the first half of 2013. Arguably, the question posed by the Hungarian court will have limited impact on the domestic case as the Competition Council also based its decision on an analysis of the anti-competitive effects of the collusion, and not only on the aims. Advocate General Crúz Villalón argues in its opinion published in October 2012 that the Court should declare the lack of its jurisdiction. If the national procedure involves the court review of decision that applies national competition rules due to the lack of inter-state effects, the interpretation of EU competition rules is irrelevant. The AG acknowledges the need for harmonised domestic competition laws but emphasises that this aim should not be pursued with the extensive reliance on the preliminary rulings procedure.[72] Alternatively, the AG suggests that the complex agreement should be analysed on the basis of its effects as far as the insurance market is concerned, while the 'by aim' clause should be applied for the motor vehicle distribution aspects. The judgment of the Court is expected in the first half of 2013.

The involvement of the Hungarian judiciary in the interpretation of EU competition law raised further questions in the Hungarian MIF cartel case, discussed previously. At first instance, court decided to suspend the procedure awaiting the outcome of the judicial review

[70] On the reception of EU law by the Hungarian judiciary see M. Varju`s Chapter in this volume.
[71] C-32/11 Allianz Hungária Biztosító and others
[72] See points 44 and 47 of the opinion (accessible at the Courts's site at http://curia.europa.eu/juris/document/document.jsf?text=&docid=128941&pageIndex=0&doclang=HU&mode=lst&dir=&occ=first&part=1&cid=201775)

process in Luxembourg in a similar case. [73] The EU Commission also challenged the foundations of how *MasterCard* sets its interchange fees on transactions affecting inter-state trade. The scope of the Hungarian investigation was different and also the facts of the Hungarian case were quite specific. Nevertheless, the Municipal Court let itself be persuaded by the plaintiff not to decide the case until the General Court delivers its judgment. On one hand, this may be regarded as a prudent handling of their case as it is far from obvious how the judgment of the EU Court may influence the outcome of the Hungarian case. On the other, the price for this choice is quite high: the GVH and companies have to wait 4-5 years until the first instance administrative court will take up the case again.

The private enforcement of EU competition rules

The system was changed first regarding EU competition law as from 1 May 2004; namely, Article 6 of Regulation 1/2003/EC now empowers national courts to apply EU competition law, provided that 'national courts shall have the power to apply Articles 81 and 82 of the Treaty.' Section 91/H(1) of the HCA (Act LVII 1996) confirms that Regulation 1/2003/EC has precedence over the provisions of the HCA. As a result, . it was unreasonable to maintain a bifurcated system for EU and Hungarian competition law, in 2005 a new Section 88/A was introduced into the HCA, which virtually empowered Hungarian courts to adjudicate stand-alone claims, providing that 'the power of the Hungarian Competition Authority to proceed (...) and used to safeguard (...) the public interest, shall not prevent civil law claims, arising out of the infringement of the provisions (...) [on unfair manipulation of business decisions, cartels and abuse of dominant position], from being enforced directly in court.'

In an article written well before accession,[74] I noted that the private enforcement of competition law before courts will be a new legal phenomenon in Hungary. According to the established practice at that time, in those rare cases where competition law related pleas were raised before a civil court, the judge would suspend the procedure to wait for the decision of the GVH clarifying the implications under competition law. The direct effect of EU competition rules changed this situation dramatically, at least in theory. Not only did the EU Commission lose its exemption monopoly at EU level, but the GVH also ceased to function as the only institution with jurisdiction to enforce competition norms at national level. National procedural rules also need to be amended after accession to ensure that Hungarian courts have jurisdiction to enforce both EU and national competition laws.

The practical effects of the change were, however, rather muted. The well thought-through procedural provisions of the HCA are rarely used. A separate chapter of the Act is dedicated to provisions to sustain a consistent application of the law. Section 88/B(6) of the HCA provides that where the GVH notifies the court hearing a case relating to competition rules that it has decided to start an investigation, the court shall stay its proceeding. Furthermore, national courts are bound by the final GVH decision irrespective of whether it establishes the existence or the lack of an infringement. Orders from the GVH terminating the procedure due to the lack of sufficient evidence have no binding effects. This consistency enhancing provision, which has raised the eyebrows of classic private lawyers, applies regardless whether domestic or EU law is enforced by the GVH.

[73] The General Court adopted its judgment on 24 May 2012. It was appealed by *MasterCard* under case number C-382/12 P *MasterCard and Others* v *Commission*.
[74] Competition Law in Hungary: With Law Harmonisation Towards EU Membership; European Competition Law Review, 1998/6. p. 358-369

In a recent judgment of the Kúria, the supreme court tried to limit the reach of this 'must follow' approach. [75] According to the judges, the decision of the authority is binding only in those cases where the court had to stay its proceedings and await the final decision of the GVH. Consequently, the decision of the GVH, even if it was upheld by the administrative judges, will not be binding on civil court judges hearing a follow on damage claim against cartel members. It is belileved that the GVH is working on a proposal to amend the Tpvt. to clarify the general obligation of courts not to divert from the final and enforceable decisions of the competition office.

In these procedures, the GVH may also act as *amicus curiae*. The same opportunity is given to the European Commission. So far, the Commission has notr intervened in a Hungarian civil law dispute. The GVH was slightly more active; there are a handful of cases each year where the GVH is called upon to help interpret EU or Hungarian competition rules. The practice in this field is not transparent enough, and in our view the relevant GVH position papers should be published on its official website to foster an understanding of the thinking of the GVH. The current reporting practice is inadequate. The latest GVH report to Parliament mentions six instances of intervention, four related to abuse of dominance, one anti-competitive agreement and one issue of deception of consumers. No further information was disclosed regarding the cases mentioned.

Despite the legislation establishing a presumption of a 10% damage to encourage plaintiffs bring action, litigation activity in follow-on actions is practically non-existing. No official information is available about the number of court procedures brought after the Competition Council established the infringement of competition rules. In our knowledge, currently there are four pending actions for damages, all of which involve bid-rigging in public tenders and concern the construction industry.[76] It is assumed that in other cases where follow-on litigation would be available the parties will reach an out of court settlement. As a rule, cartel members tend to remain important business partners for the affected customers. There are neither strong associations that could bring actions on behalf of consumers, nor US-like special procedural rules encouraging litigation.

CONCLUSIONS

The application of EU competition law in Hungary started a long way before EU accession. The principles of EU case law and Hungarian substantial law mirroring the EU rules were relied upon in cases from the early 1990s. An important development in the pre-accession period was the implementation in Hungary the competition rules of the Europe Agreement, inspired by the model of the European Economic Area, resulting in a set of twin applicable competition rules, one for domestic and one for EU-related competition cases. A further characteristic of the reception process was that the direct application of EU rules was delayed until after the date of accession, since they were relevant only for those agreements or abuses which took place after May 2004. The legislative and administrative achievements of the reception process were the result of a lengthy process, pre- and postdating the accession itself.

[75] X. v Y. (Gfv.IX.30.152/2011/10.)

[76] Nagy, Csongor István, The Judicial Application of Competition Law in Hungary (February 1, 2009). PROCEEDINGS OF THE FIDE XXIV CONGRESS MADRID 2010, Vol. 2, Gil C. R. Iglesias & Luis O. Blanco, eds., pp. 255-274, 2010. Available at SSRN: http://ssrn.com/abstract=1737808

Domestic legislation, including that relating to sanctions and procedures has been brought gradually in line with EU standards. In particular, the exemption system in domestic law was terminated, the possibility of commitment decisions and a leniency system mirroring the EU model was introduced. However, there still remain some 'Hungaricums' reflecting the sovereign decisions and policy priorities of the Hungarian legislator. These are, for instance, the 10% damage assumption of cartels to stimulate private enforcement or the rule on the fee payable to informants providing evidence on cartels. Moreover, the original domestic rules on minor competition law infringements, providing a laxer evaluation for vertical restrictions remained intact. A more cautious approach can be seen as regards settlements; unlike many other Member States, Hungary has refused to integrate this legal instrument so far. In addition, the new fining antitrust guidelines seem to have more in common with the previous national guidelines than with the EU Commission's model.

Soft-law instruments are one of the most frequently used tools employed by the European Commission to shape European competition policy. The GVH may also issue interpretative guidelines based on its practices, although it has been quite modest in this activity. The fining guidelines followed a different concept than the Commission's similar soft-law instrument at that time. However, the Hungarian leniency guidelines have always relied on their European counterparts. One of the reasons for the restricted number of national guidelines is that the Competition Council and the courts accepted the various soft-law instruments of the Commission as a reliable source when the interpretation of European and even Hungarian rules was at stake. In other words, there was no need to duplicate. As regards the binding nature of fining guidelines, while earlier court judgments simply disregarded these as not being part of the law, recent decisions by the Supreme Court seem to follow a path chosen by EU Courts as well by expecting the GVH to act according to its own guidelines unless exceptional circumstances arise.

The Hungarian contribution to the development of European competition law lies practically in the hands of the competition agency. Domestic courts in judicial review respect the interpretation and application of EU rules by the Competition Council as a norm.. There is no example of Hungarian civil courts applying EU law alone. Civil courts in Hungary have not in a single instance decided to suspend the procedure and addressed questions to the EU Court. The sole reference in competition law to to Luxembourg arose from a procedure for judicial review before administrative courts.

After studying the cases decided under EU rules we can conclude that there are no real, new, European cases. These issues could also have been decided with the same result under national domestic rules. In cases where the difference between the two legal regimes could have made some difference, as with vertical resale price maintenance, the GVH was reluctant to apply EU rules. This means that most cases would have ended up with the same outcome even if Hungary was not a member of the EU. That is not to say that EU membership has made no difference at all. The interpretation of identical Hungarian rules in most cases followed the European way. The culture has changed, both inside the competition office and also outside in the market places. The GVH participated in dozens of informal and formal consultations with the EU Commission and sometimes with other fellow national agencies to arrive at an optimal outcome.