YEARBOOK of ANTITRUST and REGULATORY STUDIES
www.yars.wz.uw.edu.pl

Peer-reviewed scientific periodical, focusing on legal and economic issues of antitrust and regulation.

CARS Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.cars.wz.uw.edu.pl

Recent Competition Policy Developments in Hungary – Unfair Commercial Practices, Cartels and Abuse of Dominance*

by

Pál Szilágyi**, Tihamér Tóth***

CONTENTS

I. Introduction

This article introduces the most important Hungarian competition cases decided between the beginning of 2012 and May 2013. The paper presents

* The article was published under the project TÁMOP-4.2.1.B-11/2/KMR-2011-0002 – Development of Scientific Research at PPCU.

** Dr. Pál Szilágyi, Director of Competition Law Research Centre (Pázmány Péter Catholic University, Faculty of Law and Political Sciences); pal.szilagyi@versenyjog.com.

*** Dr. Tihamér Tóth, President of the Scientific Board of the Competition Law Research Centre, professor at Pázmány Péter Catholic University, Faculty of Law and Political Sciences and of-counsel at Réczicza White and Case LLP..

legal novelties and issues which might prove interesting for an international readership in light of recent developments and focus of competition policy. Shown are both developments concerning unfair commercial practices and the UCP Directive[1] as well as anticompetitive agreements and abuse of dominance.

Hungary has an enforcement system where the national competition authority, the Gazdasági Versenyhivatal (hereafter, GVH) is responsible for the enforcement of competition rules. Within the GVH the Competition Council is responsible for taking substantive decisions on infringements. The GVH is headed by a president and there are two vice-presidents supervising the operation of case handlers, while the other acts as the chairman of the Competition Council. The Competition Council consists of lawyers and economists who enjoy a quasi-judicial status. Decisions are made in proceeding councils composed of three or five members selected by the chairman of the Competition Council.

II. Unfair commercial practices

1. Introduction

The investigation of unfair commercial practices (hereafter, UCP) dominates the GVH's enforcement agenda. This is certainly true with respect to both the number of its cases and its press appearances. Looking at the size of antitrust fines, cartel cases are usually considered to be more important. However, the year 2012 was an exception to this rule due to low numbers of cartel decisions. A quick look at the GVH's official website illustrates that UCP dominate its policy and its competition culture agenda as well. It is notable that the Hungarian competition authority issued in 2012 new guidelines on commitments but they only cover UCP, excluding antitrust issues from its scope. It seems therefore that the GVH is campaigning much more against certain UCP than towards a further strengthening of the antitrust culture.

Cases decided in the reference period with respect to UCP related to markets that are at the top of the enforcement agenda for several years already: retail chains, time share, mobile phones, banking and other financial services. The unique areas that the GVH has recently tackled include:

[1] Directive 2005/29/EC of the European Parliament and of the Council of 11/05/2005 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 [2005] L 149/22.

'Hungaricums', referring to products with a special Hungarian character, kids ads and comparative advertising. The average size of fines fluctuated in the range of a few million forints – with the exception of two penalties that reached 100 million HUF. These numbers do not seem excessively high given the large size of the undertakings involved. It is notable that the GVH did not hesitate to impose fines reaching the statutory maximum in cases relating to credit-like financial services where some providers continuously disregarded the clear and well-articulated expectations of the competition authority.

2. Hungarians choose Hungarian food products

Slogans like 'Hungarian product', 'Hungarian quality' or the use of the Hungarian tricolours are frequently used by supermarkets to promote the sale of food stuffs. Based on experiences gained in the course of its investigations, the GVH issued a press release explaining its approach to these phenomena. The authority established that even price sensitive Hungarian consumers tend to choose products of domestic origin provided the price difference is not major. Purchasing national products helps save jobs and guarantee that profits remain in the country. It is not surprising that this issue topped the political agenda also with the Parliament adopting a new law regulating the use of expressions referring to Hungarian origin[2].

The Hungarian competition authority follows a standard text in the reasoning of its decisions. It recalls the provision of the UCP Act[3] that a misleading communication relating to the origin of a product may amount to an unfair market practice. The GVH believes that references to a domestic nature of a product are perceived by the average consumer as meaning that it was made of Hungarian components, by a Hungarian company, employing Hungarian workers and within the territory of Hungary. It seems that the GVH considers that these conditions would apply cumulatively.

In August 2012, Auchan was found to have infringed the prohibition of the Hungarian UCP Act. The hypermarket chain had to pay 10 million HUF in fines because it used Hungarian folk motives and the red-white-green tricolour during a one-week advertising campaign held in August 2010. According to the GVH, it was misleading to claim that products covered by this campaign were 'Auchan Hungaricums'.

Auchan argued that the average consumer would interpret 'hungaricum' as a product that has a strong relation to Hungary and its national identity, that is, a typical brand consumed by Hungarians for many years. Brands like

[2] Act XXX of 2012 on Hungarian values and Hungaricums.

[3] Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers.

Sport chocolate, Sió juice or Soproni beer are 'hungaricums' because they are not traded and thus not known abroad. Auchan denied that it should prove the domestic origin of these products explaining, among others, that Omnia coffee should be regarded as a 'hungaricum' even though it is a well known fact that coffee does not grown in Hungary.

The GVH explained in response that it is not required to carry out a statistical survey to prove how the average consumer interprets the message of an advertisement. The Competition Council held that the overall message derived from the term 'hungaricum', tulip motives and red-white-green colours is that the product is truly Hungarian. However, about 60% of the products covered by the investigated campaign were not actually produced in Hungary – promoting them as 'hungaricums' was therefore considered misleading to consumers. The competition authority imposed a fine on Auchan, in line with its guidelines.[4] The fine was based on the costs relating to the illegal communication campaign. The uncertainties surrounding the exact definition of 'hungaricum' and the short duration of the infringement were taken into account as attenuating circumstances. Incidentally, the decision states that the GVH intends to impose fines in order to deter future infringements. It is doubtful, however, whether HUF 10 million would have such an effect considering that the decision notes, as an aggravating circumstance, the fact that the company was already fined two times for similar misconduct (30 million each time).

In a most recent decision, the Competition Council of the GVH imposed a fine of HUF 5 million on Penny Market for claiming that several of its products were Hungarian. Penny Market claimed in its defence that it took into account the 'administrative origin' of the products. The GVH was not convinced by this technical explanation. Once again, the fine seems rather small given that the investigated campaign run in this case for almost one and a half years and that the company has committed several other similar infringements in the past.

3. Bait advertising

The GVH is well known for challenging promotions where the advertised products are not available in sufficient quantity. Point 5 of the UCP Direcitve's black list prohibits 'an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure

[4] 1/2007 Communication of the president of the GVH and the chairman of the Competition Council on the calculation of fines in unfair commecial practices cases. Available in Hungarian at http://www.gvh.hu/domain2/files/modules/module25/pdf/jogihatter_magyarpiac_kozlemenyek_2007_1_fogybirsag_m.pdf.

another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered'. This unfair commercial practice is known as bait advertising. The length and structure of the above sentence shows that this is not a prohibition easy to understand or implement. The GVH has established in the past that supermarket chains are responsible for their failure to provide the advertised products during a two-day promotion campaign and where a 'luring' effect can be assumed. Although point 5 of the black list seems to make it easier for traders to explain why their action should not be regarded as unfair, the GVH imposed fines in several such cases last year.

ALDI was fined for its failure to provide a single product – a Tevion external hard drive – promoted for one week between the end of December 2011 and the beginning of January 2012. A fine of HUF 25 million was imposed with reference to aggravating circumstances such as recidivism and the fact that the campaign reached many potential consumers. The authority took also into account that ALDI offered a 1 000 Ft voucher to complaining customers as a kind of compensation. Nevertheless, the decision makes no reference to the GVH fining guidelines. The cost of the campaign might have served as a basis for the calculation of the fine; GVH took into account the size of the Tevion drive advertisement compared to the total size of the promotional leaflet.

ALDI argued unsuccessfully that it relied upon the quantity sold during the previous promotion held in October. If demand proved higher, it hoped that its suppliers would be able to procure more of the product. It was due to natural disasters that Thailand's hard drive production fell in autumn of 2011, a fact that dramatically changed global markets. ALDI claimed also that it was unable to acquire more hard disks from its Austrian outlets.

The Competition Council emphasized that point 5 of the black list cannot be seen as creating a duty for retailers to provide the product for the entire period of the promotion and to each and every consumer. The key point here is that traders should organize their campaigns diligently. It was established that ALDI must have known that supplies will be scarce due to the drop in production, that the Tevion hard drives sold well in November even at normal prices and that a 28% reduction would surely stimulate further demand. Unfortunately, the number of products stored during the October and December campaigns cannot be compared since they are business secrets. It is telling, however, that the Competition Council made note of the fact that several ALDI stores failed to have even one Tevion hard drive for sale in December.

One of the first decisions of 2012 was to levy fines of HUF 30 million on the Hungarian franchise company CBA. The network consists of independent

small and medium size shops covering the entire national territory. These stores operate a joint procurement system and run joint promotion campaigns. For one week in May 2010, some of the CBA shops (located in one of the regions of Western Hungary) did not sell all of the goods covered by its nationwide promotion leaflet or sold them at higher prices. The investigation covered the time period starting from January 2009. It was concluded that CBA failed to establish a system where stock and prices were guaranteed in its franchisees all over the country.

The decision heralds a rather wide interpretation of the UCP Directive and its domestic equivalent as regards bait advertising and stocking issues. The Competition Council held that liability can be established even if the conditions of point 5 of the black list were not met. According to its approach, the black list includes certain practices prohibited *per se*, but similar actions may infringe the prohibition of unfair commercial practices if either the general ban on misleading or the even broader general unfairness provision is infringed. It is true that this interpretation is in line with the structure of the UCP Directive and its implementing act. However, it also diminishes the importance of the black list's definition of bait advertising. Even if a trader can show that the conditions[5] of point 5 of the list are not met, it may still be held liable on other (less clear) grounds if the GVH does not like the given promotion policy. GVH's policy in post-UCP era cases has so far been to only sanction companies on account of products unavailable during promotions if the strict conditions of point 5 of the black list were met. The detailed provisions of the black list were construed as a kind of *lex specialis* explaining when a stocking problem can lead to retailer liability. The departure from this business-friendly approach made it possible for GVH to condemn CBA's general marketing policy for not providing sufficient safeguards to ensure that products promoted nationwide were actually sold under the same conditions all over the country. The GVH admits that it may be more difficult, but still not impossible, to guarantee the same conditions in a franchise network comprising independent shops.

Interestingly, the decision's reasoning is very short when it comes to the actual insufficiency of products and the explanation why this might have caused a material distortion of transactional decision of average consumers. Only five products were not actually on sale everywhere during the promotion

[5] According to point 5 of the UCP Directive 'black list' the 'making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising) is prohibited'.

in the two years investigated by the authority. Moreover, the decision makes no effort to look into the reasons behind product shortage as required by point 5 of the black list.

The Competition Council did not set clear rules when a retailer's promotion system or policy was to infringe general UCP prohibitions. The decision repeats previous statements that undertakings should take into account quantities sold during previous promotions, under similar circumstances as regards the season and the size of the discount. The test becomes far vaguer when it also refers to practices of competitors and the 'mood of consumers' willing, or not willing to buy that product. It would be a fair question for retailers to asked how should factors like these be integrated into their promotion systems to make them fire proof under the UCP Act.

The Competition Council gave a brief explanation only using broad terms about how the fine was calculated. Similarly to the ALDI case, it did not refer to its own fining guidelines. The penalty was based on the expenditure relating to the unlawful communication (presumably the cost of CBA's promotional leaflets). The Council found no attenuating circumstances. The length of the infringement (two years), the significant size of the franchise and the number of consumers affected were all listed as aggravating circumstances.

Tesco, Hungary's largest retailer, was fined in February 2013. Its Hungarian subsidiary had to pay HUF 20 million because it failed to stock sufficient quantities of 23 garden machines that were offered for sale at prices 50% and 70% lower than normal during two week sales in autumn 2011. A quarter of Tesco shops did not have a single of these items in stock during the campaign. Taking into account the size of ALDI and Tesco, the number of products promoted without sufficient stocks, the length of the campaign and the number of previous breaches of the ban on misleading advertising, Tesco's fine seems rather small in comparison to that of ALDI.

Interestingly, GVH did not condemn Tesco for infringing point 5 of the black list when some of the advertised garden machines were not available in certain shops. Instead, the decision relies on the general ban on misleading provided by the UCP Act. Moreover, it is not entirely clear why the ads were found illegal at all, given that the Competition Council admits that in contrast to normal promotions, the company is not required to have opening stocks in each and every of its shops when it launches a seasonal final sale. Tesco's promotion materials simply advertised huge discounts of up to 70% for certain products. Its ads did not specify which exact products were covered. Instead, it invited consumers to visit its stores and look for what was available. However, the GVH found an infringement already in the 50% & 70% discount claims, since the company failed to prove that such savings could actually be achieved in comparison to previous prices. It must be concluded that the decision and

its reasoning is quite confusing as to the requisite legal standard to be observed in final sales cases.

4. Kids ads

Point No. 28 of the black list prohibits, as an aggressive practice, advertisements that directly exhort children to buy the advertised products or persuade their parents or other adults to buy these products for them. The GVH conducted two such procedures in 2012 – one against a toy manufacturer and one against the publisher of a children magazine – modest fines were imposed in both cases. The company M-Ágnes selling 'Nappy' dogs and 'Filly' royal family members had to pay HUF 1 million. The GVH argued here that the main message of the ads to 'Collect them all!' pushed children to buy multiple toys in order to get the entire collection. Since the advertised products were packed in non-transparently bags, children had to buy doubles in order to get every toy in the set. The Egmont-Hungary publishing company was also fined HUF 1 million this time for urging children to collect Egmont stickers all year long to participate in a competition.

It will be interesting to see whether this enforcement campaign continues. There are many advertisements on TV, especially on children channels, which are all meant to push children or their parents to buy certain toys or food product for them.

5. Who has the best mobile network?

Mobile service providers are penalised by the GVH almost every year. The highest fines of the year were imposed in two twin-procedures against Vodafone and Magyar Telekom (part of the Deutsche Telekom group). It was Vodafone that started the war by advertising itself between December 2010 and June 2011as having the 'fastest' and 'best mobile data network' in Hungary. Magyar Telekom launched its campaign in response in February 2011 lasting till the end of March 2011.

The GVH found that Vodafone's message was unfounded. The company had solid data sustaining its claims only for the largest Hungarian cities including Budapest, but not for the entire territory of the country. The Competition Council added that in a market subject to rapid and constant technological improvements, it is almost impossible to verify the truthfulness of such claims with respect to the entire length of a marketing campaign. In response to Vodafone's campaign, Magyar Telekom began to claim that it

had the fastest broadband mobile data network In Hungary. The GVH found these advertisements to be misleading also, since they were relying on up and download speeds only disregarding web-browsing.

The legal basis of the two decisions was not only the Hungarian UCP Directive Act but also the Act on Advertisements implementing EU Directive on comparative advertising[6]. The relationship between these two types of unlawful advertising activities (and their respective Directives) is that in order to qualify as a lawful comparative advertisement, the ad should not be misleading under the UCP Directive. The Competition Council explained that in markets with just a few well known players, a 'number one' claim can be regarded as a comparative ad despite the fact that specific competitors are not expressly mentioned.

As a result, Vodafone had to pay HUF 50 million and Magyar Telekom 100 million in fines – the difference related to the varying marketing budget of these two companies, according to the GVH. The competition authority should have given more weight to the facts that Magyar Telekom actions were merely a response to Vodafone's earlier unlawful behaviour as well as to the fact that Vodafone falsely advertised itself for a duration four times longer than the market leader, Magyar Telekom.

Vodafone, the third largest operator, was again fined HUF 30 million a few month later (March 2013) for claiming in its Rally campaign of February and March 2012 that its network was accessible 'countrywide' and 'everywhere' compared with, and in contrast to the other two mobile service networks. As regards the fine, the Competition Council recalled the seriousness of the effects of the campaign due to its length and the repeated nature of the violation. Despite the Competition Council's intentions, given the previous infringements of the company and bearing in mind the usually high costs of a TV ad campaign, a 30 HUF million fine cannot be considered serious.

6. Lottery-like consumer credit services

Companies organizing so called 'consumer groups' quite often provide their services as if they were offering financial credit products. Cases like these have been reoccurring in the GVH's recent enforcement practice. The competition authority does not hesitate to impose fines reaching the maximum statutory level if the ads confuse an average vulnerable consumer as to the true nature of the service. Members of these consumer groups pay instalments for long periods of time that form the basis of a loan which they will acquire in the

[6] Directive 2006/114/EC of the European Parliament és of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ [2006] L 376.

future. Unlike with banks, however, consumers will not automatically get such a loan after the contract is concluded. Instead, these services include a gambling element: only lucky participants will get access to financial resources in a fast and convenient manner. The rest of the consumer group will have to wait for an uncertain period of time to benefit from their membership. The provision of services like these is not illegal *per se*. However, the related communication should not confuse these services with credit products offered by banks.

Relying on its established practice, the GVH decided to publish a press release[7] explaining its approach to this issue and warning consumers of the risks involved. Individuals targeted by companies organizing consumer groups are considered by the GVH to be vulnerable as they would usually not get a loan from commercial banks.

Among the examples of such cases is Vj-57/2011 where Orion Lux Kft. was fined HUF 3.4 million and Euromobilien Kft.-t close to 1 million HUF. Their ads were found to be misleading because they did not state that there was an entry fee consumers had to pay to join the club of consumers. These fines do not seem large at first sight. In relative terms, however, compared to the size of the infringers, they are burdensome. Euromobilien Kft. had to pay the maximum possible amount of 10% of its previous financial year's turnover because it was regarded as a recidivist.

In February 2012, six related companies had to pay fines of HUF 60 million for repeatedly giving incomplete information about the true nature of the consumer group which they operated. The Competition Council relied here on the juridical reasoning of Hungarian courts which have in the mean time reviewed its earlier decisions. Accordingly, companies operating in this market should provide clear information on the gambling element of the service such as the fact that it may even take 25 years for participants to get the desired loan.

7. Commitments accepted in UCP cases

The GVH issued in 2013 a set of guidelines on the approach it takes towards commitments in UCP cases. This legal instrument (commitments) was first introduced by the legislator in order to be used in antitrust cases so that the agency could solve complex problems that did not cause significant damage to the functioning of competitive markets. However, the new guidelines cover UCP cases only. The GVH reasoned the UCP focus by recalling that most of its procedures relate to misleading advertising, rather than antitrust. Hence,

[7] Press release of 26 March 2010 on the risks of consumer groups, available in Hungarian at http://www.gvh.hu/gvh/alpha?m5_doc=6428&pg=58.

it felt in a better position to publish guidelines solely in relation to these types of investigations.

The Hungarian Post Office has benefited recently from this type of closure in case Vj-67/2011. The GVH decided that the postal operator offered sufficient commitments to remedy the competition concerns initially identified by the authority. The investigation started because consumers were not properly informed at the postal counters about costs of paying with a debit/credit card, instead of using cash. The GVH was unhappy that post office clerks were required to mention that using cards amounts to a cash withdrawal rather than a normal card payment, which is usually free in Hungary (at least to the customer). The GVH urged the company to provide consumers with more precise information. Magyar Posta ultimately undertook to use verbal as well as written communication that paying by card in a post office is regarded as a cash withdrawal subject to charges set by the issuer of the card.

The September 2012 decision shows how difficult it may be to accept commitments in UCP cases. Promising to discontinue the allegedly illegal action is not sufficient. The GVH is eager to get something more in exchange for not declaring the scrutinised practice to be illegal. It is hard to see, however, what this 'added value' for consumers was in this case – providing them with full information would be a natural consequence of an infringement decision. Perhaps the provision of written materials, beyond verbal warnings, was considered sufficiently 'added value' to make the Competition Council decide not to sanction the company.

8. Sanctions

The usual and sometimes automatic sanction used in UCP cases is to impose fines on the undertaking involved in the infringement. It is rare for companies to survive an investigation without monetary sanctions. Termination decisions are also quite common in this category of cases. Chances of successfully arguing a case before the Competition Council are rather small unless the company is able to offer appropriate commitments. The Competition Act's rules on fining are the same regardless whether the GVH is taking a decision in a cartel, abuse or misleading advertising case. The upper limit is 10% of the turnover realized in the previous business year.

Fining guidelines in misleading advertising cases were published a couple of years ago. They were signed by the President of the GVH as well as the chairman of its Competition Council. The starting point of their calculation follows the same logic as antitrust fining guidelines – a basic amount is set which is later adjusted by other relevant factors. In UCP cases, it is the costs

of publishing the misleading or otherwise unfair communication that tends to act as the starting point for the calculation of the fine. The wider and more intensive the campaign, the higher the fine will be. Unfortunately, decisions are not very detailed on this issue seeing as the actual size of the marketing budget employed in a given case amounts to a business secret. Most of the cases decided by the Competition Council in 2012 refer to these guidelines as a basis for calculating the fine. It is hard to track, however, how the GVH actually arrived at the final amounts – the reasoning of UPC decisions lists the various factors taken into account when setting the fine without assigning to them any particular weights or percentages.

It is not easy to rank cases according to the amount of fines imposed. It is tempting to take the nominal amount as the basis. The relative size of the fine, compared with the size of the company, is however far more telling for policy purposes. Fines of several thousand millions of HUF do no hurt giants like Tesco or telecoms companies, the latter ranking first as far as the size of their fines is concerned. Markgold was another company that ranked high here with its HUF 40 million fine for unfair market practices in promoting its time share services. More modest fines imposed on small companies may have greater impact. As mentioned, the respectively highest fines were imposed on small companies actively misleading vulnerable consumers in organizing gambling-related credit services.

III. Anticompetitive agreements

In terms of numbers of GVH decisions, not much has recently taken place in the field of anticompetitive agreements – one case was decided in early 2012 and two cases terminated in 2012-2013.

After a surprising legislative development influencing Hungarian competition law[8], the future of its competition policy is somewhat ambiguous. At the same time, GVH decisions show unwelcome developments also. The Agricultural Act[9] basically precludes the application of domestic competition rules in cases where agricultural products are concerned. It also makes it impossible for the GVH to impose fines in agricultural cases if Article 101 TFEU is appli-

[8] P. Szilágyi, 'Hungarian Competition Law & Policy: The Watermelon Omen' (2012) 2 *Competition Policy International – Antitrust Chronicle*.

[9] 2012. évi CXXVIII. törvény a szakmaközi szervezetekről és az agrárpiaci szabályozás egyes kérdéseiről. [Act Nr. CXXVIII. on certain aspects of the interbranch organizations and agricultural market regulation.] (hereinafter, the Agricultural Act).

cable[10]. As a result, the GVH terminated its 'Watermelon case'[11] procedure in light of the new act. In the reasoning of its decision, the competition authority first stated that trade between EU Member States was in fact affected by the scrutinised agreement and that Article 101 TFEU was applicable to the alleged price fixing by the investigated retailers. However, the decision went on to say that the new Hungarian law precludes the imposition of a fine in this case since the illegal behaviour (price fixing) was terminated already.

The GVH elaborated further on the possibility of the application of Article 101 TFEU. Accordingly, Member States, in this case the GVH, must ensure the effective enforcement of Article 101 TFEU while the European Court of Justice is the only body competent to rule on the conformity of the new Hungarian legislation with EU law. However, the GVH cannot request a preliminary ruling that could condemn the contested Act – that prerogative is limited to the judiciary. The authority can therefore do nothing other than to close its proceedings, seeing as its scarce resources are better focused on cases without legal doubts concerning the applicability of competition rules. The approach applied here by the GVH is somewhat surprising. All Member States, and thus all their NCAs, must apply Article 101 TFEU – the GVH could have disregarded national legislation which it knew breaches EU law. It could have based its decision solely on Article 101 TFEU and the *effect utile* doctrine, seeing as domestic laws were clearly preventing the effective application of EU competition rules.

A similar problem emerged in the investigation of one of the largest alleged cartels of recent years. The authority suspected in Sugar Cartel II[12] the existence of anticompetitive agreements between sugar producers. The GVH stated that although trade between Member States might have been affected, it ultimately did not establish whether that was the case seeing as it terminated the proceedings. Insufficient evidence of the anticompetitive agreement was listed among the reasons for terminating the procedure. The competition authority did not see it reasonable to conduct a further investigation into the cartel also because the new Hungarian Competition Act makes the possibility of competition law enforcement uncertain, basically because of the new provisions of the Agricultural Act. Therefore, GVH resources shouldn't be wasted on this case.

---

[10] In principle fining the undertakings for the violation of Article 101 TFEU is possible, sine the act requires the GVH to first give a formal notice and require the undertakings to end the behaviour and if they do not comply, only than is it possible for the authority to impose a fine.

[11] Vj-62/2012 – *ALDI MagyarországÉlelmiszer Bt. and Others* – GVH (10 April 2013).

[12] Vj-50/2009. – *AGRANA MAGYARORSZÁGÉRTÉKESÍTÉSI Korlátolt Felelősségű Társaság and Others* – GVH (19 December 2012).

This reasoning is not satisfactory from an academic point of view[13]. According to EU law, the applicability of Article 101 TFEU is possible even if national legislation tries to prevent it. Competition law is one of the most important policies of the European legal order. Competition authorities should therefore not bow down to dubious national legislations.

The final case[14] decided in the time covered by this article is a decision concerning railway companies. Accordingly, three rail operators temporarily fixed prices and two engaged in market sharing. As a result, they were fined 1.25 billion HUF. In its decision, the GVH expressly took into consideration the special rules of Council regulation 1017/68/EEC. The investigated undertakings tried to rely on its Article 2 that provides for certain exemptions. The GVH decided however that Article 2 was not applicable in this case for various reasons, including that its provisions must be interpreted narrowly and are only applicable if the agreement relates exclusively to technical development. One of the interesting issues here was whether the three scrutinised companies were, at the time of the anticompetitive behaviour, in fact a single undertaking, or whether they were independent from each other. The GVH ultimately concluded that since GYSEV was owned by the Hungarian State and the Austrian State jointly, its agreements with the two other parties, owned solely by Hungary, were in fact agreements between independent undertakings.

By contrast to the small number of recent antitrust decisions, the Hungarian judiciary has managed to review many past GVH cases in 2012 and the first half of 2013. Among them is a ruling delivered by the Curia, the highest Hungarian court, in a case[15] that dated back to 2004 and concerned one of a number of famous construction cartels.[16] The court considered here a number of claims made by the parties that their rights under the European Convention of Human Rights (hereafter, ECHR) were violated. The parties argued more specifically that their right to fair trial (Article 6 ECHR) was breached because a relevant piece of evidences was not properly filed and its origin was questionable as well as because the case was based on circumstantial evidence only. The Curia stated in this context that the rights of the Convention cannot just be invoked in a general manner – parties have to prove that there is a causal connection between the alleged ECHR infringement and the outcome of the case. The Curia rejected also the claim that Article 6 ECHR was violated because

[13] Meanwhile the European Commission initiated an infringement procedure against Hungary because of the Agricultural Act.

[14] Vj-3/2008 – *Győr-Sopron-Ebenfurti Vasút Zártkörűen Működő Részvénytársaság, MÁV Magyar Államvasutak Zártkörűen Működő Részvénytársaság and Rail Cargo Hungaria Zártkörűen Működő Részvénytársaság* – GVH (27 April 2012).

[15] Kfv.VI.37.232/2011/13.

[16] Vj-25/2004. – *Betonút and Others* – GVH (16 September 2005).

the parties did not have a right to appeal the decision of the court ordering a dawn raids. This is a questionable approach seeing as the European Court of Human Rights has ruled, in a very similar situation, that the lack of timely review of a court decision which allows a dawn raid is an infringement of the Convention[17].

The parties argued also that the Competition Council (in the GVH) is a tribunal within the meaning of Article 6 ECHR and that this interpretation is supported by a ministerial opinion attached to the Hungarian Competition Act. As it is well-known, tribunals within the meaning of Article 6 ECHR have to respect and protect the fundamental rights enshrined in the Convention. The parties argued, the Council's decision-making process is contrary to Article 6, since the authority is both investigating and deciding on the infringements. The Curia rejected this argument, but not because it denied that the Competition Council is a tribunal (it remained silent on this issue) but because the Competition Council closely follows every case, is the body which issues statement of objections as well as adopts final decisions. As such, it is not impartial. The Hungarian Competition Act entrusts this right to the Competition Council; the impartiality argument can therefore not be accepted. Curia's approach is very questionable, since the European Court of Human Rights (ECtHR) has well developed jurisprudence on the notion of tribunals within the meaning of Article 6. It is easy to argue on its basis that the Competition Council does not satisfy the requirements of Article 6 ECHR.

The Metropolitan Appellate Court delivered its judgement[18] in the famous 'baker cartel' case[19]. An interesting part of this ruling concerned the burden of proof and the standard of proof for participating in a cartel meeting. The GVH in its decision came to the conclusion that one of the parties (Kurdi Family Pék) was present at an anticompetitive meeting despite the fact that the undertaking concerned denied it. The court of first instance agreed with the authority, mainly based on a statement by another participant. There was, however, no other evidence of the presence of the undertaking at the actual meeting. The Appellate Court ruled that evidence was insufficient to condemn that undertaking and that the GVH decision could not be upheld with respect to that company. In light of recent developments in human rights case law, it is interesting to note that the Appellate Court expressly stated that a court cannot substitute its own judgement to that of the authority. All a court can do is an administrative legality review of the authority's decision.

---

[17] ECHR judgments of 21 December 2010, *Primagaz v France*, Application No 29613/08, and *Société Canal Plus v France*, Application No 29408/08.

[18] 2.Kf.27.260/2011/13.

[19] Vj-57/2007 – *Association of Bakers and Others* – GVH (4 June 2009).

The Metropolitan Appellate Court delivered another judgement[20] in the 'University IT-cartel' case[21]. Among the key issued considered was whether individual public procurements should be treated as separate relevant markets, or whether the relevant market should be defined more broadly. The Appellate Court was in favour of the former interpretation. The court also expressly recognized that there is no need for any direct evidence of a cartel – a cartel can be proven based on indirect, circumstantial evidence only. The court also stated that if an undertaking receives the minutes of a meeting where information on an anticompetitive agreement or concerted practice was exchanged, than it must expressly distance itself from it. Otherwise it will be liable as if it was also present at the actual meeting.

The Metropolitan Appellate Court delivered a judgement[22] reviewing yet another case concerning associations of undertaking[23] whereby the companies and their association were fixing minimum prices for certain hunting activities. This was a clear-cut cartel case and the court agreed in that regard both with the authority's evaluation of the facts and the ruling of the court of first instance. However, the Appellate Court stated also that a court cannot substitute its own views to that of the authority regarding the level of fines. In that regard, the authority has a margin of discretion and a court cannot review the decision in that regard (it can only carry out an administrative legality review).

A number of other judgments[24] regarding anticompetitive agreements were delivered in the time period covered by this article. None of them involved new points of law which were either noteworthy or not yet covered by this article.

IV. Abuse of a dominant position

Only two abuse cases were dealt with by the GVH in the time period under consideration – the E.ON case[25] and the OFFI case[26].

The GVH initiated the E.ON investigation in 2010 suspecting that a change introduced by the power company to it general contractual clauses (preventing some customers from switching during the year) constituted an abuse of a

[20] 2.Kf.27.195/2012/6.

[21] Vj-162/2004 – *International System House Kft. and Others* – GVH (15 June 2006).

[22] 2.Kf.27.556/2011/7.

[23] Vj-89/2003. – *Budapest Agrárkamara and Others* – GVH (9 December 2004).

[24] 2.Kf.27.519/2011/10.by the Metropolitan Court of Appeal in the newspaper delivery cartel, Kfv.III.37.011/2012/6.by the Curia in the Hungarian GIS cartel and Kfv. II.37.370/2012/14.by the Curia in the hunting societies cartel case.

[25] Vj-124/2010. – *E.ON Energiaszolgáltató Kft*. – GVH (20 September 2012).

[26] Vj-111/2010 - *OrszágosFordítóésFordításhitelesítő Iroda Zrt*. – GVH (21 May 2013).

dominant position. The suspected breach was an atypical competition law violation that fell under the general abuse clause. The GVH stated that such behaviours can escape the prohibition if they can be objectively justified and if there is harm to competition and not only to individual undertakings. E.ON successfully argued that limiting the periods and dates for the termination of contracts is objectively justified by the dynamics of the electricity market and its supply, and that these limitations are necessary to ensure efficient operation and lower prices.

On another occasion, the GVH suspected that OFFI applied excessive prices regarding some of its services (authorisation and official review) concerning translated documents. The scrutinised undertaking was providing these services based on state authorisation. The first question for the GVH to consider was whether there was an economic activity at all. The above services were provided in Hungary exclusively by OFFI and the undertaking argued that it was carrying out a public function. The authority considered for a while whether the undertaking was in fact carrying out a service, a public service or if it was exercising public power. Ultimately however it left this question open arguing that an abuse could not be proven. The authority tried to define the costs associated with the scrutinised services, it used benchmarking and tried to get relevant information from the undertaking itself. However, it was not able to estimate the costs of the service. The approach of the GVH is interesting because it argued that since it had failed to define the costs associated with the scrutinised activity, it therefore could not establish an infringement. A question poses itself here whether the inability of an authority to define the costs of a certain activity should lead to the statement that no legal violation occurred.

The Metropolitan Court decided in another judgement[27] that the GVH was correct in condemning as an abuse the activities of a dominant undertaking which was trying to slow down or hinder market entry by a new entity. The abuse took the form of not providing the new entrant with necessary information regarding contractual term or the provision of such information in a flowed or overly slow manner.

In the Invitel judgement[28], the Metropolitan Court had to deal again with an abuse of a dominant position primarily by hindering market entry. The GVH fined Invitel 150 million HUF for that infringement[29]. The case is interesting from a legal review point of view since the court confirmed once again that it cannot substitute its judgment to that of the authority.

---

[27] 2.Kf.649.926/2013/2.

[28] 2.Kf.649.905/2013/3.

[29] VJ-69/2005 – *Invitel Távközlési Zrt.* – GVH (5 December 2006).

V. Conclusions

It seems quite clear that the fight against unfair commercial practices remains among the key areas of the GVH's activities. By contrast, the enforcement of antitrust rules is almost nonexistent in the last one and a half years. Although several antitrust cases were reviewed by Hungarian courts in this time frame, almost no substantive decisions were delivered by the competition authority. There is no information in the public domain that competition law enforcement has increased since then albeit several sources suggest that the GVH has indeed been initiating cartel investigations recently. The adoption of the Agricultural Act on the exemption of agricultural products from the applicability of competition law has been a big setback for the GVH since two of its key recent cartel investigations had to be terminated as a consequence.