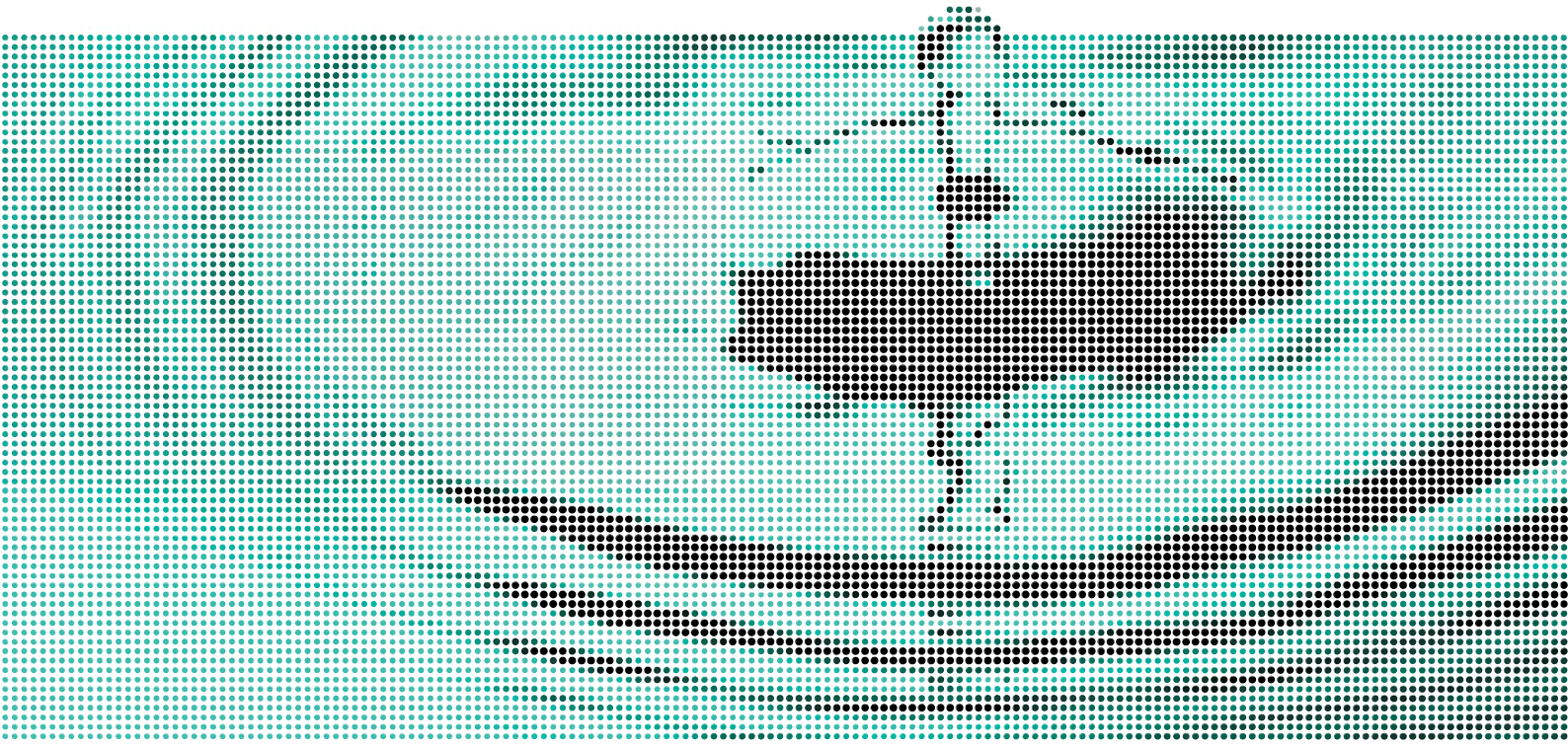
VERSENY-
TÜKÖR

Volume 13
2017

Special Edition
Issue V.



Selected papers published in Versenytükör in the last 5 years

- *The Treaty of Lisbon and human rights – a paradigm shift in competition law?*
- *Measuring the welfare gain from the operation of competition authorities. Extent and duration of the expected price effects*
- *Privatisation in the experience of the Hungarian Competition Authority*
- *The role of consumer protection in the work of the Hungarian Competition Authority*
- *Historical developments of cartel regulation*
- *Children's advertising in light of competition supervision proceedings*
- *The role of national competition authorities in managing the economic crisis*
- *Competition and Democracy*
- *The Development of Competition Supervision in Hungary*
- *Consumers and experiments*

Content

VERSENYTÜKÖR 2017/Special edition (Volume 13, Issue V.)

The Versenytükör is the journal of the Hungarian Competition Authority
The papers and views expressed therein are those of the author and shall not to be deemed as the view of the Hungarian Competition Authority!

Published: occassionally.

Editorial board: András Tóth Editor-in-chief, Zoltán Bara, András Kovács, Pál Szilágyi, Tihamér Tóth.
Assistant: Ágota Heródek.

The journal is free of charge.

The journal can be subscribed or unsubscribed at: versenytukor@gvh.hu.

The individual issues are accessible at: www.gvh.hu Kiadványok/Versenytükör/Lapszámok.
The papers prepared for publishing according to the submission guidelines for author (available at www.gvh.hu Kiadványok/Versenytükör/Szerzőknek) shall be submitted to versenytukor@gvh.hu.

Publisher: Wolters Kluwer Kft., manager in charge: Gábor Tóth, executive chief of Wolters Kluwer Kft.

ISSN: 1787-5196

László Bak*

The Treaty of Lisbon and human rights – a paradigm shift in competition law?

Abstract

Due to the future accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), this paper deals with the interplay of fundamental rights and competition law. It analyses overlaps of these two fields of law by highlighting three widely debated critics of the European competition enforcement system. Firstly, the paper critically assesses the legal nature of fines imposed in competition cases with regard to criminal sanctions under the ECHR. It further examines the role of the monist institutional structure of the European Commission combining investigation and decision making powers in light of the right to a fair trial. Lastly, the paper deals with the issue, how the fundamental right to full and effective judicial review of Commission decisions is met.

1. Introduction

The European Union has been criticised with increasing intensity for its competition proceedings, particularly since the entry into force of the Treaty of Lisbon. Critiques focus on the amount of fines, high by international comparison, the extensive investigative and decisions making powers of the Commission 'as well' as the practice of judicial review by the European courts.[1] Some of the critiques have aroused a strong reaction and suggest a severe deficit in terms of the rule of law in the practice of enforcement of European competition law.[2] But why all the fuss?

The entry into force of the Treaty on European Union[3] ('TEU') on 1 December 2009 brought a new dimension to the EU's system of protecting fundamental rights. On the one hand it requires the Union to accede (Article 6(2) TEU) to the European Convention for the Protection of Human Rights and Fundamental Freedoms[4] ('ECHR'), and on the other hand, partly also through the Charter of Fundamental Rights[5], expressly incorporates some important fundamental rights provisions of the ECHR into EU law. According to the press release of the European Commission[6], the purpose of the negotiations started in July 2010 about accession to the ECHR is to revise the system of the protection of 'fundamental rights' 'as well' as to assure consistency between the case-law of the European Court of Justice and the European Court of Human Rights ('ECtHR') of Stras-

* Chief of Staff, Hungarian Competition Authority

1 Karl Hofstetter, EU Cartel fining laws and policies in urgent need of reform, GCP: The Antitrust Chronicle, p. 2 (10 October 2011, available at http://www.rwi.uzh.ch/lehreforschung/tp/tit-hofstetter/person/Rebuttal-Lowe-GCP-25Nov2009.pdf)

2 Jürgen Schwarze, Rechtsstaatliche Defizite des europäischen Kartellbußgeldverfahrens, WuW 01/2009, p. 6)

3 Consolidated version of the Treaty on European Union, OJ [2010] C 83/13, 30.03.2010

4 Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 and its eight additional protocols

5 Charter of Fundamental Rights of the European Union, OJ [2010] C 83/389, 30.03.2010

6 http://ec.europa.eu/magyarorszag/press_room/press_releases/20100317_az_eu_alapjogvedelmi_rendszer_megerositese_hu.htm (9.10.2011)

bourg, as upon accession, all EU acts relating to fundamental rights will be covered by the ECHR.

The Treaty of Lisbon introduced novel elements into the EU legal system in terms of both form and content because it expressly states in Article 6(1) that the Charter of Fundamental Rights of the European Union ('Charter of Fundamental Rights' or 'Charter') has the same legal value as the Treaties – that is, the Charter of Fundamental Rights has become part of the primary law of the EU. This is a significant change because through the Charter fundamental rights that had long been guaranteed in the ECHR and that may affect competition law enforcement have become primary law. The relationship between competition law and fundamental rights was strengthened, relative to Regulation No 17[7] adopted in 1962, through the entry into force of Regulation (EC) No 1/2003[8] as it expanded the investigative powers of the Commission and of national competition authorities. Examples include the regulation of the power to take statements (Article 19) or the regulation of the inspection of other premises (Article 21). Furthermore, fines and periodic penalty payments, as well as the principles affecting the amount of the substantive fine such as the principle of general and special prevention all suggest that the relationship between human rights and competition law needs to be reconsidered after Lisbon.

At the same time as the accession negotiations, a heated debate developed about whether the Commission's antitrust proceedings are consistent with the requirements of the 'right to fair trial'[9] enshrined in Article 6 of the ECHR and with the relevant case-law of the ECtHR. The debate focuses on the radically increased level of fines imposed in competition cases and the procedural issues relating to the extensive investigative, examination and decision making powers of the Commission. The record levels of the fines imposed reinforce the widely held view that the fining powers of competition authorities, in contrast with Article 23(5) of Regulation (EC) No 1/2003, are quasi-penal in nature. In this context the review of the antitrust decisions of the Commission by the European Court of Justice became the focus of attention. This issue is particularly topical in the wake of the judgment of the ECtHR in the *Menarini Diagnostics S.R.L. v Italy* case, in which the Strasbourg body scrutinised the system of judicial review of competition decisions in Italy.[10]

The purpose of this paper is to provide an overview of the relationship between competition law and human rights and to analyse certain issues relating to the 'right to fair trial', the fine-setting methodology and European judicial review. We wish to highlight, *inter alia*, challenges relating to compliance with the onerous requirements for respecting human rights, quite independent from accession to the ECHR. This paper, which confines itself to antitrust law, does not set out to examine the efficiency of the current system of institutions for competition law enforcement or the examination of 'what if' hypothetical scenarios.

2. Human rights before Lisbon

Before the entry into force of the Treaty of Lisbon on 1 December '2009' European courts, in the absence of appropriate authorisation, *in concreto* were unable to apply the ECHR. Consequently, the European Court of Justice and the Court of First Instance referred to certain rights enshrined in the ECHR only as a source of inspiration and emphasised the common constitutional traditions of Members States and the guidelines for the protection of human rights arising from international agreements developed with the contribution of Member States.[11] The principles laid down in the ECHR played a major role in the interpretation of these shared principles,

7 Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ [1962] 204, 21.2.1962

8 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1-25.

9 The official Hungarian translation of Article 6 of the ECHR renders the term 'fair trial' as '*tisztességes tárgyaláshoz való jog*' (right to a fair trial). This is all the more interesting as the Constitutional Court of the Republic of Hungary uses the expression '*tisztességes eljárás*' (fair process), a combination of the translations of the French (*procès équitable*) and English (*fair trial*) terms. See: Jakab, András (ed.), Az Alkotmány kommentárja [Commentary to the Constitution], Budapest, 2009. Századvég, Article 57, para.12. This paper uses the official translation of Article 6 of the ECHR.

10 The *Menarini Diagnostics S.R.L. v Italy* case is discussed in Section 5.2. of this paper.

11 Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* (ECR 1995, I-04921), paragraph 79, Case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* (ECR 2001, II-00729) paragraph 60; Case T-43/02 *Jungbunzlauer v European Commission* (ECR 2006, II-03435) paragraph 74

primarily through the case-law of the European Court of Justice[12]. Along the lines of these principles, which constituted the primary source of procedural rights[13], the European Court of Justice assessed the common constitutional traditions of Member States and sources of law containing other general principles of law on a case by case basis, within the framework of Union law. This practice changed radically after the Treaty of Lisbon: with the transposition of the Charter and certain fundamental rights set out in the ECHR the enforcement of the fundamental rights discussed later in this paper has become mandatory. Consequently, the general legal principles of the European Union constitute the source of procedural rights only in a subsidiary and supplementary manner.

3. Relationship of the Charter of Fundamental Rights and the ECHR in the Treaty of Lisbon

Article 6(3) of the TEU provides that '*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*'. The Court of Justice of the European Union has stated the need to consider the general principles and the common constitutional traditions of Member States in numerous judgments.[14] However, the various fundamental rights are specified through the Charter of Fundamental Rights. Article 6(1) TEU declares that the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December '2007' have the same legal value as the Treaties. Article 52(2)-(7) of the Charter of Fundamental Rights, incorporated during the amendment of 2007, contains radical innovations. Not only do the provisions of the Charter of Fundamental Rights incorporate new fundamental rights into the system of protection of fundamental rights of the EU but they also lay new legal foundations for the relationship of the European Union with the ECHR. The human rights referred to are set out in Article 52(3) of the Charter of Fundamental Rights:

"3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

The EU regards the rights enshrined in the Charter of Fundamental Rights as legal standards and also refers to the fact that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the ECHR. Essentially, through the Charter of Fundamental Rights the TEU defines the system of protection of fundamental rights of the ECHR as the minimum requirement while allowing for the introduction of more extensive protective mechanisms. Thus Article 52(3) of the Charter of Fundamental Rights incorporates certain rights set out in the ECHR into the Charter, as long as the content and extent of the rights set out in the Charter are identical with those of the rights provided for in the ECHR. It states that the level of protection afforded by the Charter may not be lower than the standards for fundamental rights guaranteed in the ECHR.

Furthermore, the preamble to the Charter of Fundamental Rights opens up new 'vistas' because the Charter sets the goal of the approximation or harmonisation of the systems of protection of fundamental rights. To this end, the Charter confirms the rights that arise from the ECHR, the case-law of the ECtHR, the constitutional traditions and international obligations of Member States. It should be noted in the context of the partial transposition of fundamental rights that the content and extent of the rights, as well as the restrictions on such rights, are identical with those provided in the ECHR. This

12 Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide- und Futtermittel* (ECR 1970, 01125) paragraph 4, see also Opinion 2/94 of the European Court of Justice (ECR 1996, I-01759), paragraph 33.

13 Wouter Wils, EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU law, national law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights, World Competition, Vol. 34, No. 2., p. 22

14 Case C-274/99 P *Connolly v Commission* (ECR 2001, I-01611) paragraphs 37 and 38; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE et al v Dimotiki Etairia Pliroforissis et al* (ECR 1991, I-02925) paragraph 41

is specifically stated in the explanation to the Charter, which is important because Article 52(1) of the Charter contains only a general provision to the effect that any limitation on the exercise of the rights recognised by the Charter must be provided for by law, respecting the principle of proportionality and the essence of those rights.

The preamble refers to certain explanations that must be given due regard by the courts of the Union and of the Member States. These explanations[15] *were mostly finalised by the European Convention headed by Valéry Giscard d'Estaing, which drafted the EU Constitution. Even though the explanations have no binding force, they are useful and instructive tools for the interpretation of the Charter of Fundamental Rights. The guidance character of the explanations is also underlined by Article 52(7) in Title VII of the Charter of Fundamental Rights, to be applied through Article 6(1) TEU.*[16]

It should be noted that the partial 'transposition' of the system of protection of fundamental rights set out in the ECHR into primary EU law creates a radically new situation, because the same standards are applicable in a court case relating to EU law as in the ECHR and the case-law of the ECtHR. Now it is no longer sufficient to refer to the traditions of Member States as common constitutional traditions but, where required, it is mandatory to enforce the protection of rights guaranteed by the ECHR and due regard must be paid to case-law as well.[17] Considering that the partial 'transposition' of the rights guaranteed by the ECHR into EU law affects only the fundamental rights that have their counterpart in the Charter, it is appropriate to note a number of pairs of fundamental rights relevant for competition law purposes. In conformity with the ECHR, the Charter expressly recognises respect for private and family life (Charter Article 7 – ECHR Article 8), the right to property (Charter Article 17 – ECHR First supplementary protocol Article 1), the right to an effective remedy and to a fair trial (Charter Article 47(2) and (3) – ECHR Article 6(1)), the presumption of innocence and right of defence (Charter Article 48 – ECHR Article 6(2) and (3)), and the principles of legality and proportionality of criminal offences and penalties (Charter Article 49(1) except the last sentence and (2) – ECHR Article 7).

This shows that the ECHR fundamental rights relevant for the enforcement of competition law have been mandatory since Lisbon. Consequently, if there is any competition law intervention affecting the fundamental rights laid down in the Charter, the Commission must take into account the legal interpretation in accordance with the ECHR as well as the case-law, including the supplementary protocols to the ECHR, and its enforcement practice must be in conformity with the system of protection of fundamental rights under the ECHR.

4. Critical premise

Having recognised the partial transposition of the ECHR, there has been an increase in applications for a remedy against competition decisions of the Commission where the respondent contests the controversial nature of the Commission's procedure and, on the whole, considers the decision and the preceding procedure to be in violation of the right to a fair trial. An excerpt from a recent appeal[18]:

"By their third plea in law, the appellants allege an infringement of the Charter of Fundamental Rights and of the European Convention on Human Rights ('ECHR'). The appellants regard this overriding legislation as having been infringed in two respects. First, the plausibility check carried out by the General Court in the cartel fine proceedings does not satisfy the requirements of the Charter of Fundamental Rights and of the ECHR with regard to an effective legal remedy. In that context, the appellants refer to the fact that the Commission's decisions on fines are at least to some extent akin to criminal law sanctions. Moreover, the Commission's own procedure fails to meet the standards of the ECHR and the Charter of Fundamental Rights. In support of that assertion, the appellants observe that the Commission investigates the

15 Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303, 14.12.2007, pp. 17–35

16 Article 52(7) of the Charter of Fundamental Rights: *"The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."*

17 For a more detailed discussion of the partial incorporation of fundamental rights see Wolfgang Weiss, Human Rights and EU Antitrust Enforcement: News from Lisbon, European Competition Law Review, 32. 4., p. 188

18 Official translation of a section of the appeal brought on 27 May 2011 by Kaimer GmbH & Co. Holding KG and Others against the judgment of the General Court (Eighth Chamber) delivered on 24 March 2011 in Case T-379/06 *Kaimer GmbH & Co. Holding KG, Sanha Kaimer GmbH & Co. KG, Sanha Italia Srl. v European Commission* (ECR 2011, 00000)

relevant facts, prosecutes undertakings and subsequently even decides on the nature and amount of the penalty. Such a procedure would be acceptable only if the Commission's decisions were subject to full review by a court. As maintained in the context of the first part of the third plea in law, however, the General Court confines itself in subsequent examinations of Commission decisions to obvious inconsistencies and does not make its own direct findings of fact."

The above text highlights the complaints about the Commission's procedure and the judicial practice of the EU. The appellants, who were required by the General Court to jointly and severally pay a fine of EUR 7 million, consider that the decision maker violated the Charter and the ECHR as

- their right to an effective remedy was compromised because the General Court examines only obvious inconsistencies and does not make its own direct findings of fact, also disregarding the penal character of the fines, and
- the Commission's procedure combines investigation, decision making and sanctioning mechanisms in a single institution.

The excerpt from the appeal highlights three particular issues: the assessment of the nature of the fine, the institutional structure of the Commission and the system of judicial review. Below I shall explore these issues in detail' or 'Below I shall deal with these issues in detail

5. Fines as penalty

Undoubtedly in recent years the amount of fines imposed by the Commission has increased drastically. In his paper,[19] John M. Connor examines the 13 cartel cases concluded since the entry into force of the Commission's notice on fines in 2006 and concludes that the fines imposed between 2007 and 2009 were five times more severe than the comparable fines calculated in accordance with the fine notice of 1998[20]. In this regard the measure of severity was the ratio of the fine to the EU turnover of the cartel member. Connor also concluded that for the first time, the level of fines has exceeded the extra profit gain by the cartel members[21]. He notes that of the close to 70 undertakings examined, the ratio exceeded 100% in case of at least 24. However, care must be taken with the numerical increase of fines as the comparison of nominal amounts would not provide a true picture. According to Wils, to assure comparability, cases with similar factual bases must be compared and it should also be examined whether the fine reached the 10% turnover cap. In his opinion, when comparing the level of fines, inflation as well as the reasons for the authority's discretionary treatment of the underlying infringement must also be taken into account[22]. The record-level fines[23] raise the issue, particularly from the aspect of the respondents, of the existence of safeguards in procedural law that can prevent the imposition of disproportionate, unnecessary and abusive fines. Before moving on to the interpretation of fines imposed by the Commission in antitrust cases in light of the ECHR, we should briefly discuss why the determination of the legal nature of the fine is important.

Fines imposed in competition cases are somewhere between criminal and administrative law in nature[24]. This classification is important because the safeguards under criminal law go beyond those of administrative law. The repressive function of criminal law requires more severe guarantees satisfying higher standards of legal certainty than the administrative regime. The Commission acts as an administrative authority, it may impose fines only on undertakings and keeps no criminal records of the firms fined. Furthermore, there is no public shame attached to such fines, unlike in relation to criminal sanctions[25]. It is also clear, however, that competition law contains certain elements that are incom-

19 John M. Connor, Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines, European Competition Law Review 1/2011, pp. 27-36 (available at http://ssrn.com/abstract=1737885, 10 October 2011)
20 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 (OJ 1998 C 9/03)
21 See Connor (fn. 19) p. 14
22 Wouter Wils, The increased level of EU antitrust fines, judicial review and the ECHR, World Competition, No. 33. (1) 2010, p. 10
23 EUR 1.45 billion in the Intel abuse of dominance case, see The Commission's website: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (10 October 2011).
24 Ulrich Sieber – Helmut Satzger – Bernd v. Heintschel-Heinegg (ed.): Europäisches Strafrecht, C.H. Beck, 2011, Chapter 3, Section 5, point 25
25 Idem paragraph 26.

patible with the administrative regime: emphasis on the deterrence effect of fines[26] and on special and general prevention[27], as well as the use of administrative sanctions (such as procedural fines, periodic penalty payments), which all underline the repressive aspect of competition law.

5.1. Assessment of the legal character of fines under competition law

In the opinion of Wils[28] two aspects need to be analysed for the assessment of the criminal nature of fines. It must be established whether the Commission's antitrust fines are criminal under the ECHR and, separately, within the meaning of EU law. The guarantee regime of the ECHR is applicable to the fining procedure if the procedure is considered to be a criminal charge within the meaning of Article 6 of the ECHR. The ECtHR decides whether a sanction is criminal or not based on the criteria laid down in the *Engel and others v The Netherlands* case[29]. According to the Strasbourg court, three criteria are to be examined. First, the classification of the sanction (criminal, administrative) according to the legal system of the contracting state. While this criterion is only formal and indicative, the other two criteria - the nature of the offence (retaliatory and deterrent) and the severity of sanctions imposed on the affected party are alternative rather than cumulative. However, this does not exclude a cumulative approach where the separate analysis of each criterion on its own does not confirm the criminal nature.[30]

The situation is different when the Commission's fining procedure is assessed under EU law. Article 23(5) of Regulation (EC) No 1/2003 expressly states that decisions imposing fines are not to be of a criminal nature. This section is probably explained by historical reasons because Member States did not wish to grant criminal powers to the EU[31]*; consequently, under EU law, fining decisions fall within the scope of administrative sanctions. Nevertheless, in the past two decades the European Court of Justice has repeatedly examined the legal nature of fines under competition law and indirectly applied the fundamental criminal guarantees set out in Article 6 of the ECHR. In the Anic Partecipazioni* case the European Court of Justice established that given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, responsibility for committing those infringements is personal in nature.[32] In the Hüls case the Commission, with reference to Article 6(2) of the ECHR, expressly recognised the principle of the presumption of innocence in the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.[33] In recent years the opinions of Advocates General concerning the legal nature of competition law fines have unanimously concluded that in the broader sense, that is, in the system of guarantees under the ECHR, competition law fines are quasi-penal in nature.[34] Given the aim of competition law (namely to protect free market competition), the nature of the fines (both preventive and punitive in effect, with no element of compensation for damage) and their size (financial penalty of a high amount), the ECHR considers that such proceedings must be subject to the guarantees provided for in Article 6 ECHR.[35]

5.2. The real debate

The debate about the classification of the fining procedure goes beyond the criminal nature of the fine. One school of thought holds that the fining pro-

26 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 2010, 1.9.2006, pp. 0002-0005, point 4: '*the Commission must ensure that its action has the necessary deterrent effect*'.
27 See Weiss (fn. 17) p. 193
28 See Wils (fn. 22.) p. 12
29 ECtHR 8 June 1976, 5100/71., *Engel and others v The Netherlands* judgment, paragraphs 81-83
30 ECtHR 9 October 2003, 39665/98 and 40086/98, *Ezeh and Connors v United Kingdom*, paragraph 86
31 For more references see Donald Slater – Sébastien Thomas – Denis Waelbroeck, GCLC Working Paper 04/08, p. 8, available at http://www.gclc.coleurop.be (10 October 2011).
32 Case C-49/92 P *Commission v Anic Partecipazione SpA* ([1999] ECR I-04125, paragraphs 78-85)
33 Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-04287, paragraphs 149-150.
34 Opinion of Advocate General Sharpston in Case C-272/09 P *KME Germany AG and Others v Commission*, OJ [2009] C 220, 12.09.2009., p. 29, paragraphs 63-64. Opinion of Advocate General Bot in Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg SA v Commission*, paragraph 41, OJ [2011] C 173 11.06.2011, p. 2.
35 Opinion of Advocate General Yves Bot in Case C-352/09 P *ThyssenKrupp Nirosta GmbH v European Commission* (ECR 2011, 00000) paragraph 50.

cedure in competition cases falls under some 'secondary criminal law' and therefore the guarantees provided in the ECHR should be applied more loosely. Proponents of this view refer to the ECHR judgment in the *Jussila v Finland* case[36], in which the Strasbourg body had to decide whether the party was entitled to the right to a public, oral hearing set out in Article 6 ECHR in the administrative stage of a tax surcharge case. The Court stated that the imposition of a EUR 308 tax surcharge because of an erroneous personal income tax return did not belong to the hard-core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their 'full stringency'. The court explained this classification with the different gravity attached to criminal proceedings. The court referred to the case-law which, by applying the Engel criteria, broadened the interpretation of a criminal charge set out in Article 6 ECHR, extending it to cases not strictly belonging to the traditional categories of criminal law, for example administrative penalties, customs law and, last but not least, competition law.[37] In the latter respect the ECtHR, in the *Jussila* judgment, referred to the decisions in the *Bendenoun v France* and *Janosevic v Sweden*[38] cases, where the ECtHR considered that an administrative or non-judicial body possessing both investigative and decision making powers imposing a fine in the first instance was compatible with Article 6 ECtHR. In the *Bendenoun v France* case the ECtHR stated that the Contracting States must be free to empower their tax authorities to impose fines as sanctions, even if the surcharges imposed as a penalty are 'large ones'.[39] In a subsequent judgment the ECtHR declared that the classification of a sanction as criminal is determined by reference to the maximum potential penalty for which the relevant law provides rather than the specific fine imposed.[40]

5.3. Interim conclusion

Summarising the aforesaid: in respect of fines, pursuant to Article 6 ECHR hard-core and non hard-core sanctions or procedures must be treated separately. Whereas hard-core sanctions are classified as 'criminal' under Article 6 ECHR and penalties are required to be imposed by an independent and impartial tribunal at first instance[41], *it is sufficient for penalties outside the hard-core of criminal law to be imposed, at first instance, by an administrative or non-judicial body that combines investigative and decision-making powers.*[42] *Such a categorisation of the system of guarantees is subject to frequent criticism, mainly on the basis that there is no sufficiently objective measure developed in case-law for the scale of severity of criminal sanctions, which in itself may give rise to arbitrary, abusive enforcement practices.*[43]

6. Institutional nature of the European Commission acting in competition cases

Critics of the institutional structure of the Commission often claim that investigative powers, the 'prosecution' and deliberation are not separated in the Commission. In this regard lawyers working on proceedings of the Commission often raise the 'judge, jury, executioner' argument. In their opinion, under Article 6 ECHR it is impossible to conduct a fair and impartial proceeding if the three branches of power are combined. Furthermore, in competition cases the final decision is made by the 27 Commissioners by a majority vote, which raises concerns of voting based on political or partial considerations.[44] *Critiques of the institutional deficit share one feature element. All critics start from the assumption that competi-*

36 Judgment of the ECtHR of 23 November 2006, 73053/01, *Jussila v Finland*, paragraph 43.
37 Idem, paragraph 43; the ECtHR referred to its judgment of 27 February 1992 in the *Société Stenuit v France* case (11598/85, Series A no 232-A).
38 Judgment of the ECtHR of 24 February 1994 in Case 12547/86 *Bendenoun v France*, paragraph 46; Judgment of the ECtHR of 21 May 2003 in Case 34619/97 *Janosevic v Sweden*, paragraphs 80-81.
39 Idem *Bendenoun v France*, paragraph 46.
40 See *Ezeh and Connors v United Kingdom (fn. 30)*, paragraph 120
41 Judgment of the ECtHR of 25 February 1997 in the *Findlay v United Kingdom* case, 110/1995/616/706, paragraph 79.
42 Wouter Wils, EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU law, national law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights, World Competition, Vol. 34, No. 2., p. 22.
43 Slater – Thomas – Waelbroeck (fn. 31) p. 21; Simon Hirsbrunner – Jens Werner, Überholt das schweizerische Kartellgesetz das EU-Vorbild?, in: Jusletter 20. September 2010., p. 3.; Ian Forrester, Due process in EC competition cases: a distinguished institution with flawed procedures, The European Law Review (2009), p. 818.
44 Slater – Thomas – Waelbroeck (fn. 31) pp. 33-35.

tion proceedings are criminal in nature pursuant to Article 6 ECHR. It is worth briefly reviewing some of these.

According to proponents of the criminal nature of competition supervision proceedings, the respondents may feel a violation of their right to a fair trial particularly where a single set of persons perform functions of prosecution and adjudication. This may lead to a psychologically motivated bias on the side of the persons performing the function of prosecution (prosecutorial bias). As a result, the prosecutor may have a natural tendency to favour evidence that supports his/her belief that a competition infringement has been committed (confirmation bias). The prosecutor may have a natural desire to justify his/her past efforts and achievements, in particular to hierarchical supervisors, even in the face of convincing counter-arguments (hindsight bias). The above psychological categories may engender a desire in the representative of prosecution to enforce competition law by imposing ever increasing fines (policy bias).[45]

6.1. Historical overview – symbiosis of the Commission and the Court

The combination of these three functions in the Commission is attributable mostly to historical and political history reasons. The Treaty of Rome establishing the European Economic Community set the objectives of establishing a common market and the approximation of the economic policies of Member States (Article 2). Given the scarcity of experience with competition law in the Member States and the widely held assumption that competition law would play a marginal role in the Community, the Council, in the absence of any appropriate concept, had little interest in becoming directly involved in the structuring of the system of competition law institutions and procedures.[46] In this historic situation and making use of the power granted in Article 87 of the Treaty of Rome[47], the Council, at the proposal of the Commission and following years of consultations, adopted Regulation No 17[48] implementing Articles 85 and 86 of the Treaty. According to Gerber, there were at least three important factors contributing to the emergence of the strong powers of the Commission: the role of the Court in interpreting the law during the elaboration of enforcement principles, the goal of integration in the single market and the central role of the Commission in enforcement.

In the absence of any significant enforcement experience, the Commission paid particular attention to the '*intellectual leadership*'[49] of the European Court of Justice, the legal principles and guarantees devised by the Court. In this regard, it took advantage of the Court's immunity from political pressure. At the same time, the Court also realised that it needed the effective enforcement work of the Commission if it were to achieve its goals. Thus the desire to achieve the single market urged both institutions to use competition law enforcement towards that end.[50]

Regulation 17 gave the Commission considerable investigative and enforcement powers and minimised the competence of national competition authorities. In the context of investigative powers Article 14 of Regulation 17 is worth noting, which provides that the Commission may hold site inspections at undertakings, inspect books and other business records and require oral information on site. In respect of enforcement powers, mention should be made of Article 9(1) giving the Commission exclusive powers to determine the grounds for exemption set out in Article 85(3) as well as the notification obligation laid down in Article 4, providing that any agreement or decision that may fall under Article 85 needs to be notified to the Commission. The latter provision gave considerable powers to the Commission because the decision proposed to be made by the Commission in particular cases became a central issue.

45 For more detail see Hirsbrunner – Werner (fn. 43) pp. 4-5; Forrester (fn. 43) p. 11;
46 David J. Gerber, *The transformation of European Community Competition Law*, Harvard International Law Review 1994, Vol. 35, No. 1, p. 105.
47 Article 87(1): "*Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.*"
48 See fn. 7.
49 See Gerber, (fn. 46.), p. 109.
50 See Gerber, (fn. 46.), p. 111.

6.2 Non-judicial body combining investigative and decision making powers

The *Jussila v France* case has already been mentioned in this paper; in this case the ECtHR, referring to the judgments in the *Bendenoun v France* and *Janosevic v Sweden* cases, considered that an administrative or non-judicial body possessing both investigative and decision making powers imposing a fine in the first instance was compatible with Article 6 ECHR. In the *Janosevic v Sweden* case the ECtHR stated the following:

'The tax authorities are administrative bodies which cannot be considered to satisfy the requirements of Article 6 § 1 of the Convention. The Court considers, however, that Contracting States must be free to empower tax authorities to impose sanctions like tax surcharges even if they come to large amounts. Such a system is not incompatible with Article 6 § 1 so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision [...]'[51]

It follows from the *Janosevic* and *Jussila* judgments that if non hard-core administrative (competition, tax or misdemeanour) sanctions are imposed at first instance by a body other than a court or administrative body in which the investigative and decision making powers are not separated, this regime is compatible with Article 6(1) ECHR provided that a full judicial review is available against the decision of the first-instance authority. This is reinforced by the judgment of the ECtHR in the *Dubus S.A: v France* case, where the first-instance decision making body was considered a judicial body under French law. The judgment states that if the Contracting State member to the ECHR considers a first-instance body to be a judicial body – as was the case for the French Banking Committee in the Dubus case – this judicial body needs to satisfy the guarantees provided for in Article 6 ECHR.[52]

A recent decision of the ECtHR also reinforces the approach established in the *Janosevic* and *Jussila* cases. In the *Menarini Diagnostics S.R.L. v Italy* case[53] the ECtHR found that the Italian competition law enforcement regime respects the fundamental rights of undertakings because the appeal courts review the decisions of the Italian competition authority on their merits (that is, both on points of law and fact). Furthermore, the Italian judicial review forums satisfy the requirements of independence and impartiality imposed on courts in Article 6 ECHR.[54] The Strasbourg court reiterated that the imposition of fines by an administrative authority in administrative proceedings, at first instance, is compatible with Article 6 ECHR. In such cases, however, the appeal forum needs to have review powers to comprehensively examine the decision of the first-instance administrative authority and assess whether it satisfies the criteria of necessity and proportionality, including the level of the fine.[55]

7. The European judicial review system – full review?

The *Janosevic v Sweden* case raises the question whether the European Court of Justice '*has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision*'. Similarly to the excerpt from the appeal cited in this paper, critics of this issue claim that the General Court "*[...] violated [...] the Appellants' fundamental right to full and effective judicial review by failing to examine thoroughly and closely KME's arguments and showing a biased deference to the Commission's discretion [...].*[56]Mark Jaeger, president of the General Court, recently said that the bias, which critics call 'deferential bias', was an 'urban legend'. In his opinion the General Court always assesses the claims and motions submitted by the party, therefore any bias is out of the question.[57] Indeed, the EU courts, while recognising the discretion of the Commission in respect of economic infor-

51 Judgment of the ECtHR of 21 May 2003 in Case 34619/97 *Janosevic v Sweden,* point 81.
52 Judgment of the ECtHR of 11 June 2009 in Case No 5242/04,*Dubus S.A. v France*, paragraph 26.
53 ECtHR 2 September 2011, 43509/08, *Menarini Diagnostics S.R.L. v Italy*
54 Idem paragraph 60.
55 Idem paragraph 64.
56 Case C-272/09 P *KME Germany AG and Others v Commission*, OJ [2009] C 220, 12.09.2009., excerpt from the appeal
57 Mlex Magazine, 6th edition, July-September 2011, p. 11

mation, may also review the Commission's assessment of such economic factors.[58]

7.1. The proceeding of the General Court and of the Court of Justice

Pursuant to Article 31 of Regulation (EC) No 1/2003 to be applied through Article 261 TFEU, the General Court has unlimited review powers, in the context of Articles 101 and 102 TFEU, over decisions in which the Commission has imposed a fine or periodic penalty payment (in the wording of Article 261, 'sanction'). The General Court may cancel, reduce or increase fines. In addition to fine-related remedies, the General Court has full powers to review the legality of decisions in cartel and dominance cases and if requested in the appeal, it may undertake an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of those facts.[59] *It should be noted that the Commission's Guidelines cannot bind the General Court in the course of the review pursuant to Article 261 TFEU.*[60]

In respect of appeals against the fining decisions of the Commission in competition cases, the General Court reviews the legality of the Commission's decisions as well in accordance with Article 263 TFEU. In this regard it has full jurisdiction to examine the facts of the case in respect of the fined undertakings, the culpability of the undertaking with regard to the conduct concerned and whether the fine exceeds the 10% limit.[61] Furthermore, it examines the appropriate and proportionate application of the Fining Notice. It should be noted that the General Court is not obliged to conduct a *de novo* procedure, that is, it is not required to take over the role of the Commission and reconsider the case. This is not required either by the ECHR or the case-law of the ECtHR. The Court needs to verify primarily whether the decision is vitiated by any defects which are either raised by the applicant or are matters of public policy which the Court should raise of its own motion.[62] This also implies that it needs to respond to the arguments raised rather than conduct an investigation *ex officio*. The case-law of the ECtHR does not require a multi-level, full judicial review, it only demands that there is a judicial body that has 'full jurisdiction' to review the contested decision. The General Court fully satisfies that requirement. On appeal, the jurisdiction of the Court of Justice is more limited as it may not review the facts unless there is a distortion of the clear sense of the evidence or the facts have been wrongly categorised in law. Its role is confined to determining whether the appellant has identified any errors of law committed by the General Court.[63]

The critics of the review regime essentially object to the absence of the *de facto* review of legality, that is, that the General Court does not conduct a full review of the (economic) assessment substantiating the anticompetitive conduct pursuant to Article 263 TFEU, in particular with regard to the economic evidence relating to Article 102 TFEU. The judgment of the European Court of Justice in the *Commission v Tetra Laval BV* case appears to contradict this view when it states that *'[w]hilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature [...]'*.[64] Thus in the *Tetra Laval BV* case the European Court of Justice confirmed its review powers with regard to the review of economic matters as well.

8. Conclusion

This paper has shown that after the entry into force of the Treaty of Lisbon the European Court of Justice and the European Commission need to reconsider the relationship of human rights and fundamental freedoms enshrined in the ECHR to the competition law regime. The Charter of Fundamental Rights, which has the same effect as the Treaties establishing the Union, expressly transposes some fundamental rights correlated to the ECHR into primary EU law, making their application compulsory

58 See also Mark Jaeger, The Standard of Review in Competition cases involving complex economic assessments: towards the marginalisation of the marginal review, Journal of European Competition Law & Practice, 2011, Vol. 2. No. 4., p. 300 In this paper Jaeger refers to the 'forgotten paragraph' in the *Tetra Laval* judgment regarding the review of the interpretation of economic information by the Commission.

59 Joint Cases T-25/95-T-104/95 *Cimenteries CBR SA v Commission*, ECR 1992, II-02667, paragraph 719.

60 Opinion of Advocate General F.G. Jacob in Case C-167/04.P *JCB Service v Commission* [ECR 2006, I-08935] paragraph 141.

61 See Wils (fn. 22), p. 23.

62 *JCB Service v Commission* (see fn. 60), paragraph 40

63 Idem paragraph 41.

64 Case C-12/03 P *Commission v Tetra Laval BV* [ECR 2005, I-00987] paragraph 39.

for EU law enforcement bodies. Consequently, it is no longer sufficient to refer to the common constitutional traditions and legal principles arising from international treaties, as the application of the ECHR has become mandatory in case of certain fundamental rights.

Criticism of the institutional setup of the Commission, combining powers of investigation and decision making, appears to target the concept of the law enforcement system as a whole. Therefore, dismantling the system of EU institutions for competition law enforcement would certainly not be conducive to legal certainty. The real objective is to strike a balance that guarantees the effective enforcement of competition rules as well as respect for the fundamental right to defence. This can be best assured if the spirit of the right to a fair trial pervades the entire procedure from start to finish. The Commission is also taking steps in that direction. On the European Competition day in May 2011 in Budapest, Commissioner Joaquín Almunia announced a mechanism to better ensure the rights of the parties throughout the antitrust process and to make competition proceedings even more transparent.

This paper highlighted that the amount of the fine should not be regarded as absolute guidance when deciding whether to classify a sanction as criminal. The case-law of the ECtHR indicates that the maximum potential penalty rather than the actual fine imposed is the decisive factor. The 10% cap has been in force since Regulation 17. We can agree with the view that fines imposed in competition cases share a number of common features with criminal sanctions; however, in terms of their nature they do not belong to the hard-core of traditional criminal law. Consequently, it is justified to treat the fines imposed by the Commission in competition cases separately from criminal sanctions. In any event, the Commission is not an independent judicial body within the meaning of Article 6 ECHR. Therefore, it is justified to have the opportunity for the review of its decisions with full jurisdiction. This requirement is fully satisfied by the judicial system of the EU.

Finally, it is worth recalling the *Menarini Diagnostics S.R.L. v Italy* case once again; it was followed with keen attention because the Italian system of competition law enforcement is essentially identical with the EU system. Now that, indirectly, a judgment has been passed on the EU's judicial review system in conception cases, we can confirm our suspicion: even if a paradigm shift is not in order, a change of approach is certainly necessary to ensure the more consistent protection of the right to a fair trial.

This change is illustrated by the recent Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU[65], which, *inter alia*, provides for the possibility to hold state of play meetings at key procedural stages and allows parties easier access to documents submitted by third parties before the statement of objections. In this regard we should note the decision of the President of the Commission[66] on the increasingly important function of the hearing officer as well as the Commission's report relating to the submission of economic evidence and data[67]. It is evident that the Commission enforces the rules to guarantee procedural rights primarily through soft law tools. In addition to the 'top-down' regulation, the work of the Working Group on Cooperation Issues and Due Process (ECN), established within the European Competition Network and working with a joint German and Hungarian presidency, has proved useful. This group pays special attention to the compliance of the competition law enforcement regimes of the various Member States with Regulation (EC) No 1/2003.[68] Finally, mention should be made of the peer review projects, which are typically coordinated by international bodies with a large membership[69] with the purpose of calling attention to areas of regulation of the reviewed body or state in need of adjustment in respect of legal policy recommendations concerning the reviewed issues. The recommendations and soft law represent cautious but important steps towards finding a balance between the effective enforcement of competition rules and respect for fundamental rights.

65 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ [2011] C 308, 20.10.2011., pp. 6-32.
66 Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29
67 Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases, SEC/2011/1216.
68 See ECN Brief Special Issue, 16 December 2010, p. 9, (available at http://ec.europa.eu/competition/ecn/brief/index.html, 10 October 2011).
69 Organisation for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD).

Zoltán Bara*

Measuring the welfare gain from the operation of competition authorities. Extent and duration of the expected price effects

Abstract

The article deals with the methods by which competition authorities can be quantified not only by measuring the fines imposed or the number of competition supervision proceedings completed but also by quantifying its effects on consumer welfare. This is the essence of an impact assessment relying on the simple assumption that in the absence of the intervention of the competition authority, that is, if the infringements had continued or the mergers substantially lessening competition had gone ahead, the goods or services affected would have been more expensive. The impact assessments focus on the prevented consumer loss or harm, attempting to provide an overall picture about the magnitude of the direct benefit expected to be retained by consumers as a result of the intervention of the authority.

1. Introduction

The work of competition authorities can be quantified not only by measuring the fines imposed or the number of competition supervision proceedings completed but also by quantifying its positive effects on consumer welfare. This is essentially an impact assessment relying on the simple assumption that in the absence of the intervention of the competition authority, that is, if the infringements had continued or the mergers substantially lessening competition had gone ahead, the goods or services affected would have been more expensive for a certain period of time compared to the baseline. In other words, impact assessments focus on *the prevented consumer loss or harm,* attempting to provide an overall picture about the magnitude of the direct benefit expected to be retained by consumers as a result of the intervention of the authority.

Competition policy related impact assessments may cover the overall expected (*ex ante*) effects of the work, operation and various interventions of an authority, the analysis of the actual (ex post) effects of a particular decision of a competition authority or, in the broader sense, the term is also used for studies of the macroeconomic effects of competition policy in general. A number of competition authorities regularly publish *ex ante impact assessments about their operations as a whole*, which look at their decisions on antitrust violations and various interventions in merger cases (prohibition, imposition of commitments etc.) in a particular period. Ex post assessments of particular decisions are generally performed a few years after the decision is made by analysing the changes observed in actual market trends. Such investigations are complex and time-consuming as market developments may be affected by a variety of factors, which are not always possible to filter out with certainty. In contrast, ex ante assessments estimate the expected, rather than actual, effects of competition decisions based on a number of material assumptions. These assumptions

* The author is Head of the Competition Policy Section of the Hungarian Competition Authority, professor at the Corvinus University of Budapest (as of 1 July 2014, member of the Competition Council of the Hungarian Competition Authority - ed.).

relate mostly to the extent and duration of the expected price effects of the various types of anticompetitive conducts or interventions. This paper focuses primarily on the latter issue through the discussion of the relevant literature, in the following structure. The first section is a brief discussion of the formula for the quantification of the welfare gain arising from the interventions of competition authorities. Then second section summarises the fundamental types of case-specific research and academic analyses that serve as the foundation for determining the default values used for the assessments, which is followed by the comparison of the default figures employed by various authorities. The conclusion looks at the most recent developments in this field, namely the recommendations of the OECD and the fist impact assessment prepared by the GVH.

2. Formula for quantification

The formula for the quantification of the gains arising from interventions:

Prevented harm = Relevant turnover ×
× Price difference × Expected duration

'Relevant turnover' is the turnover affected by the infringement, i.e., the turnover which would be affected by the restriction of competition (in the absence of the intervention of the GVH). In the case of mergers it means the turnover relating to the competitive concern leading to the intervention. 'Price difference' is the price increase resulting from the infringement or merger (that would occur in the absence of the intervention of the GVH). 'Expected duration' is the expected length of the (continuation of the) infringement, that is, the time for which the higher price would have (presumably) prevailed (in the absence of the intervention of the GVH). Experience shows that such conduct is unlikely to continue indefinitely (for instance, a cartel may break down on its own). In the case of mergers, 'expected duration' is the time elapsed before the market is expected to self-correct the detected competitive anomaly (for instance though new market entry).

The turnover affected by the infringement means the net turnover; its determination requires no special calculation if it had been established in the proceeding covered by the analysis. In antitrust cases the relevant market for the infringement and, particularly where a fine is imposed, the relevant turnover of the undertakings concerned are generally specified. Similarly, it is assumed that in the case of mergers the turnover data of the undertakings of the affected group are known and the size of the relevant market has been determined. If the required turnover data are not present in the case file, simple estimation techniques can be used as long as the necessary information is available. For the purposes of this paper we merely wish to emphasise that the first component of the aforementioned impact calculation formula (*the relevant turnover*) is almost always *established based on case specific information,* unlike the two other elements, where this is seldom possible.

The values of the price difference and of the expected duration can be established case-specifically only in the exceptional case where the investigation file contains reliable information in this regard. In the absence of sufficient specific information the analysts use so-called *default values*. Once established, the same default values are used for all case types. Default values for the price difference and expected duration may vary depending on the type of cases. How are these default values determined and how reliable are the impact assessments performed on their basis?

3. Determination of the default values for impact assessments

The development of impact assessments started in the US in the 1980s and 1990s with the direct, academic research, assessment and study of the effects of specific competition-related events and interventions. From the 2000s numerous economists started studying this field in Europe and elsewhere, mostly at the initiative or within the organisations of competition authorities. In Europe, two outstanding researchers of the subject are Stephen Davies, academic adviser to the OFT and Péter Ormosi, our former colleague, currently a researcher and lecturer at the University of East Anglia. They are the scholars best known for the summary and synthesis of the continuously growing body of academic and research findings on the subject. Understandably, I relied heavily on their studies and other publications when writing this paper.

Before authorities started using non-case-specific default values, the assessment of the impacts of interventions of competition authorities was performed exclusively through analyses of market or other information available relating to specific individual or interrelated cases. The publication of the results of these case-specific studies allowed authorities to use values for their impact assessments derived from the experiences of past cases for the estimation of the price effect and expected duration. The use of these values allowed them to prepare impact assessments more easily and quickly for more cases, in particular where there was insufficient information available to calculate case-specific assessments. It should be emphasised that there are the findings of numerous case-specific studies underlying non-case-specific default values; the analyses and assessments of competition authorities recently adopting the methodology have added to the wealth of information to rely on. The types and key findings of these analyses are summarised in the chapter below.

3.1. Case-specific research and surveys[1]

There are numerous studies about the actual price effects of competition law interventions, applying one of three main methodologies: simulations, case studies and the so-called DiD method. In the course of *simulations* a formal modelling of the nature of competition in the market is attempted so that the model facilitates comparison between two states of the market: the situation with and without the intervention of the authority. Simulation is an advanced methodology also used for merger control purposes.[2] There are different market models used in simulations.[3] Differentiated products lend themselves to the Bertrand model based PCAIDS (Proportionally Calibrated Almost Ideal Demand System) or ALM (Antitrust Logit Model), while the Cournot model may be appropriate for homogeneous products. Merger simulations have the advantage of relying on the sound theoretical basis of structural market theory models. One of their major drawbacks also arises from this fact because the theory often relies on assumptions and simplifications that are unreasonable in the case of certain markets or industries. Consequently, in some cases it does not necessarily yield more accurate results than the use of default values. Furthermore, simulation has substantial resource requirements in terms of both data and labour.[4]

Merger case studies tend to examine how the market (stock market) value of the merging undertakings and of their competitors changes as a result of the announcement of the merger or of the related decision of the competition authority. In an early paper Eckbo discusses the value added by that information in the course of the analysis of the effects of a merger.[5] Examples of industry-specific merger case studies include Simpson and Hosken[6], who looked at four mergers in the US retail market, and Warren-Boulton and Dalkir[7], who wrote a case study about the famous Staples–Office Depot concentration. Duso et al. studied European mergers, focusing in particular on the efficiency of merger control and the remedies applied. Finally, we should also note the study of Diepold et al., who examined the effect of 50 merger decisions of the Australian competition authority between 1996 and 2003 on the market value of undertakings.[8]

1 For this section I relied primarily on the comprehensive study of Stephen Davies and Peter Ormosi, Assessing competition policy: methodologies, gaps and agenda for future research, CCP Working Paper 10–19, November, 2010, 2–54.

2 Simulation is less frequently used for cartel analysis, though there are exceptions, see T. Van Dijk, T. and F. Verboven: „Quantification of Damages," in Collins, W. D. (ed.), Issues in Competition Law and Policy, Vol. 3 (American Bar Association, Chicago, Illinois, USA, 2008.

3 See J. Hausman and G. Leonard: Economic analysis of differentiated products mergers using real world data, George Mason Law Review 5, 1997, 321–346. or G. J. Werden: Expert report in *United States v. Interstate Bakeries Corp. and Continental Baking Co.*, International Journal of the Economics of Business, 2000, 7, 139–148. and A. Nevo: Mergers with differentiated products. The case of the ready-to-eat cereal industry, RAND Journal of Economics, 2000, 31, 395–421.

4 Virág Balogh, Gergely Csorba et al: A versenyhivatali tevékenység jólétre gyakorolt hatásainak mérhetőségéről [The measurement of the welfare effects of the work of the competition authority], GVH working paper, 2011.

5 B. E. Eckbo: Mergers and the Market Concentration Doctrine: Evidence from the Capital Market. The Journal of Business, 1985, 58, 325–349.

6 J. S. Simpson and D. Hosken: Are Retailing Mergers Anticompetitive? An Event Study Analysis. Federal Trade Commission, WP-216. 1998.

7 F. R. Warren-Boulton and S. Dalkir: Staples and Office Depot: An Event-Probability Case Study. Review of Industrial Organization, 19, 469–481. 2001.

8 B. Diepold et al.: Merger Impacts on Investor Expectations: An Event Study for Australia. American University, Department of Economics Working Paper Series, No. 2007-07. 2006.

Davies and Ormosi[9] highlight three of the case studies on cartels. For instance, Langus and Motta[10] examined the market effects of Commission decisions adopted in proceedings that started with dawn raids. Bosch and Eckard performed a similar analysis of the decisions of the DoJ[11]. Finally, Lübbers analysed the effects of cartelisation on the German coal mining market, in particular the market impacts of the establishment of a syndicate and of two major modifications to the syndicate contract.[12]

The analysis of the effects on market value (stock valuation) relies on the assumption that the stock exchange is an efficient market (EMH – efficient market hypothesis), where share prices instantly reflect the value of the undertaking based on all information relevant to investors. The change is generated by the interaction between a large number of self-interested, independent and rational market actors; consequently, it can be regarded as the best estimate for the effect of all the information available. However, Davies and Ormosi raise the legitimate counter-argument that the assumption of the EMH is not necessarily plausible.[13] As Werden puts it: "*[…] the presumption that the instant analysis of uninformed investors is more accurate than the painstaking work of enforcement agencies with access to confidential documents and data is not supported by evidence.*"[14] Moreover, as another argument against assessment relying on the EMH assumption, the investors' expectations relating to regulatory intervention cannot be told apart from expectations relating to a number of other factors. That is, the response of the stock market to an 'antitrust event' can be explained with the same probability by other market developments, which may actually override the effects of responses to the antitrust event. A merger-related share price increase may reflect either pro-competitive effects (efficiency increases) or anti-competitive effects (foreclosure of competitors, collusion). According to Duso et al., this uncertainty can be reduced if the changes in the share prices of competitors are also observed.[15] Most oligopolistic models suggest that a merger would lead to an increase in product prices, which is also beneficial to competitors, therefore their share prices would also increase. If, however, the increased efficiency resulting from the merger is expected to reduce share prices, the prices of the shares of competitors would decline.

Davies and Ormosi conclude about the reliability of case studies that *ex post* examinations tend to confirm the predictions of case studies; therefore, they can be used as alternatives to simulations. Nevertheless, their results are not convincing enough and require further statistical analysis.[16]

DiD (difference-in-differences) encompasses a wide range of methods from experiments to matching techniques. The method relies on the observation and evaluation of changes in a market characteristic before, during and after a particular event. DiD is a traditionally econometric analysis, where changes of a market characteristic (mostly the price) over time are compared with a control market that is certain to have been unaffected by the event concerned. These analyses are generally performed *ex post*.

One example for the method's application to cartels is Simeonidis's study, in which he attempted to estimate the effect of the Restrictive Trade Practices Act adopted in the US in 1956 on the survival or formation of cartels.[17] Levenstein and Suslow examined the market effects of the Export Trading Company Act of 1982 with or without cartel exemptions.[18] Tenn and Yun offer an example for the application of

9 See Stephen Davies and Peter Ormosi (fn. 1).
10 G. Langus and M. Motta: The Effect of EU Antitrust Investigations and Fines on a Firm's Valuation. CEPR Discussion Paper No. DP6176. 2007.
11 J.-C. Bosch and E. W. Eckard: The Profitability of Price Fixing: Evidence From Stock Market Reaction to Federal Indictments. The Review of Economics and Statistics, 73, 309–317. 1991.
12 T. Lübbers: Is Cartelisation Profitable? A Case Study of the Rhenish Westphalian Coal Syndicate, 1893–1913. MPI Collective Goods Preprint, No. 2009/9.
13 See Stephen Davies and Peter Ormosi (fn. 1).
14 Gregory J. Werden: Assessing the effects of antitrust enforcement int he United States, De Economist, 2008, 156, 4, 433–451. A similar view is stated by B. G. Malkiel, see B. G. Malkiel: A random walk down Wall Street: the time-tested strategy for successful investing, New York, London, W. W. Norton 2003.
15 T. Duso et al.: How Effective is European Merger Control? WZB, Markets and Politics Working Paper, No. SP II 2006-12.
16 See Stephen Davies and Peter Ormosi (fn. 1).
17 G. Simeonidis: The effects of competition: cartel policy and the evolution of strategy and structure in British industry, Cambridge, Mass., MIT Press. 2002.
18 M. Levenstein and V. Suslow: What Determines Cartel Success?, Journal of Economic Literature, 2006, 44, 43–95.

the method to mergers, examining the effect of the divestiture in the Johnson & Johnson/Pfizer case.[19] With regard to their methodology Davies and Ormosi noted that the control group used during the study (competitors selling similar brands) should not have necessarily been regarded as having been unaffected by the divestiture, even though this is a necessary prerequisite for the use of the method.[20] Another example for the merger-related use of the method is found in Ashenfelter and Hosken, who analysed, using a set of different control groups, the price effects of five US mergers between producers of high-quality branded products. They decided that the most appropriate control group was private label products claiming that from the viewpoint of consumers these were only weak substitutes to the branded products.[21]

We summarise the arguments for and against the use of this method relying on Davis and Ormosi[22]. The appeal of the approach lies in its use of data of variables observed both in the relevant market and in the control market; consequently, the comparison is not affected by the theoretical and practical issues of model selection that are encountered in the case of simulations. This is also its disadvantage: it is an atheoretical methodology. This is clearly observable in the choice of the control group: the selected group is not necessarily the one that would be the most appropriate but the one that actually exists. In this respect it is particularly important that the observed markets should be affected by the same supply and demand shocks and in the same manner, or else the differences in these factors may have a material affect on the outcome of the comparison. On the whole, the authors consider that the DiD approach may only be usable in a small sample of markets, and its broader application is unlikely.

In addition to the three research approaches described above, some other methods should also be mentioned for the sake of completeness. Examples include aggregate macro-economy studies with a broader scope, follow-up surveys of market participants as well as expert commentaries on specific cases.

3.2. Default values used by competition authorities[23]

To the best of our knowledge there are five competition authorities that regularly prepare and publish *ex ante* impact assessments: the OFT, the DoJ, the FTC, the EC and the NMa (the Dutch competition authority). In addition, Mexico, Germany, Portugal and Japan have also engaged in such exercises with less publicity and/or regularity.[24]

Before the comparison of default values it is important to note that in the course of impact assessments, all the aforementioned competition authorities prefer case specific information for the estimation of price differences and the duration of the effect. Consequently, wherever possible, they use the methods mentioned in the previous section, in particular simulations or their simplified versions, and resort to default values only where no case specific analysis is possible due to the lack of data or other constraints such as scarcity of resources.[25]

The default values used by the various authorities are shown in Table 1. The table reveals that these values and their calculation methodologies may vary. This is because each authority has developed these values primarily based on its own experiences, which are necessarily different.

19 S. Tenn and J. M. Yun: The success of divestitures in merger enforcement. Evidence from the J&J–Pfizer transaction, International Journal of Industrial Organization, 2010.
20 See Stephen Davies and Peter Ormosi (fn. 1), 21.
21 It should be noted that serious reservations have been raised with regard to this choice, c.f. Stephen Davies and Peter Ormosi (fn. 1).
22 See Stephen Davies and Peter Ormosi, (fn. 1).
23 For the overview of default values I relied primarily on Stephen Davis: Impact Assessment: Methodologies and Assumptions. Working Party No. 2. on Competition and Regulation, Unclassified version, OECD, 2013, 2–14., as well as the publications and presentations of Péter Ormosi, Evaluating the Impact of Competition Law Enforcement, paper presented at OECD, June 2012, DAF/COMP/WP2(2012)5.
24 Stephen Davis: A Review of OFT's Impact Estimation Methods, 2010, http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1164.pdf.
25 Stephen Davis: Assessment of the Impact of Competition Authorities' Activities, OECD, 2013, point 19.

Table 1 Default values used by various authorities

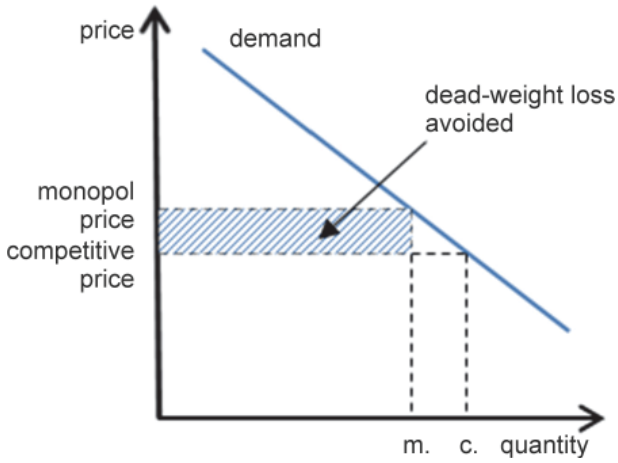
Authority	EU	USDoJ	OFT	NMa	OECD	GVH
	Cartels					
Price effect	10–15%	10%	10–15%	10%	10%	10%
Duration (Year)	1/3/6	1	6	1	3	2
	Mergers					
Price effect	simulated + 1%	simulated, or else 1% + dead-weight loss	simulated, or else the average of simulations + dead-weight loss	1+1%+ dead-weight loss	3%	5%
Duration (Year)	2–7	1	2	1	2	2
	Abuse of dominance					
Price effect	N/A	1% + dead-weight loss	10%	10%	5%	10%
Duration (Year)	N/A	2	6	1	3	2

Source: own compilation

The assumed price effect of cartels shows the most similarities, with the lowest value being 10% across the board while the EU and the OFT also used 15%. The estimates of the expected duration of cartels shows more variance. The DoJ and the NMa use the most conservative default values, the OFT and the EC representing the other extreme. The EC assesses the expected duration of discovered cartels based on case-specific information and uses one of the three values depending on the outcome. The OFT follows a similar approach except that the only non-case-specific value is the 6-year figure; they depart from this only if there is specific information available concerning the expected duration of the cartel. In this regard, the OFT's approach uses a less conservative estimate.

With regard to the expected price effects of merger cases each authority (disregarding the OECD and the GVH for the time being) is very conservative in its estimates. Each of these three authorities (EC, DoJ, OFT) employs some case-specific simulation model in their merger proceedings, and they use 1% of the assumed default or, in the case of the OFT, the average of previous simulations, only if the first approach is not practicable for some reason. Two authorities (EC and NMa) add an additional one per cent if the merger is assumed to enhance efficiency but this will not be reflected in the price. The defaults used for duration are similarly conservative (1 or 2 years), except in the EU, which, however, continues to prefer to use case-specific estimates for duration as well.

We should also note the dead-weight loss mentioned in the context of the default values of several authorities. The nature of this concept is best illustrated by the figure attached. In simplified terms,



the quantification of the benefit per year from proceedings, without the dead-weight loss, happens by multiplying the annual 'relevant turnover' (the value indicated in the figure by *m*) with the difference between the price resulting from the anticompetitive conduct (monopoly price) and the competitive price (price difference). The dead-weight loss is the

26 In this context see for instance Werden (fn. 14) or Stephen Davies: A Survey of the Approaches and Methods used to Assess the Economic Effects of a Competition Authority's Work, Swedish Competition Authority, 2012 or the views of Ormosi (fn. 23) expounded in his papers.

area of the small triangle next to the hatched square; for its calculation an estimate of the quantity without the restriction, indicated in the figure with v, would also be needed.

Finally, let us examine the most sensitive area of the impact assessment of interventions of competition authorities[26] the default values used in abuse of dominance cases. In respect of the price effect there is a significant difference between the values used by the two European authorities (OFT and NMa) and their US counterparts (DoJ and the FTC, the latter not shown in the table). The US authorities are much more conservative in this regard, which is indicated by the 1% default value used in the absence of case specific information. In contrast, the aforementioned two European authorities employ a 10% value in similar cases. The EC publishes no default values for abuse of dominance cases stating that the number of cases is so low that it would jeopardise the confidential treatment of information regarding the cases underlying the estimate.[27] In my opinion, the uncertainty of estimation in dominance cases may also play a part in that decision.

4. Recent developments

Table 1 also contains the default values used by the OECD and the Hungarian competition authority. Naturally, the OECD figures are recommendations as the organisation performs no impact assessments itself. However, these recommendations can be interpreted as a kind of average of the actual values employed by OECD member countries. Thus there is a consensus of the members underling this value.[28] The default values used in the first impact assessment prepared and published by the GVH are most similar to the values in the OECD recommendations.[29]

The definition of the default values is an important methodological issue of the *ex ante* assessment of the effect of the interventions of competition authorities on consumer welfare, but this is not the only such issue. Other methodological issues include the period to which the assessment relates, the frequency of estimates, the cases covered, the average values published, the type of cases analysed, whether the deterrent/dissuasive effect of interventions is taken into account, how the size of the market affected by the infringement is determined, how the court decisions following the authority's intervention are taken into consideration, to mention just the most important questions. This list also shows that the determination of the default values discussed in this paper is only one of the methodological issues that may affect the validity of impact assessments prepared by the authority.[30] The discussion of these important methodological questions, however, is beyond the scope of this paper.

27 This suggests that even though authorities perform *ex ante* impact assessments and calculate the consumer harm avoided on a case-by-case basis, they only disclose the averages of all the cases investigated in a particular period.

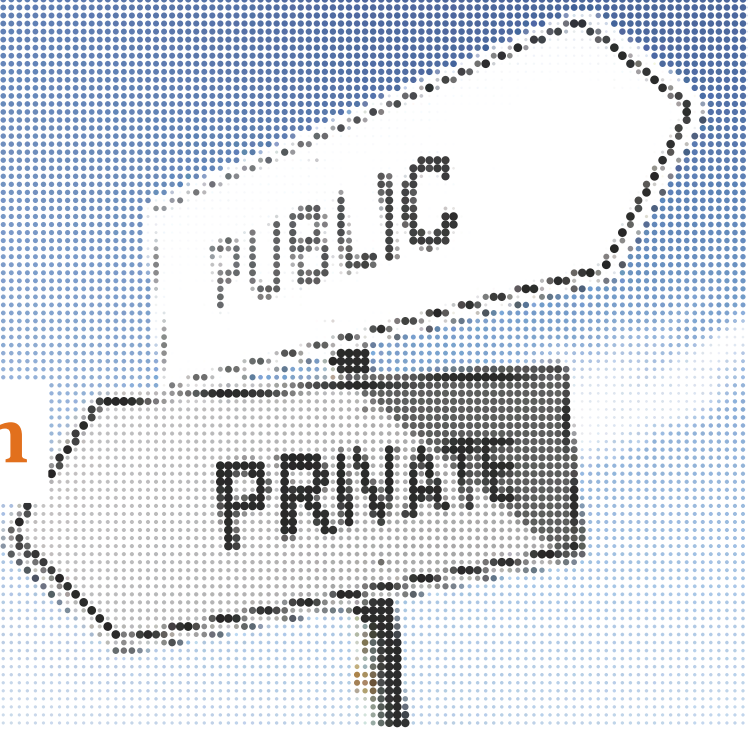
28 The values in the aforementioned OECD guide was adopted by the member countries on 25 February 2014. The Guide is expected to be published in May 2014, OECD: Guide on impact assessment, 2014, forthcoming (published since the article was submitted – *the ed.*).

29 The public version of the GVH's impact assessment is available on the GVH website at the time of publication of this paper.

30 The independent review of the GVH's impact assessment by the experts of the MTA/KRTK is also available on the GVH website.

András Bodócsi*

Privatisation in the experience of the Hungarian Competition Authority



Abstract

Pursuant to the Competition Act in force between 1991 and 1996, a foreign undertaking which did not have turnover in Hungary did not have to seek authorisation for a Hungarian merger, even if undertakings belonging to the same group of undertakings had turnover in Hungary. In this era, such foreign undertakings accounted for the overwhelming majority of significant privatisation. Therefore, the above-mentioned privatisations were not considered as mergers and did not require the authorisation of the GVH. This was advantageous as the priority economic policy purposes manifested in the privatisation decisions could not be questioned. During privatisation, in most cases the cooperation between the ÁVÜ (Állami Vagyonügynökség – State Property Agency) and the GVH (Hungarian Competition Authority) ensured that competition related interests were protected. In only a limited number of areas privatisation led to unfavourable market structures which might have been prevented if merger control had been performed by the GVH. From 1997, authorisation had to be sought for the mergers of foreign undertakings. However by this time, privatisations which were significant in terms of their effect on competition had already been completed. As a consequence, after 1997 all merger applications which related to privatisation were authorised by the GVH.

1. Introduction

Preparations for the introduction of competition regulation in Hungary started already in the mid-1980s in the National Price Office. The project received funding from international financial organisations (World Bank, IMF) and included visits to study the competition laws and enforcement practices of major European countries. As a result, the codification work on what was to become Act LXXXVI of 1990 on the prohibition of unfair market practices ('Competition Act'), coordinated by government bodies (primarily the Ministry of Justice) were competed by the autumn of 1989, and the draft was published in the economic weekly *Figyelő*. The draft bill also provided for the establishment of a competition authority (though not called '*Gazdasági Versenyhivatal*' at the time).

However, in the emerging uncertain political environment the Government did not submit the bill to Parliament. The new government that was formed in mid-1990 submitted to Parliament the draft worded in the autumn of 1989, which was passed, practically unanimously, on 20 November 1990. The Competition Act entered into force on 1 January 1991 and the Hungarian Competition Authority was established.

This was significant for the relationship of privatization and the Hungarian Competition Authority ('GVH') because state ownership was predominant when the Competition Act was being drafted, and the rules and institutional framework of the organised privatisation of state property had not been set up by the autumn of 1989, when the Competition Act was elaborated. While the Companies Act[1] and the Transformation Act[2] entered into force on 1 Janu-

* Hungarian Competition Authority – Competition Council Expert.

1 Act VI of 1988

2 Act XIII of 1988

ary 1989, they were necessary but not sufficient prerequisites for state-organised privatisation and, in themselves, they only opened the door to so-called spontaneous privatization, which was subsequently considered a qualified success. The privatisation legislation, which changed frequently and contained experimental arrangements[3], set up the State Property Agency ('SPA' or 'Property Agency'), the body with primary responsibility for state-organised privatisation to exercise the ownership rights of the Hungarian State, and laid down the procedures governing privatization only in March 1990.[4]

2. The role of the Hungarian Competition Authority in the privatization process between 1991 and 1996

2.1. Relationship of competition regulation and privatization

As a result, the Competition Act worded in the autumn of 1989 did not directly address the relationship of privatisation and competition rules. This would have been necessary because privatization transactions always entail the acquisition of (typically voting) shares of the state-owned enterprise transformed into a business association. For such acquisitions of dominant influence over the privatised entity, the acquirer needed to obtain the consent of the Hungarian Competition Authority pursuant to the Competition Act if the joint market shares of the undertaking acquiring control and the acquired undertaking in the relevant market, in respect of any of their products, exceeded 30 per cent.[5] Consequently, the privatization decision could be followed by a competition supervision proceeding which could have prohibited a merger involving the acquisition of dominant influence, subject to an authorisation requirement as described above, if deemed detrimental or dangerous to competition.

Looking at the issue from the other side, the legislation governing state-organised privatisation also failed to connect privatization to competition rules. This would have been important because privatisation was practically the only opportunity to directly enforce competition policy objectives (in particular demonopolisation and deconcentration). The Competition Act (just as most competition laws) allows, through merger control, only interventions against the increase of concentration.

As the only appreciable attempt at avoiding the possibility of a clearly undesirable conflict between the objectives of privatization and competition regulation, the Property Policy Guidelines[6] adopted by Parliament in March 1990, after the establishment of the SPA, states in its Section 2.1. the *"Property Agency, before the transformation or sale of an undertaking, should consult: [...] the Competition Authority to be established if the company to be sold is in a dominant position"*. It also stated in its introduction that *"The sale of [state property] should promote the development of market competition, and through organisational decentralisation reduce the number of dominant undertakings."* Furthermore, the Property Policy Guidelines contained specific criteria for the consideration of the interest of competition, albeit with some restrictions. Pursuant to Section 2.2., *"In the course of the sale of state property in general, attempts should be made to ensure that in the course of the sale the freedom of competition is increased and economic dominance is reduced even if this means the acceptance of a bid less favourable in terms of purchase price."* Section 2.3. stated that *"Ownership rights conferring majority control over such undertakings that are in a monopoly or oligopoly position and have negligible actual or potential convertible-currency exports should not be sold."*

This, however, was more of a wish list rather than an enforceable normative rule set. As a result, they had limited capacity to prevent conflicts between privatisation and competition supervision decisions. In the course of privatization decisions, considerations of competition policy as well as other

3 Tamás Sárközi: A tisztességtelen piaci magatartás tilalmáról szóló törvény a magyar gazdasági jogfejlődésben [The Act on the prohibition of unfair market practices in light of the development of Hungarian economic law] (in: Verseny- és Árszabályozás, Unió Könyvkiadó, 1991, Ed.: Ferenc Vissi).

4 Act VII of 1990 on the State Property Agency and on the management and utilization of property belonging to its scope; Act VIII of 1990 on the protection of assets entrusted to state-owned enterprises.

5 Section 26 of the Competition Act

6 Parliamentary Resolution No. 20/1990 of 12 March 1990 on the temporary Property Policy Guidelines of 1990.

aspects of importance for the national economy were (and had to be) enforced. For instance, the preservation of production capacities and of jobs and, importantly, the generation of the highest possible privatization proceeds. Of these, the latter would be the most likely to come into conflict with the consideration of competition law, in particular in view of the imbalance in the Hungarian public finance system at the time and the ever increasing need to boost budget revenues. The potential ability of an undertaking to be privatised to increase prices and to generate revenue is closely related to its market share. The greater the market share of an undertaking, the higher its ability to charge prices above the competitive level.[7] From the aspect of competition policy it is this high market share that may give rise to concerns when mergers are proposed. In simplified terms: purchasers of state-owned companies had an interest in acquiring companies with the highest possible market shares and they were willing to pay a relatively higher price for that market. This was not against the interests of the SPA, which was urged to increase privatization proceeds (and complete privatization as soon as possible). In contrast, competition policy would clearly have favoured the privatization of companies with high market shares by breaking them up, as much as reasonable and possible, into several undertaking with smaller market shares.

2.2. Competition supervision in practice

This problem, however, was effectively not encountered in practice. The first application for merger (acquisition of dominant influence) following a privatization decision was submitted in mid-1990 to the GVH (by a foreign buyer not engaged in distribution in Hungary), which was assessed on the merits and authorised with some conditions imposed.[8] During the assessment of the applications submitted in the second half of 1991 and early in 1992[9] the GVH adopted the view that pursuant to the Competition Act the acquisition of the majority of stocks or business shares constitutes the acquisition of dominant influence subject to the authorisation of the GVH only if both parties (the acquirer and the acquired) are 'entrepreneurs' within the meaning of the Competition Act. Pursuant to the Competition Act, entrepreneurship (and thus being covered by the effect of the Competition Act) required the pursuit of production or service related business activity for consideration in the territory of the Republic of Hungary.[10] This meant that a non-resident privatisation buyer that had not engaged in distribution in Hungary was not considered an entrepreneur within the meaning of the Competition Act, and thus it did not need to seek the authorisation of the GVH to acquire control. Importantly, a foreign investor was not deemed to be an entrepreneur within the meaning of the Competition Act even if it already had a (controlling) ownership share in a Hungarian company.[11]

In view of this, in its decision of February 1992 the GVH adopted the position concerning all three applications that "there is no obligation to request a prior authorisation".

Subsequently the GVH informed the SPA about the relationship of privatization and merger control proceedings as described above, and the two bodies adopted the joint decision to strengthen their cooperation so that considerations of competition policy are given due regard in privatization decisions. To this end they agreed that, over and above seeking the opinion of the GVH as required in the Property Policy Guidelines, the representative of the GVH will be a permanent observer at the meetings of the Board of Directors of the SPA and the views of the GVH will be taken into consideration when adopting a decision.

After this agreement between the SPA and the GVH, there was only one merger application submitted to the GVH before end-1995 relating to a privatization transaction with a foreign buyer. In the case of the acquisition of a 35% stake by Alitalia in Malév, the Hungarian Airlines, the GVH also established a lack of obligation to seek authorisation. This deci-

7 Motta, Massimo: Competition Policy: Theory and Practice. Gazdasági Versenyhivatal Versenykultúra Központ, Budapest, 2007, pp. 127–128.
8 Vj-77/1991.
9 Vj-130/1991, Vj-150/1991 and Vj-19/1992.
10 Section 1 and Section 2(a) and (b) of the Competition Act.
11 Bodócsi, András – Fógel, Jánosné: A privatizáció és a vállalkozó versenytörvényi fogalmának összefüggései [The relationship of privatization and the concept of entrepreneur in the Competition Act], Versenyfelügyeleti Értesítő, 1993/3., pp. 77–79.

sion, however, was not based on Alitalia not engaging in business activities in Hungary but on the fact that the 35 per cent share does not cover dominant influence, and Alitalia did not receive any other power that would have ensured dominant influence over the decisions of Malév.[12]

A larger number (altogether ten) of merger applications were submitted to the GVH relating to the privatization of electricity companies at the end of 1995 and in 1996 pursuant to the decision of the State Privatisation and Holding Co. ('ÁPV')[13], the successor of the SPA. In this round of privatisation dominant influence was obtained over Hungarian electricity providers and power plants by mostly German (e.g. RWE, Bayerwerk) and French (e.g. EDF) undertakings that had not engaged in business activities in Hungary. Again, the GVH responded to their applications by stating the absence of an obligation to seek authorisation.[14] There was only one additional merger application relating to privatisation transactions implemented by the ÁPV with a foreign undertaking engaging in no business activity in Hungary, where absence of a requirement to seek authorisation was established again.[15]

The aforementioned applications were submitted even though the GVH established a cooperation with the ÁPV similar to the one it had had with the SPA. Thus the ÁPV initiated the merger control applications with the GVH even though it was fully aware of their outcome (absence of an obligation to request authorisation). In the case of energy privatisation, the high-profile and otherwise problematic nature of the transactions may also have played a part. For instance, the GVH noted already in its report to Parliament on 1993 that "*The privatization of the large supply systems need to be preceded, with a view to establishing the framework for market operation, by the elaboration of sectoral regulations.*"[16] Such regulations had not been elaborated before privatisation, as noted by the GVH in its report to Parliament on 1995.[17] The problems of the privatization of natural monopolies (an in particular energy providers) were highlighted by academics as well in mid-1995, when energy privatization was in the planning phase.[18]

Finally the GVH received one application where the privatization was not organised directly by the privatization agency (in this case the ÁPV) but the majority state-owned Hungary Electricity Co invited a tender for the sale of Energetikai Gyártó és Szolgáltató Rt., its fully owned subsidiary. Siemens AG München und Berlin, which had no economic activity in Hungary, obtained dominant influence, and the GVH, in conformity with its established practice, established the absence of an obligation to seek authorisation.[19]

In its report to Parliament early in 1993, the GVH raised the issue of the relationship of privatisation and competition law described above and noted that this should be resolved sooner or later.[20] In 1993 preparations for the amendment of the Competition Act started with involvement of a wide scope of the legal profession (researchers of the Institute of Political Science and Law of the MTA, staff of the Department of Civil Procedure of the Faculty of Law of ELTE). The objectives of the amendment included the change of the effect of the law to make the relationship of privatisation and competition regulation more manageable.[21] This was eventually achieved in Act LXVV of 1996 on the prohibition of unfair and restrictive market practices (CA), which entered into force on 1 January 1997 and provided that an application for any merger meeting the authorisation limit set out in the CA needs to be submitted to the GVH, irrespective of whether or not it is privatisation related (see Section 3.1. for the content of the amendment). However, until end-1996 the GVH took part in the privatization in the former framework.

12 Vj-15/1993.
13 Act XXXIX of 1995 on the sale of state-owned entrepreneurial assets.
14 Vj-237-243 and 248/1995, Vj-145 and 209/1996.
15 Vj-192/1996.
16 Report to Parliament on the activities of the Hungarian Competition Authority in 1993, 4.
17 Report to Parliament on the activities of the Hungarian Competition Authority in 1995, 10.
18 Illés, Mária: A nagy gazdasági csapda, avagy: a külföldi szakmai befektetők uralma a természetes monopóliumok felett [The economic catch, or the rule of foreign strategic investors over natural monopolies]. Magyar Nemzet, 26 July 1995, and Ipar-Gazdaság, 1995/8–9.
19 Vj-262/1996.
20 Report to Parliament on the activities of the Hungarian Competition Authority in 1992, 8.
21 Report to Parliament on the activities of the Hungarian Competition Authority in 1993, 24.

2.3. The 'what if' question

One may reasonably wonder whether privatisation would have run a different course or the competitive environment would have developed differently if **the effect rule introduced in the CA had been in force since 1991, and thus foreign investors had needed to turn to the GVH after the privatization decisions.** Naturally, such questions are difficult to answer. Having said that, it is not entirely unreasonable to investigate this issue because it helps assess the role of the GVH in the privatisation process (as described above) between 1991 and 1996. The question and answer can be approached either from the side of privatization or competition policy. From the aspect of privatization, the fundamental question is whether the economic government of Hungary at the time would (could) have allowed major privatization decisions (which were likely to reach the merger control threshold) to be subordinated to the direct interests of competition policy. From the aspect of competition policy, we may wonder if a more favourable market structure would had evolved by the second half of the 1990s if the effect rule of the Competition Act had allowed the control of privatization procedures with foreign undertakings as buyers under merger control procedures.

2.3.1. From the aspect of privatization

It is completely clear that the legal situation under the Competition Act (whether this reflected the intent of the legislator or not) was decidedly advantageous in the sense that, considering that companies of importance for the national economy were acquired by foreign investors almost without exception, the GVH's proceeding could slow down the implementation of a privatisation decision that served an economic policy priority only in exceptional cases. Thus the privatization decision, based on the weighing of a combination of different interests, could not be subordinated to the interest of competition. Even at that time the GVH was obliged to assess mergers (including the acquisition of dominant influence) primarily based on their effects on competition.[22] However, being 'advantageous to the national economy' was also a factor to consider.[23] However, a broad interpretation of this criterion, which was controversial and dropped from the CA, that the GVH should assess a merger control application following a privatisation decision within the context of the entire national economy (weighing all the often mutually exclusive interests) would have resulted in the GVH becoming a review body for the SPA's decisions. That is, the final decision on privatization would have effectively been taken by the GVH. Taking into account the possibility of the judicial review of GVH decisions, this would have slowed down the privatization process to an extent that would have been in severe conflict with the economic policy priorities of the time. It is also worth noting that in the merger control procedure following the privatisation decision the GVH could have re-assessed the privatization arrangement approved by the SPA from the aspect of competition only.

Accordingly, if the effect rule of the Competition Act had not ruled out the merger control of privatisation transactions deemed to be significant for the national economy, then, assuming a consistent economic policy of the government, the economic government would have had no choice but to adopt legislation to the effect that privatisation-related mergers require no authorisation from the GVH.

The possibility of conflict between privatization and competition supervision decisions is illustrated by the Pest-Budai Gasztrolánc Kft. (Gasztrolánc) and Junior Vendéglátó Rt. case. The SPA concluded the agreement with Gasztrolánc for the sale of a majority stake in Junior. However, the authorisation of the GVH was also necessary because Gasztrolánc, which acquired a dominant influence through the transaction, was an enterprise active in Hungary and thus covered by the CA , furthermore, the application threshold set out in the Competition Act was also met. The GVH prohibited the merger.[24] This is particularly noteworthy considering that this was the only decision of the GVH under the Competition Act whereby it prohibited a merger. In its decision, the GVH also clarified two important issues relating to the relationship of privatization and the Competition Act.

22 Section 24(1) of the Competition Act.
23 Section 24(2)(c) of the Competition Act.
24 Vj-172/1994.

On the one hand, it did not accept the view of Gasztrolánc, which was also supported by the Ministry of Industry and Trade, which had been notified[25] as required by the Competition Act, that the GVH *"has no jurisdiction in the privatization cases of the SPA, therefore it needs to refuse the assessment of the merits of the case on grounds of an absence of jurisdiction."*[26] A GVH, though noting the problematic nature of the merger procedure following the privatisation decision, clearly stated that *"the authorisation of the acquisition of dominant influence pursuant to a privatization decision is outside the jurisdiction of the Hungarian Competition Authority only if it is implemented through an administrative resolution [Section 23.(3) of the Competition Act]. The SPA and its Board of Directors, however, is not the representative of the State as a public authority; instead, it exercises the ownership rights of the State. Consequently, its decisions are not public administration resolutions in terms of form or content."*[27]

On the other hand, the decision explained in respect of the assessment that *"even though the Competition Council accepted the economic principle, currently considered to be an axiom, that private property can function more efficiently than state property, it considers this to be valid only if all other circumstances are identical. Consequently, it did not necessarily consider the situation resulting from privatization to be more favourable than the pre-privatisation situation, irrespective of the differences in the state of competition."*[28]

2.3.2. From the aspect of competition

From the entry into force of the Competition Act on 1 January 1991 to 31 December 1996 the GVH received only 31 merger applications relating to privatisations with a Hungarian undertaking as the buyer, therefore the GVH assessed these applications on their merits. It should be noted that in each of these cases decisive influence was acquired by undertakings in majority foreign ownership, thus the necessity to seek authorisation could have been avoided if the privatisation transaction involving the acquisition of decisive influence had been concluded by the parent of the Hungarian undertaking or a foreign subsidiary of that parent company.

The GVH allowed four of the five mergers[29], prohibiting the transaction in the aforementioned Vj-172/1994. case. In the latter case, as explained above, it did not consider the privatization context to be a circumstance that could have been assessed in itself as a benefit justifying the authorisation. It is important, though, that the decision concluding the case also stated that *"it would be more advantageous for the preservation and development of competition if control over Junior were acquired by an undertaking that is not a participant in the catering market. However, the Competition Council did not compare the market situation that would result from the authorisation of the acquisition of decisive influence to such a hypothetical possibility; instead, it sought to find out which would be more beneficial for the preservation and development of competition: the authorisation of the acquisition of decisive influence or its prevention and thus the maintenance of the status quo (without privatization)."*[30] In terms of their content, two decisions authorising acquisitions also outlined a similar approach.[31]

2.3.2.1. Investors that are new entrants on the Hungarian market

The approach described above would have been relevant primarily for the hypothetical GVH assessment of privatization transactions by foreign undertakings where neither the undertaking obtaining control nor the indirect participants[32] (in the current terminology of the CA: undertakings belonging to the same group) had engaged in economic activities in Hungary before the privatization ('investors that are new entrants on the Hungarian market') In this case there is only a change of ownership without any increase of concentration in Hungary, thus there is no lessening of competition.

25 Section 45(3) of the Competition Act.
26 Vj-72/1994. paragraph 5(a)
27 Idem paragraph 10.
28 Idem paragraph 17.
29 Vj-137/1992, Vj-205/1992, Vj-236/1994 and Vj-203/1996.
30 Vj-172/1994, paragraph 17.
31 Vj-137/1992 and Vj-236/1994.
32 Section 27 of the Competition Act.

This does not mean that privatization by foreign investors could have had no harmful effects on the national economy. These could have appeared (and unfortunately did appear in more than one cases) in case of strategic investors whose group of undertakings engaged in activities abroad that were horizontally or vertically connected to the activities of the Hungarian undertaking sold. In case of horizontal linkages the acquirer could have an incentive to increase the turnover of a foreign undertaking within its group in Hungary rather than promoting the Hungarian company acquired, often leading to the closedown of the privatised Hungarian firm (as it was termed after the problem was realised: 'the investor bough a market rather than a company'). In case of vertical linkages, the investor could employ such (so-called transfer) prices within the company group to ensure that some of the profits that would have been generated by the Hungarian undertaking at arms' length prices was transfered to foreign members of the group.[33] This incentive was only strengthened by the fact that in the privatization process often an ownership share of barely more than 50 per cent was sold (to assure decisive influence), while in the case of utility companies stakes below 50 per cent were sold and the decisive influence of the foreign investor was assured by their right to appoint the majority of senior executives. In such cases the disclosure of the revenues generated by the Hungarian firm in the books of the foreign undertaking did not only mean that the relevant tax was not paid into the Hungarian budget but also that the foreign owner did not need to share the revenue 'syphoned off' with the Hungarian owners.[34] Nevertheless, the aforementioned problems are unlikely to have substantiated the prohibition of a merger that did not result in increased concentration.[35]

Accordingly, if the GVH had had to make a decision on the merits of such cases, in light of its position described above it would have hardly claimed (and in accordance with the Competition Act it could not have claimed) that it prohibits a merger because there is an alternative privatization arrangement that is more favourable to competition (e.g. the break-up of the company to be privatised and the sale of the resulting firms to different investors). This was pointed out in the Report of the GVH to Parliament on 1992, noting that *"In a competition supervision proceeding the decision is about a specific merger under a particular privatization arrangement; it is not possible to propose a different investor or technique."*[36]

Accordingly, the acquisition of decisive influence by foreign undertakings that had not engaged in business activities on the level of their company group could not have been prohibited even if the effect rule of the CA could have been enforced, and even if the transaction were to conserve a monopoly. For instance, this would have been the case in two merger proceedings that were closed by establishing the absence of competence and thus of an obligation to apply for authorisation: the monopolies preserved in carbonic acid production[37] and in the vegetable oil sector[38] after privatisation could not have been prevented with the tools of competition supervision.

Consequently, it was not detrimental from the aspect of competition policy that the mergers implemented by the groups of undertakings that entered the Hungarian market for the first time did not fall under the Competition Act. It is unlikely that the GVH could have blocked these mergers in its competition supervision proceeding, while during its cooperation with the privatisation agency (particularly after it started attending the board meetings of the SPA) it had the opportunity to champion the considerations of competition policy as much as it was possible during the privatization decision. It did so primarily by arguing for privatization arrangements where state-owned companies that were monopolies or dominant before privatization are decentralised as much as possible, and the resulting independent undertakings are sold. This was the privatization arrangement implemented in several industries (e.g. tobacco industry,

33 In that period there was practically no regulation of such transfers of profit.
34 For the detailed discussion of the issue see: Illés (footnote 18.) and Illés, Mária: Privatizációs módszerek és jövedelmezőségi perspektívák [Privatisation techniques and profitability potentials]. Ipargazdasági Szemle, 1996/1–3.
35 This is also confirmed by the fact that pursuant to the EU merger law effective at the time (and also at present) as well as the rules of the Competition Act compatible with EU law, the acquisition of decisive influence by an undertaking that has zero turnover in Hungary is not subject to an authorisation obligation.
36 Report to Parliament on the activities of the Hungarian Competition Authority in 1992, 6.
37 Vj-150/1991.
38 Vj-19/1992.

breweries), which put an end to the monopoly or reduced the former level of concentration.

2.3.2.2. Investors present on the Hungarian market

The situation is much less positive where a foreign member of such a company group participated in the privatization which already had another member (generally also acquired through a privatization transaction) engaging in business activities in Hungary. In the event of such privatization-related acquisition of decisive influence concentration may increase or vertical relationships may change for the worse. Thus if the effect rule of the Competition Act had not prevent their control by the competition authority, anticompetitive transactions could have been prevented by the assessment of the merits of the case where the interests of competition policy could not be effectively enforced through cooperation with the privatization agency.

Such situations could emerge primarily where a state-owned company (typically) with a nationwide presence consisted of clearly identifiable parts (plants), which were capable of independent operation, and thus the company was split up (demonopolised) while still state-owned or could be (could have been) split up during privatization. In such cases the interest of competition policy is not a simple break-up but also that the various parts are sold to different owners wherever possible. In a considerable proportion of cases (e.g.. in the aforementioned brewery and tobacco sectors) this was the chosen method. This is to a large part attributable to the pro-competition approach of the Board of Directors of the SPA, which was manifested in the elaboration of decentralised privatization alternatives and of tender terms restricting multiple purchases.[39]

Nevertheless, there were some sectors (e.g. sugar industry, cement industry) where by end-1996 privatization had created such an unfavourable market structure that could have been prevented through merger control.[40] The sugar refining sector is a typical example.

Before the start of privatization there were 11 state-owned sugar refineries in Hungary. As the first step of privatization, control of thee refineries (with an aggregate market share of 35 per cent) was acquired by the French Eridania Beghin Say SA, and two plants (with an aggregate market share of almost 25 per cent) by the German Agrana AG. At the end of 1993 the majority stake in five of the remaining six refineries was acquired by the First Hungarian Sugar Production and Distribution Consortium, a combination of agricultural producers also growing sugar beet. On 1 July 1995 the five sugar plants created, through a merger, the First Hungarian Sugar Production and Distribution Rt. ('EHCF') with the consent of the GVH[41]. The GVH gave the green light to the merger despite the over 30 per cent aggregate market share of the merging undertakings in view of the fact that without the merger "*the trends on the sugar market were driven essentially by the will of two groups of undertakings. In contrast, after the merger there would be three independent business policies present and competing in the market.*"[42] Barely a year after the merger, on 26 September 1996, pursuant to the decision of the ÁPV, Agrana AG, which already owned two sugar plants in Hungary, was allowed to obtain the majority of the EHCF (which combined the five sugar refineries), increasing the share of the Agrana group in the Hungarian sugar market above 50 per cent. (Meanwhile the last remaining state-owned sugar refinery, Kaba, was also acquired by a foreign investor, the Dutch Eastern Sugar BV.) The parties applied for an authorisation of the merger to the GVH; however, in the legal environment described in detail above the only decision open for the GVH was to declare that "*there is no obligation to apply for authorisation*".[43] In view of the decision prohibiting the Gasztrolánc/Junior merger[44], we cannot rule out the possibility that, if allowed to decide, the GVH would have consented to a merger resulting in such a high market share.

39 Report to Parliament on the activities of the Hungarian Competition Authority in 1992, 9.

40 For a detailed discussion of the issue see: Kovács, Csaba – Pogácsás, Péter: A privatizáció mezzo szintű hatásai [Mezzo level effects of privatization], 1994 (study, Budapest University of Economics, Department of Business Economics) and Kovács, Csaba – Pogácsás, Péter: A magyar versenyszabályozás hatása a versenyképességre [Effect of Hungarian competition regulation on competitiveness], 1997 (study, Budapest University of Economics, Department of Business Economics)

41 Vj-77/1995.

42 Vj-77/2015. paragraph 12.

43 Vj-192/1996.

44 Vj-172/194.

There were also multiple purchases during the privatization of electricity service providers: the RWE/EDS and the EDF both acquired decisive influence over two electricity providers each[45], and there was an undertaking that obtained control of an electricity as well as a gas company. However, the GVH is unlikely to have been able to prevent these transactions. This is indicated by a decision adopted after the entry into force of the CA, which was not privatization-related but concerned a transaction between the foreign owners of the electricity companies. In this decision the GVH concluded the absence of market effects on the basis that even though the various electricity companies engaged in the same activities, *"but in geographical markedly separate areas, and under the effective regulations neither has the possibility to enter the geographical market of the other firm. Consequently, the merger does not result in any increase in concentration."*[46] The GVH does note in its decision that *"in the future, when regulations are liberalised, there may be a situation when the present concentration of ownership will also mean the concentration of markets."*[47] However, the GVH did not see any possibility to take this into consideration in its decision under the CA, primarily due to the uncertainty of the time and mode of future liberalisation. This is also suggested by the fact that the GVH prohibited the merger of two telecommunications providers operating in distinctly separate geographical areas at the time of the proposed merger (similarly to the electricity providers) with reference to the market situation expected to emerge after liberalisation; this was possible because at the time of the merger decision the date of liberalisation had already been set and most issues relating to the mode of implementation had already been decided.[48] This leads to the conclusion that the GVH would not have prevented the multiple purchases of the electricity providers in the framework of the privatization process a few years earlier even if the effective regulations had allowed it to do so.

Based on the above we can conclude that even though the rules of the Competition Act were on the whole unfavourable to competition policy with regard to investors already present on the Hungarian market (indenting to make multiple purchases), it cannot be claimed - with the exception of a few industries – that a substantially better (less concentrated) market structure would have emerged by the end of 1996 if the effect rule of the CA had been in force at the time.

3. Competition regulation and privatization after 1997

3.1. Changes in the effect rule

Based on the above considerations the fact that the effect of the Competition Act did not cover foreign undertakings (investors) not engaging in direct business activities in Hungary was decidedly advantegeous for privatization, and we can state with relative certainty that even from the aspect of competition policy there were only a few fields where this led to an unfavourable market structure that could have been prevented had the foreign investor also been covered by the Competition Act. The effect rule of the Competition Act was controversial in respects other than the issues relating to privatisation by foreign investors, as also highlighted in the official explanation to the CA[49] (published in the Hungarian Official Journal).

The problem was rooted in the fact that the Competition Act defined the concept of business activity, which laid the ground for a narrow interpretation of the concept. The CA avoided this problem by refraining from defining 'market conduct', a term introduced for substantive scope, thus it covers all practices or acts that are regulated by the CA in some form (prohibition, obligation to apply for authorisation). Also importantly, the CA also refrains from defining the term 'undertaking', which replaced the 'entrepreneur' used in the Competition Act. The latter was a collective term for legal and natural persons, with no underlying content that could be controversial.

45 They could not have obtained more as pursuant to Government Decree No. 1064/1995 of 6 August 1995, "in the field of electricity supply, a single strategic investor, when bidding on its own, may not be awarded more than two undertakings".
46 Vj-26/1997. paragraph 20.
47 Idem paragraph 23.
48 Vj-107/1998.
49 *"The slightly casuistic definitions in Section 2 of the Competition Act brought about problems during enforcement […] because the scope of the act covered the business activities of entrepreneurs while entrepreneur is defined as an entity engaging in economic activities".*

Thus based on the effect definition of the CA, mergers[50] implemented by investors not engaging directly in any 'business' (distribution) activities in Hungary have been brought under the control of the GVH as long as they reach the application thresholds.

3.2. Privatisation related mergers

However, the aforementioned effect rule of the CA had no substantive relevance for privatisation related mergers because the overwhelming majority of privatization transactions of national economy importance had been completed by the end of 1996. This is indicated by the fact that after 1 January 1997 the GVH received only 11 applications for merger control relating to privatization transactions of the ÁPV, while no such applications were submitted from the first half of 1998 to 2002. Furthermore, in 9 cases a Hungarian undertaking acquired control, and in two other instances foreign undertakings that had imports to Hungary, thus the authorisation of the GVH would have been required for them even under the Competition Act.

None of the 11 cases raised competitive concerns. All of them could have been authorised in the simplified procedure currently employed. Most of them because the mergers were implemented in clearly competitive markets (the majority in the trade sector) between undertaking with low market shares.[51] In the minority of the cases the investor was not strategic but a financial investor with no market links to the acquired undertaking, thus even the privatization of undertakings with large market sizes and shares (Ikarus, Hungarocamion)[52] raised no competitive concern.

This nature of the privatization transactions submitted to the GVH facilitated the conclusion of a cooperation agreement between the ÁPV and the GVH, to the effect that "*the GVH, while complying with the provisions of the competition act, adopts its decisions in an expedited procedure as long as the conditions for such procedure are satisfied and no competition related concerns are raised.*"[53]

In addition to the privatization transactions conducted by the ÁPV, the Municipality of Budapest sold a share package conferring 25 per cent + one vote in its fully owned companies Fővárosi Vízművek Rt. (Metropolitan Waterworks) and Fővárosi Csatornázási Művek Rt. (Metropolitan Sewage Works). The shares were sold to a single investor in each case, German and French, which were jointly granted powers to appoint the majority of the board members of the undertakings. Thus both undertakings came to be under joint German–French control. In the case of both the Waterworks and the Sewage Works one of the acquirers had had stakes in Hungary in water and sewage companies operating in other communities. This, however, did not prevent the authorisation of the mergers through the acquisition of joint control because in the case of water and sewage services there is no possibility for new providers to enter the market in a given town, and liberalisation was never considered for these services, thus the merger brought about no change in the competitive situation. Naturally, these transactions also had the disadvantages discussed above,[54] but they could not be considered by the GVH when it made its decision.

Privatisation was resumed after 2002. In this context the GVH received several merger applications, including for the privatization of major undertakings such as Postabank,[55], Dunaferr[56] or Nemzeti Tankönyvkiadó (a publisher of schoolbooks).[57] While the investors were strategic in each case, their market shares in Hungary were not substantial enough to give rise to competitive concerns, therefore the GVH allowed the mergers (mostly in an expedited procedure).

In this period several local governments sold minority shareholdings in their public utility compa-

50 The CA introduced the collective term 'concentration' for the various types of mergers, which, however, denotes the same concept as the term 'merger' previously exclusively applied and still used in competition law.
51 See for instance Vj-52/1997.
52 Vj-27/1998 and Vj-34/1998.
53 Report to Parliament on the activities of the Hungarian Competition Authority in 1997, 31.
54 See footnote 18 and footnote 34
55 As an interesting feature, first the also state-owned Hungarian Post Office acquired control over Postabank (Vj-45/2002), to subsequently pass it on to the Austrian Erste Bank (Vj-140/2003).
56 Vj-57/2014.
57 Vj-187/2004.

nies, transferring the right to appoint senior executives and thereby control.[58]

3.3. Turning point in economic policy after 2010

After 2010 Hungarian economic policy radically changed its previous approach of considering state ownership inherently inferior to private ownership. This resulted not only in no privatization transactions being implemented in the 2010s but also in the State obtaining majority stakes in previously privatised undertakings, mainly in public utilities and the banking sector, which constituted concentrations. Accordingly, the GVH conducted merger control proceedings in respect of several acquisitions by the Government or local governments.[59] The GVH granted the authorisation in each case.

The return of certain utility companies to state (local government) ownership was promoted by the intensification of state intervention, in particular the so-called 'utility rate cut' drive, which noticeably reduced profitability potentials, thus the former owners were not necessarily reluctant to part with their shareholdings.[60]

At the end of November 2013 the situation changed in that the Government was authorised to classify a concentration, in a decree, as being of strategic importance at the national level, requiring no authorisation from the GVH.[61] After this, there was only one merger application submitted to the GVH relating to the acquisition of majority ownership by the State. On the other hand, each concentration classified to be of strategic importance at the national level entails the acquisition of ownership by the State. This means in practice that the GVH has been barred from the control of the acquisition of ownership by the State from the aspect of competition policy. In a certain respect the situation is similar to the 1991–1996 period. At that time, privatization was the priority objective of the national economy, and as explained above, there were benefits to the limited competition supervisory control that was possible. Now a certain reversal of privatization, which may have been overdone at the time, and the increase of the ratio of state ownership to a level not excessive relative to developed market economies, are also priorities for economic policymakers. Again, it is not necessary disadvantageous that government decisions adopted taking into account different, often competing national economy interests cannot be overridden based on competition policy considerations alone. There is an important difference between the situation then and now, though: in the course of the privatization process the GVH had a right to be consulted, thus it could introduce the considerations of competition policy into the decision making process.

4. Conclusion

Pursuant to the Competition Act effective between 1991 and 1996 foreign undertakings making no sales in Hungary did not have to apply for authorisation of a merger in Hungary even if other undertakings in their group had turnover in the country. In this period such undertakings participated in the overwhelming majority of privatization transactions. Consequently, the authorisation of the GVH was not required for these mergers. This was advantageous in the sense that the priority of privatization decisions that served economic policy priorities was not brought into question. The appropriate representation of the interest of competition in the course of privatisation was assured in a substantial part of the cases by the cooperation between the SPA and the GVH. Thus it was only in a few areas that privatization resulted in undesirable market structures that could have potentially been avoided through merger control by the GVH. From 1997 on mergers implemented by foreign entities also required an authorisation. By then, however, the privatization transactions relevant for the state of competition had been completed. The GVH authorised all of the limited number of mergers relating to privatization after 1997.

58 E.g.: Vj-36/2006.

59 The most significant cases: Vj-47/2012: acquisition of control by the Local Government of Budapest over Budapesti Vízművek Zrt.; Vj-31/2013: acquisition of EON's Gas business by the State.

60 For more details, see: Kőcse, Ildikó: A Magyar Állam sérelmes iparági beavatkozása miatt nemzetközi választott bíróság előtt az igazukat kereső befektetők pereinek tanulságai [Lessons from the actions of investors seeking remedy for the sectoral interventions of the Hungarian State in international courts of arbitration] (Budapesti Corvinus University, energy management economist specialisation), 2014, 47–48.

61 Sections 24/A and 97 of the CA.

Miklós Juhász*

The role of consumer protection in the work of the Hungarian Competition Authority

Abstract

The paper deals with the consumer protection activity of the Hungarian Competition Authority (GVH). It provides a general overview of the experience acquired by the GVH in consumer protection cases over the 25 years of its operation. The contribution details the major developments that have taken place in relation to the authority's enforcement practice, and its fostering of competition culture and competition advocacy. The paper highlights the fact that European competition authorities have integrated consumer protection into their portfolios, thereby placing an emphasis on the aim of competition, which is the enhancement of consumer welfare. On the one hand, the paper demonstrates the intervention practice of the GVH on the supply side of the market through the enforcement of consumer protection laws against undertakings, on the other hand, it shows the involvement of the GVH on the demand side to support the informed decision-making of consumers. The contribution explains why the GVH focuses on small and medium sized enterprises in its enforcement practice and how its competition advocacy promotes compliance with competition law regulations.

1. Introduction

The Hungarian Competition Authority ('GVH') is an integrated law enforcement body. Consequently, ever since its establishment in 1991, it has also had consumer protection functions to assure the fairness of competition in addition to its traditional competition supervision roles (antitrust, merger control). Between 1991 and 2008 the GVH enforced several acts, including Act LXXXVI of 1990 on the prohibition of unfair market practices, Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices ('Competition Act') as well as the provisions of the old advertising act[1] relating to deception, the unfair manipulation of decisions and comparative advertising. A major change in the system of prohibitions occurred on 1 September 2008, upon the entry into force of Act XLVII of 2008 on the prohibition of commercial practices that are unfair to consumers ('UCPA'), which transposed Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. Though new elements were also added in the form of an assessment based on black-listed practices, the principles applied by the GVH remained quite similar, with the result that no substantive change was required.

Authorities with consumer protection functions include government offices with general consumer protection powers, and the National Media and Infocommunications Authority responsible for sectoral supervision and control. As one of the authorities entrusted with consumer protection functions, the

* The President of the Hungarian Competition Authority

1 Act LVII of 1997 on Business Advertising Activity.

GVH has the competence to take action against firms in all sectors, with the result that it has a wide perspective and extensive practical experience. Simultaneously, it takes action specifically against practices that are aimed at illegally and unfairly manipulating the decisions of consumers and business partners[2], and when doing so considers whether the extent of the effect necessitates action to protect public policy, and whether competition is substantively affected, that is, whether the distortion of consumer decisions may have an impact on competition. Thus for the purposes of the UCPA[3], a substantive effect on competition exists if a misleading communication or commercial practice is used extensively, in the form of a television commercial that is broadcast nationwide, or through a conduct that is applied throughout the country. If this cannot be established, then pursuant to the provisions of the UCPA, the government offices, the Hungarian Authority for Consumer Protection, or in the case of financial services, the National Bank of Hungary take action, thereby highlighting how the system in place covers all possible circumstances.

When the GVH publishes a press release about a decision, people are often surprised to read that fines in the range of hundreds of millions or even billions have been imposed in a cartel case. Most citizens are aware that cartels are harmful: they result in higher prices, raising the cost for taxpayers, citizens and consumers. In the same way, consumers are also ultimately harmed when an undertaking abuses its dominant position, drives its competitors out of the market or hinders market entry. In such cases it is very difficult to quantify the harm that is ultimately caused to taxpayers. This is true even though the GVH also conducts impact assessments which quantify the welfare effects of cartel cases and merger interventions on consumers with economic methods relying on international standards[4].

In my opinion we can safely say that classic antitrust cases tend to be alien to most citizens; negative effects such as less choice and higher prices are often only indirectly perceivable to consumers.

Consumer protection cases are different.[5] They are generally initiated on the basis of some specific grievance that has been signalled by a consumer; consumers generally have a direct interest and the consumer harm is also easier to quantify because the aggrieved party tends to experience the harm directly on his/her health, purse or bank account, and the readers of the GVH's press releases also have an inclination to feel that the problem affects them personally, or someone they know personally.. Let us look at a few examples.

Several cases have been investigated by the GVH where the respondent undertaking had promised to sell the timeshare rights of a consumer. However, in most cases the sale never happened and instead the consumer acquired yet another timeshare, the maintenance costs of which were added to their financial out- lays.[6]

Sometimes a consumer purchases a product that has been advertised as having a 'curative' effect or other health benefit, only to find out that it has none of the promised effects. These products may cost tens of thousands of forints, but often consumers are willing to pay such prices, as it is only natural that people want to be cured or improve their health. In 2014, 32% of the consumer protection cases dealt with by the GVH concerned cases involving promises of curative or other health benefits.

We found that at product presentation events the infringing undertaking pressured consumers to make an immediate decision, depriving them of the time necessary to make a well-founded and well-informed decision. In these cases the distributor created the false impression that the alleged discount for the product or service concerned was only available at that very moment (VJ/114/2010.). Furthermore, if an undertaking is willing to provide the funds for the purchase, the consumer will be more inclined to sign the agreement and make a financial commit-

2 The GVH conducts these proceedings based on the UCPA if consumers are involved, the Competition Act if trading parties or comparative advertising is involved, relying on the sectoral regulations (see below) referring to the procedural rules of the UCPA. Below I shall describe the proceedings conducted based on the provisions of the UCPA.

3 In the event of conducts infringing a prohibition set out in the UCPA or certain sectoral legislation.

4 See the GVH website: http://www.gvh.hu/gvh/elemzesek/tarsadalmi_haszon (retrieved 30 September 2015).

5 The GVH conducts these proceedings based on Act XLVII of 2008 on the prohibition of commercial practices that are unfair to consumers ('UCPA') if consumers are involved, Act LVII of 1996 on the prohibition of unfair and restrictive market practices ('Competition Act') if trading parties or comparative advertising are involved, relying on the sectoral regulations (see below) which refer back to the procedural rules of the Unfair Commercial Practices Act. Below I shall describe the proceedings conducted based on the provisions of the UCPA.

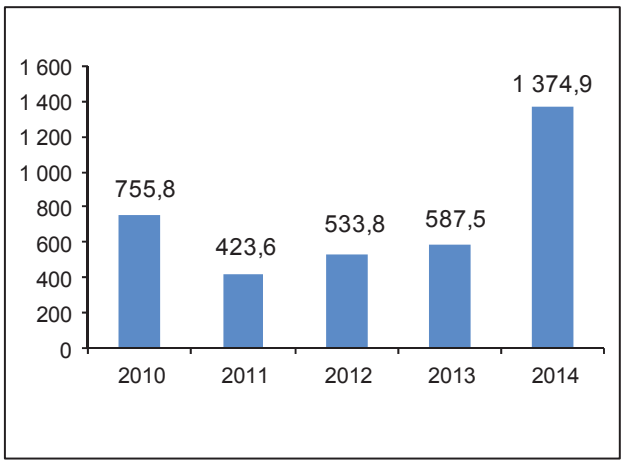
6 See for instance Case VJ/20/2014. against EURO BENEFIT Kereskedelmi és Szolgáltató Kft.

ment. In such cases, it is often not until the purchaser arrives home and thinks about the transaction that he/she realises that he/she has made a commitment without really intending to (VJ/20/2014.).

On the basis of advertisements, it is quite common for people to think that they are signing up for a loan, whereas in practice they are actually joining a purchasing group. In such cases the purchasing group will not give them the desired loan, and the individuals will only procure a right to purchase, the distribution of which contains an element of luck. Since 2005 the GVH has conducted 31 proceedings against organisers of purchasing groups.

There are many more examples that could be given. Clearly in these cases the consumer or buyer, unlike in classic antitrust cases, is directly faced with the detrimental consequences of the infringement, personally experiencing the negative effects. It is for this reason that we can state with confidence that despite the lower fines and the more modest, though continuous media attention, consumer protection is a priority in the enforcement work of the GVH.

In recent years the GVH has initiated approximately 110-120 cases a year, and closed about the same number. The majority of these cases, 55% to be exact, have been consumer protection cases. Between 2012 and 2014, HUF 0.5-1.4 billion of fines were imposed in consumer protection cases.[7]



Fines in consumer protection cases (HUF million) 2010–2014

2. Promotion of conscious consumer decision making

In addition to proceedings, consumer protection is also promoted by the better-informed, more conscious actions of consumers themselves. The GVH has the following tools at its disposal to promote conscious consumer decision making:

- competition supervision proceedings, including information on enforcement,
- the development of competition culture, including information provided to consumers and undertakings, as well as
- competition advocacy, including the promotion of optimum regulations based on the experience gained from proceedings.

On the supply side the GVH's intervention is directed at influencing the conduct of undertakings (through the initiation of competition supervision proceedings based on 'consumer protection' or antitrust rules), while on the demand side it strives to support consumers in making the best possible decisions. Of course, the various tools can be used in combination – either contemporaneously to draw the attention of consumers to the issues investigated by the GVH or subsequently, in the form of legislative proposals by the authority aimed at addressing problems that cannot be solved through its proceedings.

3. Enforcement

In the context of proceedings one may ask who is considered to be a consumer by the GVH and what characteristics and level of consciousness the consumer is assumed to have when, for instance, an advertisement is assessed. In the course of its proceedings the GVH uses as a reference point, the behaviour of a reasonably acting average consumer[8], taking into account what the 'everyday' average consumer would think about a particular communication and its message. The GVH expects a basic level of awareness but it should be emphasised that consumers are not expected to have reservations from the start.[9]

7 2012 – HUF 530 million, 2013 – approx. HUF 590 million, 2014 – close to HUF 1.4 million.

8 See Section 4(1) of the UCPA.

9 See Section I.4.1. of the Decisions on principle of the Competition Council of the GVH; for the concept of 'average consumer' see Judgment No. 2. Kf.27.425/2010/10. of the Budapest-Capital Regional Court of Appeal in Case No.Vj-56/2008.: *"average consumers do not need to question the truthfulness of advertising claims and particularly need not suspect that the promise of beneficial effects in reality conceals an absence of effect or even adverse effects."* More comments can be found in József Zavodnyik: Nagykommentár a tisztességtelen kereskedelmi gyakorlatról szóló törvényhez [Commentary on the Act on unfair commercial practices], Wolters Kluwer Kft., Budapest, 2013, 232.

Directive 2005/29/EC of the European Parliament and of the Council ('UCP Directive'[10]), which was transposed by the UCPA, states that the average consumer test is not a statistical test, and national authorities (including the GVH) should use their own judgement when determining what the typical reaction of an average consumer would be in a given case.[11]

The characteristics of the average consumer may be different for different markets, services or products (for instance regarding a classic bank deposit or a more sophisticated investment service). On the other hand, a particular consumer group may become familiar with the features of a product or service over time, with the consequence that the GVH's stance on what constitutes the average consumer may alter over time . To give an example, the GVH established in a mobile telephony related proceeding that the loyalty agreement requirement on the relevant market was generally known to consumers (in respect of telephone sets, tariffs etc.), due to the extensive information, also covering loyalty agreements, that was communicated by the undertakings. This means that an infringement cannot automatically be found if the respondent or its competitors, in the absence of other special circumstances (for instance the requirement of a loyalty agreement for a period longer than customary) fails to state in its advertisements the need for such agreements because it is not substantiated that this commercial practice would encourage, or is capable of encouraging, the consumer to make a commercial decision that he/she would not have made otherwise. In view of the above, the GVH terminated the proceeding.[12]

Furthermore, the enforcement of the general prohibition of unfair conduct that is relevant for a reasonable average consumer also facilitates the handling of issues that are not covered by specific provisions but which still cause problems. An example of such a problematic issue was the 'Hungarian product' concept. When the GVH initiated its first case dealing with this topic and adopted its decision in the case, Act XXX of 2012 on Hungaricums and the related Decree No 74/2012 of 25 July 2012 had not yet been adopted; nevertheless, in the case the GVH was still able to make a decision relying on the terminology of the average consumer.

The GVH began receiving signals that the appearance of the country of origin mark on consumer products was leading consumers to attribute additional qualities to such products, for example that by purchasing these products the consumers were contributing to the Hungarian economy and the preservation of Hungarian jobs.

The GVH examined what the average consumer considers to be a Hungarian product based on commercial communications, and assessed the communication of the undertakings on that basis.[13]

In 2012 the GVH commissioned a survey among the Hungarian population to assess awareness of its actions relating to the 'Hungarian product' marking. The answers revealed that 'Hungarian product' means that it is made from Hungarian raw materials (96% of the respondents), made in Hungary (89%), made using Hungarian labour (81%), made by a Hungarian firm (79%) or has a Hungarian brand name (63%). Consequently, in addition to the GVH's decisions in these cases passing the test of judicial review, the survey also confirmed the position we took in our decisions.

Vulnerable consumers warrant a special mention.[14] The GVH has been closely monitoring the communications aimed at this group for years. The UCP Directive also requires that the characteristic behaviour of these persons needs to be taken into account if a practice exclusively targets such a group, because these consumers are particularly vulnerable due to their age, credulity, mental or physical infirmity or health. The GVH has looked into practices offering promises of cures for conditions such as cancer in a number of cases, given the fact that sick consumers or their relatives are particularly vulnerable to such promises and are willing to make finan-

10 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.

11 See recital 18.

12 See paragraph 46 of the decision in Case Vj/78/2012/15.

13 VJ/17/2011. Auchan Magyarország Kft., VJ/21/2011 Spar Magyarország Kereskedelmi Kft., VJ/88/2010. Hansa-Kontakt Kft.

14 See Section 4(2) of the UCPA.

cial sacrifices on this basis even though they may in fact be actually risking their health; that is, the consumer harm that may be incurred is particularly substantial.

If trading parties (clients, buyers, users) are affected[14], the GVH expects a higher level of awareness, setting the standard of credulity higher for professional partners than for non-professional consumers.[16] Trading parties typically act as professionals that are well-informed about the product concerned, even though we have encountered cases where the conduct under investigation was not related to their typical scope of activities. For instance, in the past the GVH has established that such customers have been deceived in connection with the characteristics of a trade mark, and that the distributor of office supplies unreasonably limited the freedom of choice of trading parties, creating significant difficulty in the assessment of the real nature of the product through its commercial conduct.[17]

In my opinion, the steps taken by the GVH to appropriately communicate its enforcement efforts, to provide clear explanations of the well-founded decisions adopted in competition supervision proceedings, and to publish its decisions on its website, provide guidance as to the competition law abiding behaviour that the GVH expects from not only undertakings, but also from market actors. The effective communication of a good decision is also capable of raising consumer awareness. The effect of the communication of decisions is also shown in some cases by the willingness of respondent undertakings to make commitments. The publication of a commitment may convey a more positive message about the company than the publication of a finding of infringement. Where the case and the nature of the commitment has allowed, the GVH has often accepted commitments which have resulted in the implementation of campaigns targeting consumers, with effects going far beyond the impact of the publication of GVH decisions.

In addition to competition supervision proceedings, sectoral inquiries are also conducted to optimise market conditions and the circumstances of consumer decisions. For instance, in the course of an inquiry the GVH performed in 2009 on the switchover between certain retail and SME financial products the GVH recommended, relying *inter alia* on research findings[18], the limitation of the right to unilaterally amend the contractual terms of credit products, the use of transparent and predictable pricing techniques, the imposition of maximum switching charges as well as increasing transparency, including the elaboration of comparative indicators, personalised information and the establishment of a consumer information system (comparative website) for credit as well as current account products to facilitate the personalised comparison of proposals.[19] The recommendations relating to the website were subsequently used during the development of the website operated by the Hungarian Financial Supervisory Authority to assist with such comparisons.

4. Competition culture development

In addition to law enforcement, the Competition Act specifically identifies the role and responsibility of the GVH in the development of the culture of the conscious decision-making of consumers. Pursuant to Section 33(4) of the Competition Act, the GVH shall, in order to promote the public acceptance of competition, compliance with the law by undertakings and the creation of a competitive regulatory environment ensuring informed decision-making by consumers, furthermore, to improve consumer awareness, in particular through academic and educational programmes in the field of competition law, competition and consumer protection policy, support the training of experts in the fields of competition law, competition and consumer protection policy and competition policy awareness, facilitate

15 See Section 2 of the Competition Act.
16 See paragraph 11.8.1. of the Decisions on matters of principle of the Competition Council of the GVH.
17 See for instance the decisions in cases VJ/103/2009/20 and VJ/54/2013/181.
18 The sectoral inquiry of the GVH relied on data from diverse sources in the course of the analysis of the level and effect of switching costs. Direct information from consumers was available from a questionnaire-based survey conducted in 2006, which revealed consumer perceptions of switching. The findings of the survey were used in 2007 to perform a supplementary analysis to investigate the switching preferences of consumers in more detail.
19 See the Report on the enquiry; http://www.gvh.hu//data/cms998828/banki_%C3%A1gazati_vizgy_2009_02_09_pdf.pdf.

the conscious decision making of consumers and the protection thereof, contribute to the development of competition culture and the culture of the conscious decision-making of consumers, as well as to the professional discourse on the economic and legal aspects of conscious consumer decisions.

In this context, the GVH prepares publications and organises educational campaigns; furthermore, it supports the programmes and activities of NGOs and contributes to the organisation of professional and academic events.

To promote compliance among undertakings, the GVH has been targeting small and medium-sized undertakings since the end of 2012. One might ask about the reason for this choice. According to official statistics, SMEs represent 99.9% of all active undertakings and employ 73.8% of the labour force working in the commercial sector.[20] The internal statistics of the GVH show that between 2010 and 2013 almost 78% of the respondents in consumer protection cases were SMEs while the corresponding ratio in cartel cases was over 70%. The size of the respondents in itself would not necessarily warrant special attention, however, a survey carried out by the GVH among Hungarian SMEs clearly showed that it was worth focusing on these undertakings. The survey revealed that SMEs have problems both in terms of familiarity with competition regulations and in respect of conscious decision-making and information collection practices. The survey of 2012[21] aimed to assess the knowledge and perceptions of entrepreneurs and business leaders about the functions and activities of the GVH, the Competition Act, economic competition and competition law. 37% of the respondents knew hardly anything about the Act and 4% had no knowledge of it. 16-18% of the company executives surveyed thought that competition law pertained to sports events. Consequently, the development of competition culture targeted small and medium-sized undertakings because, in our experience, large corporations have sufficient financial resources to ensure compliance with competition law through the use of legal advisers.

Also with an eye on small and medium-sized undertakings, in 2014 the GVH added a complex media campaign to its programmes supporting competition compliance launched in 2012. In addition to the content available at www.megfeleles.hu, which is a website that comprehensively interprets and explains competition compliance, the media campaign effectively promoted both the understanding and acceptance of fair competition and market practices, thereby raising awareness and promoting a change in attitude. In addition to the appearances of the media campaign on television, radio and in the press, internet users clicked on the advertisements of the GVH approximately eight and a half thousand times. The campaign was concluded with a conference in November 2014. We hope that by raising their awareness, the owners and employees of small and medium-sized undertakings will also become more conscious consumers.

As part of the compliance programme we involved all those organisations that are in close contact with undertakings, as well as the representative bodies of undertakings[22] and the professional organisations of lawyers and accountants.

Thousands of signals are received by the GVH annually, including some 2000 complaints, mostly from consumers. In response to these, we have published various information materials, initiated campaigns and attempted to help consumers to find information in cooperation with peer authorities (Hungarian Authority for Consumer Protection, National Bank of Hungary / Hungarian Financial Supervisory Authority).

The '*Don't be taken in*' campaign, focusing on the potential target audience of purchasing groups, was implemented in this framework. The effectiveness and success of the 'Don't be taken in' campaign, launched in 2012 to combat the misleading advertisements of organisers of purchasing groups offering

20 http://2010-2014.kormany.hu/hu/nemzetgazdasagi-miniszterium/belgazdasagert-felelos-allamtitkarsag/felelossegi-teruletek (retrieved 28.9.2015).

21 Available at: http://www.gvh.hu/gvh/versenykultura_kozpont/versenykultura_felmeresek/komplex_felmeresek/6365_hu_komplex_felmeresek.html (retrieved 28.9.2015.).

22 Our partners included the Hungarian Chamber of Commerce, the Hungarian Bar Association, the British Chamber of Commerce in Hungary (BCCH), the National Association of Hungarian Tax Advisers and Accountants, the Chamber of Hungarian Auditors, and the Brand Association.

deceptive financial arrangements was proven by the thousands of customers who had second thoughts, the hundreds of deceived consumers who contacted the GVH and the results of the survey conducted by the authority.

In the course of the campaign we drew attention to this harmful practice and the tools of prevention and potential action using a dedicated website, a media campaign focusing on local media, messages placed on the websites of local governments and leaflets placed in the customer service areas of local governments and government offices.

In the framework of the campaign the GVH also opened a special free information telephone service; an overwhelming number of calls were received in response to the advertisements and intensive media presence: during the month after the start of the campaign, close to 100 calls per day were taken in the customer service office, with the total number of calls exceeding 2500 by the end of November.

The surveys conducted after the campaign[23] also revealed that approximately 85% of the population may have been exposed to the typical advertising slogans of purchasing groups, and even though only 6 to 8% of the respondents believe them,– these respondents constitute the vulnerable target group. Before the campaign, 16% of the respondents were able to give a correct definition of purchasing groups, with this ratio significantly increasing to 20% as a result of the GVH's campaign. Every second respondent reported that they had encountered the 'Don't be taken in' slogan, the central motto of the campaign, and 82% of respondents were able to correctly identify the message of the campaign. Every fifth person of those exposed to the slogan stated that they would be more careful with advertisements in the future.

In addition to providing information on long-standing problems, the GVH also considers it important to draw attention to topical issues. The 'Think about it calmly' series available on the GVH's website has just that objective . In the series, the GVH has addressed product demonstrations, real estate advertisements, 'wonder drugs' and timeshares, and we are continuously disclosing new information in light of the complaints received by the customer service of the GVH.

To assist consumers as well as small businesses, in June 2014 the GVH established competition counsel offices in five cities (Eger, Debrecen, Szeged, Pécs, Gyor). The GVH concluded an agreement for their operation with the Hungarian Consumer Protection Association. The GVH as a body of nationwide competence has no network in the country, thus it wishes to facilitate direct, convenient access through this cooperation: many people prefer to contact the authority in person.

The network receives and answers queries and questions submitted by consumers relating to economic competition and competition law, as well as consumer protection in the sense of competition law (unfair commercial practices, illegal comparative advertising, unfair manipulation of business decisions). In addition, the offices also give advice on consumer problems outside the competence of the GVH, and in a one-stop-shop arrangement they direct customers to the competent authorities when required, also establishing cooperation to access additional consumers, for instance with the 'Homár' blog focusing on consumer protection topics.

In addition to informing adult consumers, it is also important to raise the awareness of schoolchildren. The National Curriculum identifies the teaching of financial and economic skills as an important task for secondary education, so that students become conscious consumers, are able to manage their finances and assess the risks of their decisions. The GVH has been sponsoring student contests[24] and supports college students in completing their theses by organising tenders and offering consultation and library use opportunities.

5. Competition advocacy

In the framework of its competition advocacy the GVH promotes the adoption of regulations relating to competition, distribution and terms of mar-

23 http://www.gvh.hu/gvh/versenykultura_kozpont/versenykultura_felmeresek/ugyismertsegi_felmeresek/6366_hu_ugyismertsegi_felmeresek.html

24 In view of the relatively low level of financial culture, we focus these efforts on financial topics, such as the PénzSztár contest for secondary students and the KHB 'Vigyázz, Kész, Pénz!' financial contest.

ket entry and thus ultimately aims to improve the decision making position of consumers by providing information to legislators so that consumers may make their decisions under more favourable circumstances. Pursuant to the Competition Act, the GVH is entitled to express its position not only about legislation within its scope of authority and competence but also in a much broader sense, practically about any provision affecting the conditions of competition. (It is an interesting question of dogmatics what role the GVH as a law enforcement body may play in influencing the process of legislation. Undoubtedly, most competition authorities have powers to comment on legislation. It should be noted that this role of the competition authority is rooted in historical European traditions; this is how the competition advocacy rule that the GVH has a right to be consulted on regulatory concepts and proposed legislation affecting competition ended up in Act LXXXVI of 1990 on the prohibition of unfair market practices[25] and in the effective Competition Act[26].)

Since the mid-1990s there has been a declining trend in the number of draft bills sent to the GVH.[27] The OECD, which examined the work of the GVH in 2008/2009, also stated that the legislators are reluctant to send the draft regulations to the GVH. This is often difficult to understand because a less thoroughly considered regulation may result in discrepancies in enforcement or in the implementation of the intention of the legislator. Of course, when the final regulation is adopted, the legislator has the ultimate responsibility of deciding which other considerations and public policies should be taken into account. Nevertheless, the GVH has been unrelenting in its competition advocacy work from the start.

In the second half of the 2000s the GVH conducted several sectoral inquiries into the financial sector[28], for instance on unilateral interest rate increases and contract amendments and the possibility of switching banks. The regulations adopted in this area generally took into consideration the findings of the sectoral inquiries and the recommendations put forth in them.

We found in the course of our purchasing group related proceedings that competition supervision proceedings in themselves are not sufficient to address this issue. We continually pressed for the legal regulation of this area, including in our reports to Parliament[29], and the legislative amendment and regulation adopted[30] partially took into account the GVH's recommendations.

The GVH also made use of the tools of competition advocacy in relation to the regulation of product demonstrations. With regard to the tightening of requirements for mandatory information provisions, we recommended that the credit institutions selling credit products at product demonstrations, as well as the bodies responsible for banking regulation and the supervision of banking activities, are also involved.

In 2007 the GVH launched a sectoral inquiry into the market of television broadcasting (content creation and packaging), retail, wholesale and television commercial markets, within the electronic media sector, to investigate and assess the market trends relating to the sale of television commercials, access to sports and film rights and the transmission of television channels.

6. Conclusion

By protecting consumer decisionmaking, effective competition is also protected. This is because the distortion of the decisions of a significant number of consumers may also distort market processes and competition. Thus the protection of the freedom of competition and of the freedom of consumer

25 Section 60: Ministers are obliged to solicit the opinion of the Office of Economic Competition on every draft bill that would have a restrictive effect on competition, including, in particular, market activities or access, or that would provide exclusive rights or regulate prices or marketing.

26 Section 33(3) of the Competition Act

27 *„Kikérik, de figyelmen kívül hagyják a véleményünket"* [Our opinion is sought, then disregarded] – Gergely Fahidi. Interview with Ferenc Vissi, President of the Hungarian Competition Authority, in: HVG. – No 16. (19.4.1997), 57. A4/9343.

28 Mortgage lending (2005), bank switching (2009), media (2009), building societies (2010-2011).

29 See the recommendations in the annual reports to Parliament on the activities of the Hungarian Competition Authority in 2011 and 2012 and the description of its experiences with the enforcement of the Competition Act and with the fairness and freedom of competition.

30 Amendment of Act CLV of 1997 on consumer protection, and Government Decree No 30/2013 of 30 December 2013 on purchasing groups.

choice are mutually interdependent. Consumer protection and competition policy have the common objective of increasing consumer welfare.

Clearly, the protection of competition is an important objective in itself. However, to make this effort worthwhile, consumers must also feel the benefits. In my opinion there is a reason why consumer protection has been incorporated into the portfolios of an ever growing number of competition authorities. For instance, in the European Union the following national authorities have a dual responsibility in cooperation with other consumer protection/market surveillance institutions: the Italian (1992)[31], Polish (1996), Danish (2010), Maltese (2011), Dutch (2013), British (2013), Finnish (2013), Irish (2014) authorities. On the global scene, authorities with a dual responsibility operate in the United States (1914) and in Australia (1995). Experience indicates that dual responsibility and the cooperation of units working in different areas facilitates a better choice of instruments and more effective intervention. This is what we wish to achieve in our cooperation with domestic and international bodies, because we believe that the protection of competition and of consumer choice is a shared responsibility to be achieved through the cooperation of different authorities.

31 The year of start of the dual function in parentheses.

Izabella Szoboszlai*

Children's advertising in light of competition supervision proceedings

Hot bun, hot bun,
Every child would love one,
If you get one, you will love it,
Or go hungry and regret it!

Abstract

The article provides a general overview of the rules governing children's advertising and the Hungarian Competition Authority's approach in the competition supervision proceedings. The paper furthermore presents the questions relating to the Hungarian enforcement and shows some international experience. Regarding the special features of the target group, the paper finally highlights the concept of children's advertising and the reasons for protection.

1. Introduction

This nursery rhyme is a perfect illustration of the practical enforcement issue that the Hungarian Competition Authority faces when assessing advertising addressed to children. The crier in the rhyme does not actually say 'buy a bun' or 'ask your parents to buy you a bun for you' but he clearly and unquestionably sends the message that you will be sorry if you do not make the purchase. This little rhyme is particularly relevant as it sticks in our heads due to the playful words, tune and rhythm, just like a well-constructed modern advertising slogan, also indicating what kind of (deep and long-term) effect this may have on the target group.

An overview of the competition supervision proceedings of the Hungarian Competition Authority and their subjects reveals that a rather low percentage of the investigations relate to advertising targeting children – while children's advertising is far from negligible in terms of numbers or effect. The low number of proceedings is probably also attributable to the fact that the harm caused to consumers or competitors through children's advertising as explained below is less obvious than the harm caused by a false or misleading claim, thus in general the market distortion is also less obvious. Consequently, there are barely any signals from the market to trigger competition supervision proceedings.

The purpose of this paper is to explain the approach of the Competition Council to children's advertising, in particular the unfair commercial practice 'blacklisted' in paragraph 28 of the Schedule to Act XLVII of 2008 on the Prohibition of Commercial Practices that Are Unfair to Consumers ('UCPA'). The Annex to the UCPA lists the practices which the legislator considers to be illegal, that is, to constitute unfair commercial practices apart from any other consideration (such as the assessment of the potential effect on the transactional decision of consumers).

* Member of the Competition Council of the Hungarian Competition Authority.

2. Rules governing children's advertising

Children and minors enjoy statutory protection against commercial communications targeting consumers under the aforementioned provision of the UCPA as well as other legislation. A brief explanation of these provision will highlight the similarities and differences of the various prohibitions and the resulting complexity of protection.

Within the scope of the general prohibition of advertising, Act XLVIII of 2008 on essential conditions and certain limitations to business advertising activity ('Act on Business Advertising Activity') prohibits advertisements which

- are capable of harming the physical, intellectual or moral development of children or young persons,
- are addressed to children and young persons and have the capacity to impair the physical, mental or moral development of children and young persons, in particular those that depict or make reference to violence or sexual content, or that are dominated by conflict situations resolved by violence,
- portray children or young persons in situations depicting danger or violence, or in situations with sexual emphasis,
- contain solicitation to participate in games of chance,
- relate to alcoholic beverages and are addressed to or depict children or young persons.

In addition to limiting the content of advertisements, the Act on Business Advertising Activity also regulates advertising channels, stating that no advertisement of any kind may be disseminated in child welfare and child protection institutions, kindergartens, elementary schools and in dormitories for students of elementary schools. This ban does not apply to the dissemination of information intended to promote a healthy lifestyle, the protection of the environment or information related to public affairs, educational and cultural activities and events, nor to the display of the name or trademark of any company that participates in or makes any form of contribution to the check the use of American and British English, 'organization' v 'behaviour', one style should be chosen and used throughout organization of such events, to the extent of the involvement of such company directly related to the activity or event in question.

With regard to advertisements targeting children, the Act on Business Advertising Activity imposes the following restrictions. It is prohibited to disseminate

- advertisements of alcoholic beverages in theatres or cinemas before 20:00 hours, as well as immediately preceding any programs for children or young persons, during the full duration thereof, and immediately afterwards; on goods which have been clearly designed and manufactured for the purpose of a toy, including the packaging of such goods; and in institutions of public education and in health care institutions, or on any outdoor advertising media situated within a two hundred-meter radius from the entrance thereof;
- advertisements relating to games of chance in any printed media which have children and/or young persons as their primary target audience.

Going back to content restrictions: in the scope of the protection of children and minors Act CLXXXV of 2010 on media services and mass communication ('Media Act') requires providers of linear media services to assign a rating to each programme they intend to broadcast and to broadcast each programme only in the manner and at the time appropriate with its category (with certain exceptions).[1] Furthermore, the Media Act provides, as a restriction on channels, that commercial communications may not be aired in linear media services at such times when it is foreseeable that these would not be allowed to be aired if rated based on their content.

Furthermore, Section 24(1) of the Media Act imposes additional constraints on commercial communications broadcast in media services when it requires that commercial communications

- may not directly call upon minors to purchase or rent products or to use services,
- may not directly call upon minors to persuade their parents or others to purchase the advertised products or to use the advertised services,

1 This prohibition does not apply to news programmes, political programmes, sports programmes, previews and advertisements, political advertisements, teleshopping, public service advertisements and public service announcements.

– may not exploit the special trust of minors placed in their parents, teachers or other persons or the inexperience and credulity of minors,
– may not show minors in dangerous situations, if this is not justified.

As another constraint in this context, commercial communications broadcast in media services pertaining to alcoholic beverages may not be aimed specifically at minors or show minors consuming alcohol.

The Media Act also introduces other specific restrictions on the communication channel: pursuant to Section 30(3) of the Media Act no (paid) product placement may be used in programmes intended specifically for minors under the age of fourteen. Section 33(3) and (6) provide that it is not allowed

– to interrupt with advertisements or teleshopping any programme broadcast in a linear media service,
– to publish virtual or split screen advertisements in a programme broadcast in a linear audiovisual media service,
– if the programme is intended for minors under the age of fourteen and its duration does not exceed thirty minutes.

Act CIV of 2010 on the freedom of the press and the fundamental rules of media content ('Freedom of Press Act') states that linear media services may not show media content that could severely damage the intellectual, psychological, moral or physical development of minors. The Act also restricts content which 'merely' threatens the intellectual, psychological, moral or physical development of minors: such content may only be published in a manner that ensures, either by selecting the time of broadcasting or by means of another technical solution, that minors do not have the opportunity to listen to or watch such content under ordinary circumstances.

In addition to the restrictions on advertisements targeting children, there are numerous considerations and discussion materials associated with the societal psychology, psychology, ethical or other aspects of the issue: recently advertising promoting over-consumption (particularly the consumption of excessive amounts of or unhealthy food) has triggered the most heated arguments.

3. Section 28 of the Schedule to the Unfair Commercial Practices Act

The UCPA offers two fundamental types of protection to children as a particular group of consumers: on the one hand, it provides special protection to children as a target group,[2] and on the other hand, in its Schedule it specifies a commercial practice that is illegal *per se*. Pursuant to Section 28 of the Schedule to the UCPA, with reference to Section 3(4) of the UCPA, a direct exhortation to children to buy the advertised product or persuade their parents or other adults to buy advertised products for them is unconditionally considered to be an unfair commercial practice.

The UCPA serves the purpose of compliance with the Directive on unfair commercial practices[3] ('UCP[4] Directive'). Pursuant to Point 28 of Annex I to the UCP Directive, "*including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them*" is one of the commercial practices which are considered unfair in all circumstances. "*This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.*"

In this context it should be noted that even though the aforementioned provisions of the UCPA, the Act on Business Advertising Activity, the Media Act and the Freedom of Press Act supplement each other, there are overlaps, and therefore the uniformity of enforcement may be brought into question. The overlap between Section 28 of the Schedule to the UCPA and Section 24 of the Media Act may result in a situation (also taking into account the differences in the definitions of minors and children, and of advertisement and commercial communication) where the same advertisement is assessed by two different

2 Pursuant to Section 4(1) and (2) of the UCPA, where a commercial practice is specifically aimed at a particular group of consumers, it shall be assessed from the perspective of the behaviour of the average member of that group. Where certain characteristics make consumers particularly susceptible to a commercial practice and the behaviour only of the group, which can clearly be identified, of such consumers is likely to be distorted by the practice in a way that the person carrying out that practice can reasonably foresee, the practice shall be assessed from the perspective of the behaviour of the average member of that group.

3 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.

4 Unfair commercial practices.

authorities[5], which may arrive at different outcomes and impose different legal consequences.

4. The Competition Council's approach

The infringement pursuant to Section 28 of the Schedule to the UCPA has so far been subject to three competition supervision proceedings (Vj/123/2009., Vj/124/2009., Vj/22/2013.)[6,7] Section 28 of the Schedule to the UCPA covers two practices: direct exhortation to children

- to buy the advertised products, and
- to persuade their parents or other adults to buy advertised products for them.

In the latter context the Competition Council underlined that the UCPA prohibits not only the unfair practices against consumers actually purchasing the products but also those that target or reach consumers who may influence the transactional decisions of the consumer who purchases the goods. In the present case, through the so-called 'nagging factor', children may have substantial influence over their parents or other adults to get them to buy the product concerned.[8]

The Competition Council noted that the completion of a transactional decision within the meaning of the UCPA is not necessarily conditional on the conclusion of a civil law contract or the satisfaction of the conditions of the validity of such contracts. The conduct specified in Section 28 of the Schedule to the UCPA may also be exhibited if the child may not conclude a valid purchase agreement for the advertised product.

Furthermore, the law only requires that the advertisement directly solicit the child to purchase and not that the advertised product must be purchased directly by the child. While both phrases of Section 28 of the Schedule to the UCPA require that the undertaking directly address the child, it is irrelevant whether, as a result of the direct solicitation, the child himself or another person 'convinced' by him purchases the advertised product. Indeed, the infringement does not even require that the product is actually purchased, because the exhortation addressed to the child within the meaning of Section 28 of the Schedule to the UCPA in itself constitutes an infringement.

The Competition Council also stated that the direct exhortation of children to purchase the advertised product or service may be committed even if the advertisement does not expressly say, for instance: 'buy this product'. Section 28 of the Schedule to the UCPA covers all advertising with content inviting or motivating the child to acquire the advertised product for consideration or otherwise.

In the Competition Council's approach a commercial practice is infringing if it attempts to persuade children, who are unable to assess the consequences of their transactional decisions, to make a purchase in such a manner that the potential sum required for the purchase or any additional expenditure following the purchase is impossible to assess even for an adult.

In the context of classification as children's advertising, the Competition Council stated that it can be established from the content and design of the advertisements or the nature of the advertised product whether they target minors, in particular children below the age of 14. Such qualification is reinforced if the commercial for the product or promotion features children, and if it is broadcast on a channel which has children as its target group as indicated by its programme schedule.

The Competition Council emphasised that the blacklisting of a practice by the EU legislator means that the law enforcement body has no responsibility other than establishing the facts.[9] In the case of blacklisted practices the legislator assumes that they are capable of distorting consumer decisions. The Competition Council need not examine how 'emphatic' or aggressive the exhortation is and what effect it has on children, whether it is capable of convincing them to make a purchase or whether the children would otherwise have bought the product

5 The authority specified in Section 10(3) of the UCPA, and, with respect to the Media Act, the National Media and Infocommunications Authority.
6 In the first two proceedings the undertakings under investigation did not seek remedy, while in Case No Vj/22/2013 the first-instance court upheld the decision of the Competition Council.
7 We have no information about the consumer protection authority's proceedings in such cases.
8 József Zavodnyik: Nagykommentár a tisztességtelen kereskedelmi gyakorlatról szóló törvényhez [Commentary on the Act on unfair commercial practices], Wolters Kluwer Complex Kiadó, Budapest, 2013, 392–394.
9 See for instance paragraph 42 of the decision in the competition supervision proceeding No Vj/143/2009 (practices falling under sections 20 and 31 of the Schedule to the UCPA).

or not. These factors, in view of the structure of the UCPA, need to be examined in the context of deception and aggressive practices but not in case of blacklisted conducts.

Considering that within the blacklist of the UCP Directive the conduct in question is among aggressive commercial practices, the Competition Council highlighted that the expression 'aggressive commercial practice' as used in the UCPA is not identical with the meaning of aggression as used in common parlance because the former covers violent, threatening actions as well as other forms of physical pressure.[10] In view of this, it should not be concluded that aggressive commercial practices could not take the form of the promise of positive things such as rewards or prizes. The frequent repetition of a practice may become inconvenient to consumers even if the message is positive in its content, and the communication may be regarded as an aggressive commercial practice.

The Competition Council did not accept the argument that the English language version of the UPC directive prohibits a much stronger and more aggressive practice with regard to children's advertising than the UCPA. The English text uses the wording '*direct exhortation to children to buy advertised products*', implying the meaning of urging, pressing to do something. The German and French versions of the Directive convey a similar meaning. Therefore it is not acceptable to argue that the wording of the UCPA results in an interpretation considered to be stricter than the European legal norm.

In other respects the Competition Council accepted the position that advertisements always promote, directly or indirectly, the purchase of something, while some of the communications examined were direct exhortations to consume the product. Direct exhortation means, for instance, that the exhortation relates not only to the promoted content but it also specifies the product.

The Competition Council emphasised that the fact that the text of the advertisement concerned does not use the phrase '*buy it*' does not prevent it from being an invitation to purchase in terms of its content, consistently with the established practice of the Competition Council.[11] If, for instance, a promotional offer (obtaining a gift, access to a discount, other benefit or collectibles) is available only after the purchase of a particular product, then, even if not specifically stated in the commercial, the invitation in its content is a direct exhortation to purchase the product concerned.

5. Objections and questions relating to enforcement

Answers to questions relating to the interpretation of certain provisions of the UCPA are frequently offered by the undertakings under investigation themselves. In the course of the competition supervision proceeding No Vj/22/2013 the respondent, objecting to the narrow interpretation of the Competition Council significantly restricting advertisements directed at children, expressed a marked counter-argument, with the following cardinal points of general relevance:

- According to the position statement of the Advertising Self-Regulatory Board ('the Board'), the prohibition applies exclusively to direct exhortation; that is, it excludes practices where children are given gifts or coupons without any direct exhortation to buy, after they have made a purchase. The Board also concluded that advertising to children is not prohibited in itself, the '*direct exhortation to purchase*' element must be interpreted verbatim.
- Section 28 of the Schedule to the UCPA cannot be construed to mean an absolute prohibition of children's advertisements. The EU legislator is unlikely to have intended to prohibit advertising targeting children as such. Only a certain segment of advertising to children, advertisements that cross a line are prohibited.
- Pursuant to the UCP Directive, the unfair commercial practice concerned is a specific form of aggressive practices. Thus, for the interpretation of the facts of the case, we must go back to the definition of aggressiveness, which suggests physical or psychological pressure that deprives consumers of their discre-

10 See for instance paragraph 26 of the decision in the competition supervision proceeding No Vj/154/2009 [practice falling under Section 8(1) of the UCPA].

11 See paragraph 82 of the decision in Case No Vj/22/2013; with regard to exhortation to purchase (Section 7(5) of the UCPA), paragraph 40 of the decision in the competition supervision proceeding No Vj/11/2011.

tion in decision making. However, communication that is not threating to an adult may appear aggressive to children. Children want to live up to the expectations of adults but they are unclear about the significance of communications from different sources; this is why the law devotes special attention to children. In view of this, however, only conducts qualifying as aggressive commercial practice are considered to be illegal pursuant to Section 28 of the Schedule; consequently, the identification of aggressive elements within the commercial practice under review is a crucial question.

- The term used in Hungarian for '*exhortation*' is relatively neutral, covering a range of meanings from 'invitation' to 'order', while the English equivalent denotes a strong, aggressive behaviour. This underpins the functional approach that for the ban to apply, aggression must be present; in linguistic terms the use of the imperative in itself is insufficient to establish an infringement.
- Any communication that is positive can be excluded from the range of potentially infringing communications because if something is positive, it cannot at the same time be threatening. Aggressive advertising is illegal because it is completely removed from the product, it simply frightens children, giving such strong orders to him that the child has no willpower to resist and he does as told directly or passes the message on to his parent.
- The other element of directness is that the communication must be a direct exhortation to buy for an infringement to exist. If an advertisement does not call on to purchase in linguistic terms, the indirect messages contain no direct exhortation to buy.

As each case must be assessed on its individual merits, we should respond to these provocative statements only in general, independent of the statements made by the Competition Council in its decisions. Agreeing that the purpose and effect of the provision in question may not be an overall ban on children's advertising (if the legislator had that intention, they could have imposed a clear prohibition). In my view the objective of the Act cannot have been to deprive the provision of all meaning and to prohibit only claims such as '*buy it*' or '*get someone to buy it for you*', or synonymous phrases. Commercials containing such slogans are unlikely to be encountered as they fall short of expectations of creative marketing for selling products.

Any direct invitation or exhortation to buy can be evaluated only in a given communication situation, while any verbatim interpretation would be oversimplification that deprives the provision of any sense.

Furthermore, one may ask whether interpreting that provision only as an aggressive commercial practice would also hollow out the unfair commercial practice concerned. As children are different from adults (the - allegedly - responsible decision makers) in their emotional and intellectual development, perception and recognition and phases of social maturity, for any given product (e.g. an immune-boosting dietary supplement) children find different features to be important (e.g. the packaging or the fancy gift coming with the product) than their parents (e.g. the price, reliability). This is why a commercial practice may be aggressive when it comes to children because it confuses their thinking or sends the message that they want to hear. Frequently, an advertisement shifts the emphasis from the benefits of the acquisition of a product to the disadvantages of not possessing it. Such advertisements are latently aggressive in general but they may have a particularly strong impact on children with the '*if you are left out, you are left behind*' message.

It should be noted that direct exhortation is different from aggressive commercial practices not only in terms of its target group, because if the legislator had intended the provision ('direct exhortation') only to ban aggressive commercial practices in the everyday sense of the word, they could have simply imposed a blanket (rather than child-specific) prohibition on aggressive commercial practices, in view of the general protection of vulnerable target groups set forth in Section 4 of the UCPA.

Otherwise, in the context of aggressive commercial practices, Section 8(1) of the UCPA also refers to interference with consumer decisions, and it is easy to see that the decisions of children are easy to influence.

Thus direct exhortation does not necessarily entail aggression and the definition in the Directive does not refer to aggressive conduct in the absolute sense when using the term 'exhortation', which is also a synonym for encouragement or inducement.

I agree that children find it more difficult (due to their aforementioned level of emotional and intellec-

tual development as well as their desire to acquire and possess and their instinctive drive to comply) to differentiate between instructions and exhortations based on their importance or the significance of their source – however, these weaknesses in differentiation are the reason for the broadening of the interpretation of the prohibition concerned.

No doubt all advertising sets out to influence, to induce to buy or to condition that if you are to purchase something at some point, you should choose my product. These objectives can be attained only through positive messages, thus it is clear that the regulation did not have to consider, when defining aggression or direct exhortation, whether the content of the message is positive or not.

In the course of the judicial review of the decision in the competition supervision proceeding No Vj/22/2013 the Budapest Court of Public Administration and Labour confirmed in its judgment[12] that *"direct exhortation to buy addressed to children may take a form where its wording has positive content and its aggressiveness is not manifested in the everyday sense of the word but exerts pressure in the psychological sense."*

Recognising the importance of self-regulation, it should also be noted that in the first half of 2014 the Board , based on a public administration contract with the National Media and Infocommunications Authority ('NMIAH'), conducted an extensive monitoring survey about advertisements targeting minors to establish the appropriateness of the rule set out in the Media Act to protect children. According to the summary published by the Board[13], this subject was chosen for the survey because the protection of minors is of outstanding social importance, and compliance with and enforcement of the regulations governing advertising is also an important task for the Board as a co-regulator.

According to the summary, a commercial message directed at children is psychologically harmful if it is intended to or capable of disturbing the processes that maintain the good psychological condition of the child.

In other respects, the Board examined the content of the commercials based on the following points 1 and 2 of Section 3 of Chapter III of the Code of Conduct, which is based on the Media Act:

"(1) Commercial communications may not directly call upon minors to purchase or rent products or to use services. This prohibition applies to those types of commercial communications targeting minors which contain a direct exhortation to engage in a commercial act (for instance, 'buy it, own it!').

(2) Commercial communications may not directly call upon minors to persuade their parents or others to purchase the advertised products or to use the advertised services."

The summary of the Board states that they looked at the entire message and effect mechanism of advertisements as well as the '*direct exhortation to buy*'.

Based on the results of the survey, the Board drew the overall conclusion that it is necessary to communicate the criteria used in the survey to advertisers and the media, thereby promoting their conscious and responsible advertising behaviour; because of the actions of the Hungarian Competition Authority, exhortations to participate in promotions have been tamed to information provision; the advertisements of large corporations clearly show the effects of the educational work of the Board; any potentially objectionable advertisements, negligible in numbers, were all commercials of small firms.

However, in the context of the Board's summary it is also worth noting that the Board's Code of Conduct prohibits not only the '*buy it*' but also the '*make sure to have it*' direct invitations to buy, similarly to the position reflected in the Competition Council's established practice relating to children's advertising.

6. Experience of other countries

Despite the identical basis, the national regulations transposing the UCP Directive have adopted different regimes due to differences in the existing, tradition regulatory and institutional systems and in interpretation. The latter may also be attributable to differences in the institutional setup.

In general, advertisements targeting children are given special attention throughout Europe; however, there are differences in what is considered a 'direct exhortation' in a particular environment and language.

12 12.K.30.552/2014/9.
13 http://www.ort.hu/images/Pdf/társszab dokumentumok/ÖRT Monitoring 2014. I. félév.pdf

The (rather few) descriptions of national cases available on the Commission's website reveal that other Member States also attribute special importance to the legal interpretation of the phrase 'direct exhortation' when examining children's advertising under legislation transposing the UCP Directive.

Experience also shows that even if there is no 'direct exhortation' in a particular case, the characteristics of the target group make them so vulnerable that the standard of deception is significantly lower than the standard applied to the average consumer.

Pursuant to a decision in Germany[14], an advertisement targeting children (published in a children's magazine) was found illegal as it contained the following claims: '*Your extra cool we-radio with headphones*' and '*Do not miss - from 15 of April at your kiosk*'. The justification of the decision states that a direct exhortation was present because inspecting a magazine in a kiosk is in general not possible without buying the magazine. Therefore, the advertisement could not be qualified as mere information about the release date.

In German case-law[15] the following slogans have also been found to be infringing: '*...kids, ask for X*!', '*get this booklet*' (the spot was not otherwise meant for children, but the German advertising council considered that it could be understood as an exhortation to buy directed at children because of the familiar grammatical form), '*Hello, kids, look, here we have X product for painting at home*' (the exhortation was present in the suggested use), '*With X you can now listen to the most beautiful Christmas carols in the world*' (because of the presentation of the product and the second person plural used), '*You should also taste this!*' (the spot depicted a room full of children, with snacks on the table, the children ate some and invited viewers to follow suit).

Austrian Pony Club members received a package each month for a certain fee, however, the content of the packages was disclosed only in the previous month issue of the magazine. The undertaking distributed advertisements in schools, with a start pack at an introductory price. The terms of contract, including the need for the signature of parents, was in the small print. The court found that it was not necessary to determine whether there was any direct exhortation because the information was clearly misleading. Furthermore, the court ruled that the practice was aggressive and that the children convince their parents to order the product based on insufficient information.[16]

In Latvia a leading mobile phone provider gave out SIM cards to small children in several schools, thereby trying to get them to use the phone. The package distributed with the card also contained recommended tariff packages. It was established that even though some of the information was intended for parents, but the package and the card was given directly to the children who then tried to convince their parents to subscribe for the service, for instance not to be different from their peers.[17]

In Norway the following direct exhortation of Atomic Soul (on the Facebook page of the firm) concerning the Justin Bieber concert in the Oslo in the summer of 2012 was found infringing: "*Beliebers – RIMI cards are still available in several stores. Run, get on you bike or get a ride!*"[18]

7. The concept of children's advertising

The practice of the definition of children's advertising in the GVH is supported by the findings of the research conducted by the NMIAH responsible for monitoring compliance with the Media Act.[19] The research findings of the Media Council of the NMIAH also show that an advertisement is directed at children if

- it features products or services consumed or used typically by children, gifts (toys) or other promotion material (collectibles) valuable to children,
- it features children or children's voices,

14 https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.directive.browse2&article=article-196&elemID=224#article-196; national case ID: 103 O 171/08.

15 Müller, Melissa: Az áruvilág kicsi királyai – Gyerekek a reklámok világában, Geomédia Kiadó, Budapest, 2001, 200.

16 https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.directive.browse2&article=article-196&elemID=224#article-196, national case ID: 4 Ob 57/08y.

17 https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.directive.browse2&article=article-196&elemID=224#article-196, national case ID: E03-RIG-511.

18 http://www.forbrukerombudet.no/2013/12/11043358.0.

19 http://mediatanacs.hu/dokumentum/160573/kozvelemeny_kutatas_nmhh_reklam1.pdf.

– the imagery and sounds elements reflect childhood and the lives of children,
– well-known cartoon characters are portrayed,
– its use of language is adapted to children,
– it is shown in a children's channel or children's programme, or before or after such programme.

The targeting of children is clear in most cases, the advertisement in question shows more than one of the above features – there may be numerous cases, however, where there is room for discretion (for instance because the target group becomes ever younger or older, for instance in the case of telecommunication equipment or cornflakes).

The regulation[20] is clear in that commercial targeting is the main characteristic of advertisements. In the particular case, however, the question is whether all/any type of advertisement (or media) may be capable of committing the infringement specified in Section 28 of the Schedule to the UCPA (in particular direct exhortation). Probably the media and other characteristics of the delivery of the advertisement also play a part in the decision: it is highly questionable whether a commercial that is shown only late at night or early in the morning, or in a scientific channel, may satisfy the other criteria.[21]

It is also questionable whether a marketing letter addressed to the parent (which every small child may receive in a particular neighbourhood) or a leaflet available in a location not frequented by children is capable of addressing or reaching children.[22]

8. Purchase, use or convincing to purchase, persuasion

The purchase, use or getting someone else to purchase a product or service is a transactional decision within the meaning of the UCPA. For the infringement to occur it is not required that the child enter into contract – that is, such products or services may also be advertised illegally which the child is unable or unauthorised to buy (e.g. the promised prizes may be handed over only to adults).

9. Direct exhortation

Clearly, the constraint on children's advertising (the enforcement practice) is determined by the content of the direct exhortation. In the everyday sense of the word any message may be direct exhortation in a given contextual, linguistic, visual and social environment.

One approach to direct exhortation is to say that direct exhortation to children to purchase occurs when the advertisement considers children to be decision makers or addresses them as such: it emphasises a feature of the product or promotion which is significant mostly to children (and not, or not primarily, to the parent).

In effect, undertakings have no particular difficulty in circumventing the prohibition of the '*buy it*' phrase because there are many other tools to obtain the desired effect. In view of this, the Competition Council is also of the opinion that if the advertisement suggests that the advertised product is indispensable to the child, either because its consumption yields special benefits or because the child may obtain special advantages through its purchase, or he will be at a disadvantage if he does not acquire the product, then the real message is: '*buy it*'.

Still, are the boundaries of exhortation or inducement always unclear? If the medium targets children specifically (e.g. thematic channels, children's magazines, storybooks), can directness be called into question? Can exhortation be called into question? The answers again depend on the circumstances of the case.

10. Reasons for protection

When assessing a particular commercial practice, it is irrelevant why children need special protec-

20 Pursuant to Section 3(d) of the Act on Business Advertising Activity, commercial advertising means any form of communication, information or the making of a representation in any form with the aim or having the direct or indirect effect of promoting the supply of goods of a fungible nature that are capable of being delivered, including natural resources that can be utilized as capital goods, including money, securities and financial instruments, and services, immovable property, rights and obligations, or in connection with this objective, the representation of the name, the trade mark or the activities of a producer of goods or a provider of services.

21 Irrespective of the fact that if the target group is children, then the choice of the channel makes the advertisement ill-placed.

22 Pursuant to Section 3(j) of the Act on Business Advertising Activity, advertisement target can be the person to whom it is addressed as well as the person to whom it is transmitted.

tion against advertisements. If, however, we are looking for the rationale of this provision, we encounter numerous question about the reasons why children are unable to properly assess what they see or hear in commercials. Why is the same advertisement aggressive when intended for children which would not reach the level of aggressiveness in the eyes of adults? What is the justification for the special protection afforded to children against advertising messages?

The answer is supported by empirical research findings and child psychology theories. The list below contains some features recognised by specialists about the cerebral and psychological development of children:[23]

- children aged 3 or 4 uncritically accept advertisements as part of reality, they are unable to tell the difference between media communication and real communication,
- children below the age of 4 or 5 are unable to property distinguish between the advertisements inserted in the programme and other programme items,
- above the age of 5 children tend to recognise advertisements, but mainly based on criteria such as one advertisement is funnier or shorter than the other,
- up to the age of 5-7, children see in black and white: what is not true is a lie, and they understand everything verbatim,
- it is only by the age of 7-8 that the thinking of children develops to the stage where they realise the purpose of advertisements, and this is when they start to question them,
- children start to appreciate the value of money only after they have mastered the basic arithmetic operations,
- children younger than 12 are unable to compare the value they place on the product and its monetary value,
- small children have an instinctive drive to collect, acquire and possess. The possession of objects has different roles (relating to developmental theory) depending on the age of children. For small children the objects in their possession provide consolation (basic trust). In primary school, where competence is important, the favourite objects are sports equipment and games of skill. In adolescence fashion-driven objects become central to their lives.

According to the Central Statistical Office's figures on the 2011 census[24], children (below the age of 14)[25] represent 14.6% of the population, or almost one and a half million potential consumers. Also, in 2011 there were 24 children for every 100 active-age person. Consequently, this group is worth addressing, even though children are unable to realistically assess (by the standards of adults) a commercial, offer or shopping situation because of their emotional and intellectual abilities. They are unaware of concepts such as value-for-money, utility, the value of money, the family budget or the workings of the media. Still, children are one of the most receptive target audiences of advertisements (primarily television spots, where pictures and sounds reinforce the message), while they are characterised by excessive, unpredictable or malleable dependency, playfulness and credulity.

In this environment advertisements may have a number of direct and indirect effects on children while the publishers of advertisements also try to pay attention to the needs of this target group:

- the advertisement confirms that acquisition brings pleasure, it creates demand among children, it shapes their needs and value system, urges impulse buying,
- children like to imitate, they are interested in the adult world while advertisements also inform them about the cool, fashionable, approved objects in their own world,
- children are not only part of the current target group but are also future consumers, therefore undertakings also strive to form brand loyalty and brand dependence; children often chose their own clothing and other personal objects, and they may even have a say in the selection of consumer durables,
- children become media consumers at an ever younger age, thus they may encounter more and more targeted advertisements, for instance in the thematic media,

23 http://www.fajltube.com/irodalom/oktatas/A-reklamok-hatasa-a-gyermekekr72536.php.
24 http://www.ksh.hu/nepszamlalas/tablak_demografia.
25 Pursuant to Section 3(e) of the Act on business advertising activity, child means a person under th age of fourteen.

– and last but not least, the desire of the child to purchase and the resistance/financial capacity of the parent are one of the sources of conflicts between parent and child.

11. Responsible parents and responsible consumers

In effect, children's advertising targets two 'vulnerable', easily influenced consumer groups: the children (influenced by the advertiser) as well as the parents (influenced by their children), who try to take into account and consider the desires of their children and their own limitations one way or the other. Little wonder that children's advertising is not particularly popular with the institutions and organisations representing parents and teachers. Nevertheless, the research of the Programme monitoring and analysis department of the NMIAH about the consumers' perception of Hungarian television advertisements and advertising techniques[26] shows that Hungarian consumers do not generally find advertising to children objectionable – though they do not support them either.

The research found that the Hungarian adult population generally thinks that children may be shown advertisements, while they are less convinced that children would be able to choose on their own from among the advertised products. The majority of the respondents (54%) do not consider children to be entities able to make their own decisions and they do not consider advertisements addressed to them important either. This view, however, shows that parents would not like advertisements to present children as decision makers.

As a recent development[27], the US Federal Trade Commission (FTC) found that for years Google did nothing to prevent children playing on telephones to make purchases on Google Play or in applications offering purchases within the apps with a few moves, without the knowledge and consent of their parents.

The proceeding against Google was concluded with an obligation on Google to repay a total of USD 19 million to owners of Android telephones. In addition to the refund, the FTC also obliged Google to clearly make purchases conditional on the consent of owner of the telephone set concerned. In January 2014 the FTC obliged Apple, on the same grounds, to refund USD 32 million, and a similar investigation is ongoing against Amazon.

These obligations naturally give an indication to other market participants, but perhaps also to other authorities, and it is worth considering what is the relationship between responsible parents and responsible, reasonable consumers acting with due care.

12. Conclusion

Overall, it can be concluded that the circumstances, content and formal characteristics need to be examined on a case-by-case basis to establish whether a children's advertisement is an infringement pursuant to Section 28 of the Schedule to the UCPA. In this regard 'direct exhortation' has particualr relevance. Finally, we have seen that advertisements targeting children raise important questions of responsibility not only for legislators but also for advertisers and NGOs. In this area cooperation may play a crucial part in assuring the effective achievement of the object of protection.

26 http://mediatanacs.hu/dokumentum/160573/kozvelemeny_kutatas_nmhh_reklam1.pdf.
27 http://www.cnet.com/news/google-to-pay-19m-settlement-in-ftc-in-app-purchase-suit/ (accessed 4 September 2014).

András Tóth*

The role of national competition authorities in managing the economic crisis[1]

Abstract

This paper deals with the economic crisis from the point of view of competition enforcement. It is important to assess the connection between financial stability and consumer welfare to be able to eliminate the effects of the crisis; consequently, this article aims to examine the role of the national competition authorities in this context. In particular it discusses the challenges faced by the national competition authorities as a result of the crisis and suggests the strategy that they should follow in relation to cartel cases and concentrations. Furthermore, it highlights that while state aid is the most common instrument in managing the economic crisis, national competition authorities have limited scope to monitor its use.

1. Introduction

When the crisis erupted, anticompetitive voices became more vocal. In its report published in 2008[2] the US President's working group on financial markets declared that the crisis had been triggered by complex financial instruments, which evolved as a result of competition, in a drive to maximise profits in a competitive environment. According to John Fingleton, the strengthening of anti-competition voices is due to the fact that while the immediate costs of competition are up-front and visible, its benefits are delayed and less visible.[3] Nevertheless, the years of financial stability and its consequences (e.g. high employment, growth) proved that competition is the key to consumer welfare. The OECD's strategic response to the crisis, however, notes that competition also has an important role to play in the recovery.[4] This OECD document also points out that we must not conclude from the crisis that capitalism has come to its end or that the market economy is an outdated concept. The US regulatory response to the Great Depression of the 1930s proves that government authorisation to engage in anticompetitive practices may actually lengthen the time required for recovery.[5]

Accordingly, competition authorities must continue to consistently and strictly enforce competition law during the crisis as it does not alter the purpose of competition policy, only the eco-

* Vice President of the Hungarian Competition Authority, Chairman of the Competition Council, Associate Professor and Head of Department at the Faculty of Law of KRE. Assistant professor, Pázmány Péter Catholic University, Faculty of Law.

1 This paper is the expanded version of the presentation delivered at the 7th Seoul International Competition Forum in Busan (South Korea) on 5 September 2012.

2 President's Working Group Financial Market: Policy Statement on Financial Market Development 2008.

3 John Fingleton: Competition policy in troubled times, 2009, http://www.oft.gov.uk/shared_oft/speeches/2009/spe0109.pdf.

4 OECD Strategic Response to the Financial and Economic Crisis, http://www.oecd.org/economy/42061463.pdf.

5 Philip Lowe: Competition Policy and the Global Economic Crisis, Competition Policy International, Volume 5, Number 2, Autumn 2009, p. 6.

nomic environment of its application.[6] This, however, is often difficult both due to the political expectations responding to public pressure and because the crisis may cut into the budgets of competition authorities, which in turn narrows their scope for action.

This paper specifically discusses the challenges faced by national competition authorities in the context of the crisis. Consequently, the strategy to be followed by national competition authorities will be presented in the context of cartels and concentrations. It should be noted, however, that the most common instrument in managing the economic crisis is state aid, the monitoring of which in the EU is in the exclusive competence of the European Commission as the competition authority. (Between 2008 and 2011 the Commission authorised EUR 4.5 trillion of state aid in the financial sector, corresponding to 36.7% of the GDP of the EU.)[7] Consequently, national competition authorities may have no more than a limited scope in the field of monitoring state aid. It should be noted that competitive markets work to the benefit of consumers and efficient firms, and in this they are supported by financial markets.[8] Thus access to funds is indispensable for innovation, growth and employment. The governments' efforts to focus on helping out financial institutions so that they can perform their lending functions is important considering the role of these institutions in the economy as a whole. This arrangement is more efficient that keeping failing firms afloat with state aid.[9]

2. Cartels

2.1. Crisis cartels

The crisis has a detrimental effect on the stability of cartels.[10] This is one of the reasons why competition authorities have been detecting an increasing number of cartels recently. In 2011 the GVH commenced 14 cartel investigations, a record number.[11] By 2010 the number of undertakings involved in cartel cases doubled in Europe as well.[12]

In addition, the number of cartels may also increase, as it may be a reasonable strategy for undertakings to join forces so that they survive the depression. These crisis cartels pose a significant challenge to competition authorities especially because in times of crisis competition authorities are often urged to take into account factors outside the realm of competition policy, such as reducing employment losses, rationalization excess capacities, facilitating the survival and profitability of producers and stabilizing prices.[13] The Commission may be able to condone crisis cartels (excluding price-fixing or quota agreements, which continue to be prohibited) only if the crisis results in overcapacity and the restrictive agreements are aimed solely at achieving a coordinated reduction of overcapacity and do not otherwise restrict free decision-making by the firms involved.[14] This approach, however, has been little used. The former Commissioner for competition policy emphasised that the restrictive effects of crises must be alleviated rather than aggravated and, to that end, competition authorities have no choice but strict enforcement.[15] The example of some Member

6 OECD Policy Roundtables: Crisis Cartels, 2008 Oct., p. 177, http://www.oecd.org/daf/competition/cartelsandanti-competitiveagreements/48948847.pdf.
7 http://ec.europa.eu/competition/recovery/financial_sector.html
8 Bruce Lyons: Competition Policy, Bailouts and the Economic Crisis, CCP Working Paper 09-4, p. 12.
9 Memorandum submitted by the OFT, in Themes and Trends in Regulatory Report, Ninth Report of Session 2008–2009, House of Commons Regulatory Reform Committee, p. 161.
10 Frédéric Jenny: The Economic and Financial Crisis, Regulation and Competition, http://www.oecdhungarycompetitioncentre.org/Uploaded/NewsFile/JennyRevueConcurrences_ENG.pdf.
11 Report to Parliament on the activities of the Hungarian Competition Authority in 2011, p. 7,http://www.parlament.hu/irom39/08117/08117.pdf.
12 http://ec.europa.eu/competition/cartels/statistics/statistics.pdf
13 Lia Vitzilaiou: Crisis Cartels: For Better or for Worse? CPI Antitrust Chronicle March 2011(2), p. 7.
14 European Commission: XXIIIrd Report on Competition Policy 1993, paragraph 84 http://bookshop.europa.eu/en/xxiiird-report-on-competition-policy-1993-pbCM8294650/?CatalogCategoryID=iuoKABstTOOAAAEjtZAY4e5L.
15 Neelie Kroes: Working together to clear up the banking mess, SPEECH/09/269 http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/269&format=HTML&aged=0&language=EN&guiLanguage=en

States shows that national competition authorities seem reluctant to adopt a more flexible approach to cartels. With good reason: such a tolerant approach may send the wrong message with respect to strict and consistent anti-cartel enforcement, furthermore, in the long term it may lead to undesirable market structures.[16]

In 2008, for instance, the strongest fish farming companies in Greece requested the Greek competition authority to clear their agreement, which was to help them to cope with the crisis.[17] The parties claimed that there was oversupply in the market resulting in dropping prices, which may cause some undertakings to go out of business. To prevent this, they would determine sale prices and quantities of products on a weekly basis. The Greek competition authority held that the agreement on prices and quantities violated Article 101 TFEU by its object. The parties argued that their agreement could be cleared pursuant to Article 101(3) TFEU because it stabilises prices and contributes to safeguarding the reliability of their products; furthermore, by increasing the chances of viability for more undertakings in the market, it increases consumer choice in the post-crisis era. The competition authority was not convinced by such arguments: it found that the agreement in question primarily aimed at safeguarding the parties' interests and not the consumers, that it constituted a violation of competition rules, and thus the agreement could not be considered a necessary or proportional means to achieve the efficiencies sought.

A study carried out in 1998 at the request of the Irish Government concluded that in the beef processing market the number of participants was higher than desirable, and that it was necessary to reduce the number of processors, with a compensation arrangement. Accordingly, the industry participants established an organisation to coordinate the capacity reduction and to provide compensation to the undertakings to leave the market. The parties notified the Irish competition authority of the agreement. In the course of the judicial review of the decision of the competition authority, the Irish Supreme Court decided to refer the matter to the Court of Justice for a preliminary ruling.[18] In the proceedings the parties argued that the arrangement was not anti-competitive by object because it rationalised the beef industry in order to make it more competitive by reducing production overcapacity. In November 2008 the Court of Justice rejected that argument. It stated that to determine whether an agreement is non-competitive by object, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain; in this regard, the subjective intentions of the parties including the object of remedying the effects of a crisis, are irrelevant. The Court of Justice held that the agreement in question would change the structure of the market and enable several undertakings to implement a common policy which is clearly in violation of the requirement in Article 101 TFEU of the independent determination of policies. On the one hand, the agreement limits the output of undertakings remaining in the market by obliging them to use a certain sum to compensate the 'goers', and on the other hand, it severely curtails new market entry because the 'goers' may not make their processing facilities available to them. The fact that those restrictions are limited in time is not such as to put in doubt the finding as to the anti-competitive nature of the object of the agreement. Indeed, the fact that the agreement was promoted by the Government did not prevent it from being considered to be restrictive by object.

In the course of the judicial review of the Commission's decision in the French 'mad cow' case, the General Court [19] (the judgment of which was upheld in its entirety by the Court of Justice[20]) considered that the agreement on the minimum slaughterhouse entry price scale for culled cows was anti-competitive by object. The General Court did not accept the justification offered by the applicants by pleading the crisis in the beef sector.[21] In this context the General Court emphasises that the inadequacy of government measures to deal with the problems of a

16 Lia Vitzilaiou: Crisis Cartels: For Better or for Worse? CPI Antitrust Chronicle March 2011(2), p. 7.
17 For the description of the case see idem p. 3.
18 C-209/07 – ECR [2008] I-08637.
19 T-217/03 – ECR 2006 II-04987.
20 C-101/07 P – ECR 2008 I-10193.
21 T-217/03, paragraph 90.

particular sector cannot justify the private operators concerned in engaging in practices contrary to the competition rules or in claiming to arrogate to themselves rights which are those of public authorities, either national or Community, in order to substitute their own measures for those of the authorities.[22] Importantly, however, the Commission took the crisis into account in determining the fines, which were reduced by 60%. With regard to the role of the ministry the General Court also underlined the that whether conduct on the part of undertakings was known, authorised or even encouraged by national authorities has no bearing, on its own, on the applicability of Article 101 TFEU.[23]

It should be noted that the cases described above were not against the backdrop of a general, even less global, crisis. The crisis mentioned in these cases affected only a particular industry. The current crisis, in contrast, has an effect on almost all industries; consequently, the clearing of restrictive agreements by reference to the economic crisis would represent a much more severe limitation on the enforcement of the law prohibiting anti-competitive agreements.

2.2. Reduction of fines

Pursuant to the guideline of the European Commission on setting fines[24], The fine notice of the GVH[25] contains identical provisions, adding that in the absence of any special circumstances resulting in fine reduction, there may be grounds to grant that the payment is made in instalments having regard to the financial difficulties of the undertaking. Authorisation for payment in instalments may be granted if payment of the fine in a lump sum would result – having regard to the paying capacity of the undertaking – in an extremely disproportionate burden being placed on the undertaking concerned. According to the provisions relating to competition supervision proceedings, payment in instalments can only be granted if the undertaking requests it before the adoption of the GVH's decision. Essentially such a payment by instalments was authorised in the mill cartel case for a number of undertakings (see Vj-69/2008).

3. Concentrations

3.1. Acceleration of authorisation proceedings

European as well as Hungarian merger control rules facilitate the flexible approach necessary for crisis management. One of the most important factors in merger control is time; consequently, this is where the competition authority can help undertakings. By 2012 the GVH had considerably accelerated its merger authorisation procedure: decisions in simplified proceedings are made in a month on average, which is mostly attributable to the establishment of a dedicated merger unit. From now on, pursuant to Section 72(4) of the APA, which has been applicable also to proceedings under the Competition Act since 1 February 2012, the GVH may adopt a simplified decision (which contains no justification) as long as there is no opposing party and the GVH gives its consent to the application. The GVH first explained the criteria for the use of simplified decisions in the competition supervision proceeding No Vj-24/2012 and applied this procedure first in Case No Vj-

22 T-217/03, paragraph 91.
23 T-217/03, paragraph 92.
24 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, pp. 0002–0005, paragraph 35.
25 Notice No 1/2012 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the method of setting fines in case of market practices infringing Articles 11 and 21 of Act LVII of 1996 on the Prohibition of Unfair Restrictive Practices, and Articles 101 and 102 of the Treaty on the Functioning of the European Union, II.2.7.

48/2012. Mergers may also be accelerated by granting an exemption from the prohibition of implementation[26]. The Commission has granted such exemption in a total of 16 cases since 2008.[27]

3.2. Failing firm

During the crisis, competition authorities must continue to use the special approach applicable to failing firms only in exceptional cases. Market economies have a natural selection process. Firms with the least attractive products or highest costs exit the market, leaving room for more efficient firms and new entrants.[28] This 'creative destruction' ensures that less efficient firms are gradually replaced by efficient ones. Exit is as fundamental as entry in making markets work well.

The Commission's horizontal merger guidelines[29] state that *"[t]he Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger. The Commission considers the following three criteria to be especially relevant for the application of a 'failing firm defence'. First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market. It is for the notifying parties to provide in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger."*

3.3. Other challenges

It is a major challenge if a government appears as a buyer in a market where it already has a presence through a state-owned enterprise. It is important that these concentrations must be assessed in the same manner as any other change in control.[30] The only difference is that under both EU[31] and Hungarian rules(Section 15(3) of the Competition Act) state-owned undertakings with autonomous decision-making powers in determining their market conduct are deemed to be independent of each other. According to the GVH, (Vj-16/2012) In this regard those circumstances of the adoption of the business plan are relevant which support that the undertaking concerned indeed has permanent, autonomous decision-making powers in determining its market conduct. A formal authorisation granted for the adoption of the business plan is not sufficient. It is also required that the entity, making use of the authorisation, is able to influence over time the competitive strategy of the undertaking concerned. (Vj-51/2012)

It is also a major challenge if the government urges the authorisation of a concentration that has a lasting detrimental effect on the structure of competition. For instance, in 2008 the OFT, the UK competition authority recommended that the Competition Commission look at the Lloyds–TSB/HBOS concentration in depth, but the minister vetoed this by reference to public policy.[32]

26 The Hungarian competition act contains no such express prohibition of implementation applicable to concentrations; however, Article 7(1) of the EU Merger Regulation (139/2004/EC) prohibits the implementation of a merger or the exercise of control until it has been cleared by the Commission. Pursuant to Article 7(3), the Commission may, on request, grant a derogation from that obligation. The Commission may impose fines on the persons or undertakings concerned where they implement a concentration in breach of the prohibition (Article 14(2)(b)).

27 http://ec.europa.eu/competition/mergers/statistics.pdf

28 Bruce Lyons: Competition Policy, Bailouts and the Economic Crisis, CCP Working Paper 09-4.

29 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 031, 5.2.2004 pp. 0005–0018, paragraph VIII.

30 Philip Lowe: Competition Policy and the Global Economic Crisis, Competition Policy International, Volume 5, Number 2, Autumn 2009, p. 6.

31 Commission Consolidated Jurisdictional Notice under Council Regulation No 139/2004 on the control of concentrations between undertakings, paragraph 15.

32 Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds TSB Group Plc and HBOS Plc under Section 45 of the Enterprise Act 2002 dated 31 October 2008., http://www.bis.gov.uk/files/file48745.pdf.

4. Conclusions

In view of the above, competition authorities have the following tasks in particular during a crisis:

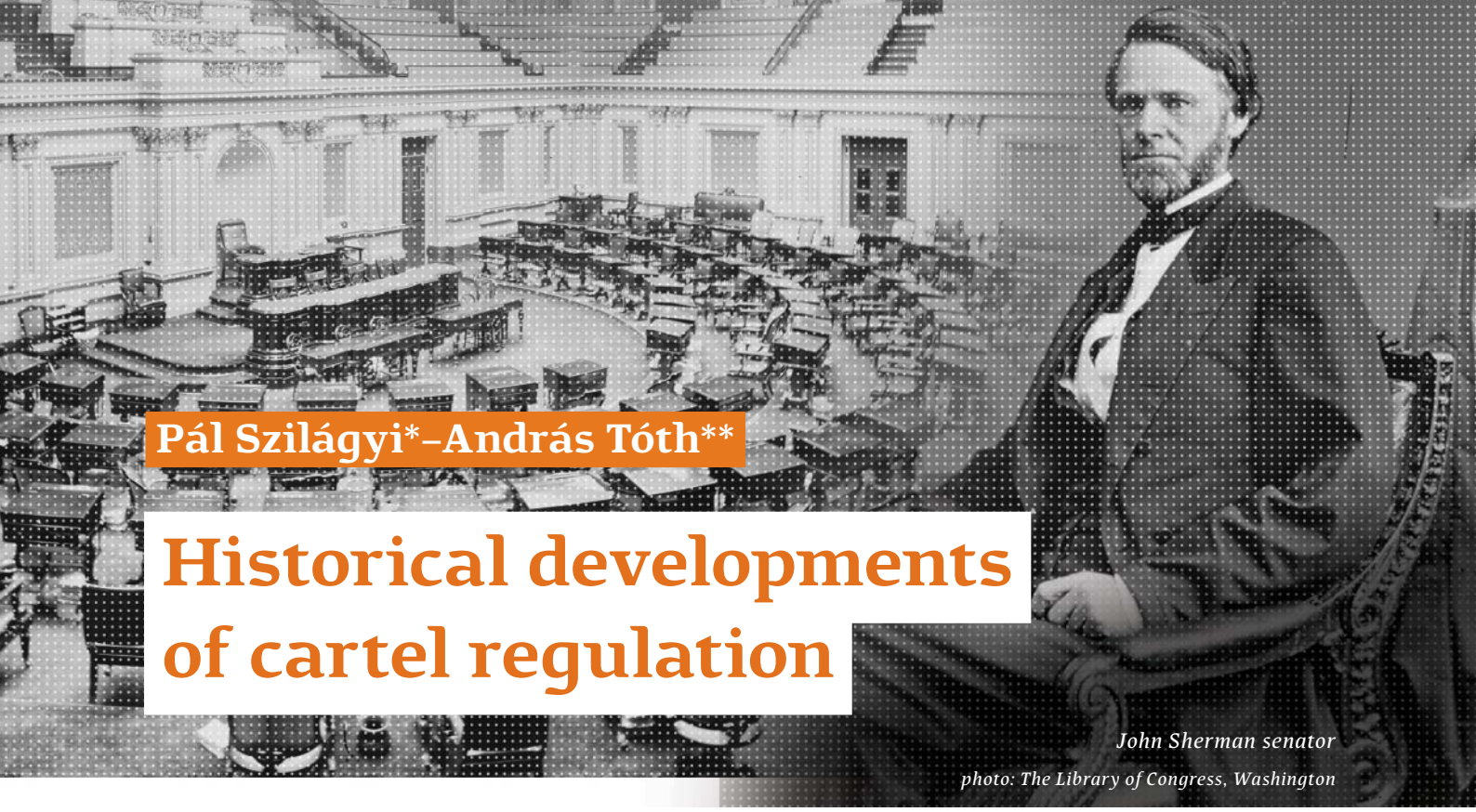
- accelerated merger control where the concentration is subject to an authorisation requirement,
- a narrow interpretation of the reduction of cartel fines and exemption for failing firms,
- refraining from clearing crisis cartels and concentrations significantly reducing competition with the crisis as justification.

In addition to regulatory enforcement, the competition advocacy work of competition authorities should also be noted. This is particularly valuable during an economic crisis, when, as mentioned in the introduction, there is pressure from the general public and, as a result, from governments to reduce competition. The OECD's Competition Assessment Toolkit[33] states: It is the job of competition authorities to highlight the benefits of competition and the harmful consequences of government measures to restrict competition.[34]

Prioritisation is a particularly important public interest in the case of competition authorities with limited human resources.[35] In times of economic crises it may be reasonable to use these limited resources to eliminate restrictive practices in sectors which tend to have a greater effect on household expenditures (e.g. energy, communication, transport) so that the burdens caused by the crisis are reduced or at least not aggravated through any anti-competitive conduct.[36]

Consequently, greater efficiency in the performance of these functions may be promoted by exchanges of experience in the framework of intensive international cooperation (e.g. OECD, ICN), which may help national competition authorities to identify and adapt the most appropriate approaches.

33 2011, Volume I, Principles, p. 21. http://www.oecd.org/daf/competition/46193173.pdf.
34 John Fingleton: Competition Policy in Troubled Times, 2009.
35 See Fundamental principles of competition policy as applied by the Hungarian Competition Authority (GVH), 2007, point 2.80.
36 Philip Lowe: Competition Policy and the Global Economic Crisis, Competition Policy International, Volume 5, Number 2, Autumn 2009, p. 5.



Pál Szilágyi*–András Tóth**

Historical developments of cartel regulation

John Sherman senator
photo: The Library of Congress, Washington

Abstract

The regulation of cartels is not a new phenomenon, but has been part of doing business since the antiquity. The Sherman Act was a turning point in legislation regarding cartels. Although many decades had to pass until the current attitude towards cartels crystallized, the first half of the 20th century made many states realize what harm international cartels can do to the economy. Consequently, this paper gives an overview of the history of cartel regulation worldwide until 1931, the adoption of the first Hungarian legislation on cartels.

1. Introduction

The purpose of this paper is to present the global history of cartel regulation since the Roman Empire to the first written Hungarian cartel regulation in Act XXX of 1931, with particular emphasis on international cartel regulation at the time of and directly preceding the adoption of the Act.

The regulation of cartels is not a new phenomenon, which indicates that cartels have been constant endemic realities of business life ever since there has been an economy and written documentation of its operation. This also means that cartels are likely to remain with us in the future.[1] The intensity, extent and scope of cartels is also a reflection of the socio-economic conditions of an era. For instance, the period between the two world wars in the 20th century, which is most relevant for our purposes, is probably the most cartel-infested period in documented history; It has been estimated that some 40% of world trade was co-ordinated by cartels in those years.[2]

2. Regulation of cartels from the Antiquity to the end of the industrial revolution

Cartels are the oldest of restrictive practices. The harmful nature of cartels was recognised already in the Roman Empire in the context of the grain dole.[3] As the distribution of free grain was an important tool in assuring social peace in ancient Rome, it was important for the Treasury to be able to purchase the highest volume of grain with the funds available. It was soon recognised that if grain prices were artificially inflated, the Treasury would be able

* Director of the Competition Law Research Centre (Pázmány Péter Catholic University, Faculty of Law and Political Sciences)
** Vice President of the Hungarian Competition Authority , Chairman of the Competition Council, Associate Professor and Head of Department at the Faculty of Law of KRE. Assistant professor, Pázmány Péter Catholic University , Faculty of Law.

1 Lee McGowan: The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy, Edward Elgar Publishing, 2010, 23.
2 Ibid.
3 Richard Wilberforce: The Law of Restrictive Practices and Monopolies, Sweet and Maxwell, 1966, 20–22.

to purchase and distribute less produce. This is why August's *Lex Iulia de annona* (18 B.C:?)[4] prohibited any price increase by merchants and the unfair hindering of supply ships.[5]

Edict No 483 of Byzantine emperor Zeno (425–491 A.D.), for instance, imposed the penalty of exile and the confiscation of property for price fixing.[6] More than a thousand years later, the Queen's Bench in the judgement in the famous *Darcy v Allin* case used this edict to illustrate the long-standing condemnation of cartels when it established that the royal monopoly for playing cards condemned the talented to idleness and that high prices and poor quality harmed everyone.[7] Also, the *Ius Regale Montanorum* (also know as *Constitutiones iuris metallici*), the famous mining law of Wenceslas II (1271–1305), the last notable Przemyśl ruler, who had Hungarian ancestors in the maternal line, also prohibited the price increasing combination of ore traders.[8]

While the harmful effects of cartels and monopolies were realised early, the benefits of competition were discovered only at the time of the Enlightenment. The difficulty of the road to that discovery is highlighted by Max Weber in The Protestant Ethic and the Spirit of Capitalism when he asks: "*How, then, did what was, at best, behavior which was morally no more than tolerated, become a "calling" as understood by Benjamin Franklin?* "[9] Aristotle also proposed in his Politics that "*[...] some persons are confirmed in their belief, that this is the proper object of economy, and think that for this purpose money should be saved and hoarded up without end; the reason for which disposition is, that they are intent upon living, but not upon living well [...]* "[10]. Aristotle had a significant effect on St Augustine (354–430), the leading theologian and philosopher of the Middle Ages, who considered greed to be one of the seven deadly sins. He admitted, though, that harmful effects of different passions may mutually eliminate each other.[11] Thus he inadvertently laid the foundations for the balancing passion doctrine, which contributed, during the Enlightenment, to removing moral aversion to formerly condemned passions (sins). The example of Cervantes's Don Quixote (1605) comes to mind, which depicts the ideal of knights and the desire for glory as innocent and frivolous passions. The era of the Enlightenment viewed trade as a harmless activity which must be allowed to surface. It is in this vein that Adam Smith (1723–1790) wrote his *An Inquiry into the Nature and Causes of the Wealth of Nations*, where he explains that by pursuing his own interest an individual frequently promotes that of the society – through an invisible hand – and therefore they should be allowed to trade.[12]

The Enlightenment brought about the unrestricted freedom of the market; however, its disadvantages surfaced soon, by the end of the industrial revolution. The encyclical *Quadragesimo Anno*[13] (1931) of Pope Pius XI commemorating the 40th anniversary of Pope Leo XIII's Encyclical *Rerum Novarum* assesses that era as follows: "*[...] the right ordering of economic life cannot be left to a free competition of forces. [...] Destroying through forgetfulness or ignorance the social and moral character of economic life, it held that economic life must be considered and treated as altogether free from and independent of public authority, because in the market, i.e., in the free struggle of competitors, it would have a principle of self direction which governs it much more perfectly than would the intervention of any created intellect. But free competition, while justified and certainly useful provided it is kept within certain limits, clearly cannot direct economic life ...*"

4 Others believe that this Act was issued by Julius Caesar in 50 B.C. See: Damien Geradin, Anne Layne-Farrar, Nicolas Petit: EU Competition Law and Economics, OUP Oxford, 2012, point 1.34, footnote 59.
5 Adolf Berger: Encyclopedic Dictionary of Roman Law. (Transactions of the American Philosophical Society; New Series, Volume 43, Part 2, 1953) New York: American Philosophical Society, 1953, 553.
6 Giandomenico Majone: Regulation and its Modes, in: Regulating Europe, European Public Policy Series, edited by Jeremy Richardson, Routledge, 1996, Part I. Introduction.
7 (1599) 74 ER 1131, (1602) 77 Eng Rep 1260 and (1599) Noy 173 http://www.commonlii.org/uk/cases/EngR/1572/398.pdf.
8 Damien Geradin, Anne Layne-Farrar, Nicolas Petit: EU Competition Law and Economics, OUP Oxford, 2012, point 1.35, footnote 61.
9 Max Weber: The Protestant Ethic and the Spirit of Capitalism, Gelléri András, Józsa Péter, Somlai Péter és Tatár György, Gondolat Kiadó Budapest, 1982, 83.
10 Aristotle: Politics, 9. http://mek.oszk.hu/04900/04966/04966.pdf. http://mek.oszk.hu/04900/04966/04966.pdf (retrieved 25 May 2013).
11 Albert O. Hirschman: The Passions and the Interests. Jószöveg Műhely, 1998, 16.
12 Adam Smith: An Inquiry into the Nature and Causes of the Wealth of Nations, Volume I, Napvilág Kiadó 2011, 488–489.
13 88., http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html (retrieved 25 May 2013).

2.1. The birth of modern competition law: the Sherman Act of the US

Similar considerations led to the enactment of one of the first competition regulations, later to be used extensively, named after Ohio Senator Sherman, in 1890; the Act prohibited restrictive agreements and monopolization. By the end of the 19th century, excess production capacities and the resulting low prices led undertakings to respond by forming cartels. In the United States trusts emerged as the typical arrangement. Persons in control of monopolistic industries (e.g. oil) tended to manage their investments through this legal arrangement and extended their control over an entire sector. In a trust, the assets of owners are managed by an asset management body on their behalf. This is why the legal institution of trust became intertwined with the fight against monopolies in the United States in the late 19th century (antitrust). According to Stigler[14], the adoption of the Sherman Act was triggered by the threat that cartels posed to agriculture by the 1880s (e.g. due to high railroad transportation tariffs), which prompted several states to enact legislation to curb monopolies and cartels. The largest trust of the era was Rockefeller's Standard Oil, which initially operated in Ohio and extended its control not only to the oil sector but also to railroads, which it used to restrict the transportation options of competing oil companies. After the trust was banned from having control over different industries in Ohio, Standard Oil moved its headquarters to New Jersey, where no such legislation was in place. It was after this that Senator Sherman from Ohio submitted the federal competition law effective to this date, which was largely invoked against Standard Oil in 1911, when the company was dissolved.[15]

2.2. Developments in the pre-war era

Thus competition law in the modern sense of the form took root first in Canada, and later in the United States. Numerous studies attempted to identify the original intent of the legislator in enacting the law, going all the way to concluding that the protection of consumer welfare was in the focus in the late 1890s.[16] Apparently, however, the legislator acted on political considerations alone when taking up arms against trusts possessing significant power in the private market. Both monopoly and trade restrictions were well-established concepts in common law both in the United States and in the UK.[17] Monopolies granted by the Crown were contested first by the English Parliament then also by common law. However, the legislator used the terminology borrowed from common law to denote a different concept.[18]

The prevailing public mood effectively compelled Congress to address this social issue. Republican Senator John Sherman was well-versed in the economic developments of the second half of the 19th century due to several government functions he had held. The Senator found the available legislative tools to combat cartels and monopolization to be insufficient; therefore, he wished to take action against trusts through federal legislation[19]. The Bill submitted to the Senate in 1888 contained the following wording: "*That all arrangements, contracts, agreements, trusts, or combinations ... made with a view, or which tend to prevent full and free competition ... or which tend to advance the costs to the consumer ... are hereby declared to be against public policy, unlawful, and void.*"[20] It should be noted that subsequently (a few days before the adoption of the Act) the terms 'full and free competition' and 'advance the costs to the consumer'

14 George J. Stigler: The Origin of the Sherman Act, The Journal of Legal Studies Vol. 14, No. 1 (Jan., 1985), 1–12.
15 221 US 1 31 S. Ct. 502; 55 L. Ed. 619; 1911 U.S. LEXIS 1725.
16 See for instance BORK, Robert H.: The Antitrust Paradox: A Policy at War with Itself, Basic Books, New York, 1978 or in particular BORK, Robert H.: Legislative Intent and the Policy of the Sherman Act, Journal of Law and Economics, 1966.
17 Posner, Richard A.: Antitrust Law, The University of Chicago Press, Chicago, 2001, 33., Peritz Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 19–23., Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 30–31.
18 Posner, Richard A.: Antitrust Law, The University of Chicago Press, Chicago, 2001, 33–36. and the literature cited therein.
19 Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 9–10.
20 Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 13.

were removed from the final version, to be replaced by common law terminology. The change in the text of the law also brought a surprising increase in support: previously senators supported the Bill at a ratio of 31–28 while the Bill was eventually passed with a vote of 51–1. Senator Sherman was expressly against this change because for him the low level of consumer prices and the protection of citizens from the power of the private market were top priorities, which received less emphasis in the modified text of the law.[21]

There was a good reason for the changing public mood against trusts and the commitment of legislators because, as opposed to classic economic theory, in reality enormous wealth accumulated and monopolies evolved without the support of the government.[22] At the same time, for the American public the thinking about cartels was closely related to the assessment of the social position of corporations.[23] *The adoption of the Sherman Act fundamentally altered the legal environment, which triggered a radical change in world history from 1890 on: today there is essentially no significant economic power or state without competition regulations similar to the Sherman Act.*

The text of the law was in place, but its enforcement was left to the courts. In the 1890–1911 period there was a fundamental disagreement within the Supreme Court between two schools of thought, depending on their position on the scale of competition policy versus protection of property rights, and whether they relied on the textual interpretation of the act or on the rule of reason[24], tolerating economic power as long as it is not abused.

In 1912 Woodrow Wilson and Theodore Roosevelt were the strongest candidates in the presidential election. Wilson's so-called 'New Freedom' program represented a strong anti-monopoly drive and focused on small and medium-sized undertakings. Roosevelt's 'New Nationalism' aimed for a strong regulatory approach.[25] Roosevelt's approach is illustrated by the following quote: "*Combinations in industry are the result of an imperative economic law which cannot be repealed by political legislation.*"[26]

Meanwhile, despite the court judgments of 1909 and 1911, the public considered the Supreme Court as the defender of the interests of large corporations. Little wonder that in 1914 new laws were added to the anti-monopoly legislation in the form of the Clayton Act and the Federal Trade Commission Act[27]; furthermore, numerous laws were adopted in the various states. Such a change in the public mood and the continued existence of trusts is certainly surprising because, through the threat of dissolution, sanctions equivalent to a death sentence[28] *could be imposed on offenders.*

The Clayton Act was adopted in response to the rule of reason principle of the Supreme Court. As noted above, the Sherman Act in its original form had an express reference to free competition. In its final form it used the wording of the common law, which was 'redressed' by the federal legislator in 1914, when it re-incorporated references to competition and unfair competition. The Federal Trade Commission Act, as one of its salient points, established an independent body to enforce the regulated conducts. However, the Supreme Court was slow to change its interpretation of the law, partly because of the general tendency of the time to think of markets in two extremes: either competitive or monopolistic.[29] Under the latter approach, if there is any form of competition in the market, it is to be considered competitive.[30]

21 Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 14–20.
22 Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 11–12.
23 Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 24.
24 The scope of *per se* prohibitions is related to the rule of reason principle. In this case, unlike under the rule of reason principle, the existence of a practice in itself is sufficient to establish an infringement without the assessment of its actual effects.
25 Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 60–61.
26 Quoted by Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 30.
27 See also Bork, Robert H.: The Antitrust Paradox: A Policy at War with Itself, Basic Books, New York, 1978, 47–48.
28 Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 63.
29 Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 67–68.
30 See for instance *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920). For more information see Page, William H.: Standard Oil and U.S. Steel: Predation and Collusion in the Law of Monopolization and Mergers, Southern California Law Review, 2011, 101.

3. Cartels and their regulation between the world wars

After WWI trade associations gained in popularity under the auspices of the ideal of 'cooperative competition', with the result that antitrust rules were gradually extended to them, but only after a decade of lenient treatment. Cooperative competition means that competitors set the limits of fair competition themselves in agreement, and prefer cooperation, for instance by determining capacities together.[31]

Meanwhile, "*[...] by 1939, international cartels were a major force in the world economy*".[32] By the late 1920s the Supreme Court in its case-law considered price fixing both by private and state entities to be illegal, the latter being a *per se* prohibition.[33] During WWI and in subsequent years trade associations were organised by the federal government, and by the mid-1920s the Supreme Court refrained from assessing them under the strict cartel rules. This was in sharp contrast to the *Addyston Pipe*[34] judgement. Industrial self-regulation flourished, mostly managed by large consulting firms. For instance, one of the most influential consulting firms (Stevenson, Jordan & Harrison) stabilised industries in three steps: they shared costs based on a common accounting methodology; if this was not sufficient, they compiled statistics about the whole production and distribution process; if this was still not enough, they proposed the allocation of quantities.[35] In the 1930s there were more than ten thousand trade associations in operation.

This form of cooperation was also embraced by economists, for instance, in 1923 John M. Clark, the "father" of the workable competition theory, wrote that the exchange of information between members helps avoid cutthroat competition.[36] However, the Supreme Court started to adopt a stricter stance to trade associations already in the 1920s.[37] Naturally, this did not win the approval of the trade organisations supported by politicians or of the government itself.[38] In 1925 the President appointed a new judge to the Supreme Court; the effects became evident soon: in the case of information exchange within the industry, the compulsion requirement became a fundamental requirement.[39] The US president, who supported trade associations, expressly promoted antitrust investigations by the government aimed against associations operating as cartels in the strict sense.[40]

The New Deal heralded a new era not only in the economy but also in US antitrust legislation. Franklin Roosevelt attached outstanding importance to the notion of equality in its policies including competition policy. He exploited the post-recession sentiment and set out to take action against large corporations.[41] The notion of the freedom of contract based on the will of equal parties, which had been the primary principl, was losing ground. It was replaced by fair competition and a balance between the public interest and private interest in antitrust judgements as well. In the 1930s so-called fair competition codes were popular in the US industries but these were essentially intended to reduce rivalry within the sector, for instance by limiting price competition.[42]

31 This approach was popular not only in the United States but also in a number of European countries. See for instance. Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 10.

32 Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 4.

33 See also Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 74.

34 *Addyston Pipe & Steel Co. v. United States* 175 U.S. 211 (1899).

35 See for instance peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 76–77., as well as Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 32–33.

36 Quoted by Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 77.

37 See for example *American Linseed Oil Co.* (1923) 262 U.S. 371, or *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

38 For more information see Peritz Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 87.

39 See for instance *Maple Flooring Manufacturers' Assn. v. United States*, 268 U.S. 563 (1925).

40 See also Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 32–33.

41 Wells, Wyatt C.: Antitrust and the Formation of the Postwar world, Columbia University Press, New York; Chichester, 2002, 34.

42 See also Wells, Wyatt C.: Antitrust and the Formation of the Postwar world, Columbia University Press, New York; Chichester, 2002, 35–36 and Peritz, Rudolph J. R.: Competition Policy in America, 1888–1992: History, Rhetoric, Law, Oxford University Press, New York; Oxford, 1996, 128–129.

In the 19th century the European trend was similar to the developments witnessed in the United States. The era of free competition after the French Revolution was followed by disillusionment. This is when the formation of cartels in the modern sense of the word started, most markedly in Germany.[43] There was, however, a significant difference: in the United States, while corporations and trade associations were accepted, there was always a strong antipathy against cartels both in the public and in the law. That was not the case in Europe. Wells quotes the German Imperial Court stating: *"If prices continue to remain so low that economic ruin threatens entrepreneurs, their union [in cartels] appears not merely as a rightful exercise of self-preservation but rather as a measure of serving the interests of the whole as well"*[44]. The acceptance of cartels by the public was so strong that in 1926 the national steel makers' organisations of Germany, France, Belgium and Luxembourg formed an international cartel, with a shared office in Luxembourg, to supervise the market. Eventually the cartel broke up in 1931 because of the dissatisfaction of its members but until that time it was a significant power in the world market.[45] Subsequently, however, they re-organised themselves in 1933 to allocate national markets, joined by the British producers in 1935 and later by their Polish, Czech and Austrian peers. Even US producers became members, but only in respect of their overseas sales because of the American antitrust rules. Their hands were tied by the Webb-Pomerene Act of 1918, which allowed cartel-type cooperation only as regards foreign markets, under the supervision of the Federal Trade Commission. On the domestic market the Sherman Act was applicable.

3.1. The Geneva and London conferences.

Cartels gained considerable ground in the interwar era. This was observed in effectively all segments of the world economy. Cartels continued to grow until the Great Depression of 1929. The Depression brought a brief intermission in cartelisation, but even so, some studies claim that 40% of the global economy was controlled by cartels between 1929 and 1937.[46]

In 1927 the World Economic Conference was organised under the auspices of the League of Nations, then in 1930 the 26th Assembly of the Inter-Parliamentary Union was held in London. At the Geneva conference there was a palpable difference in the approaches of delegates. For instance, France, adopting the thinking of economist William Oualid, proposed that international cartels should be regulated in some form, while several states, for instance Germany, the United Kingdom and Norway, rejected this approach. The resolution of the Geneva meeting called on the League of Nations to explore, analyse and make public the issues relating to cartels and their results.[47] According to the resolution, "*the publicity given in regard to the nature and operations of agreements is constitutes one of the most effective means, on the one hand, of securing the support of public opinion to agreements which conduce to the general interest and, on the other and, of preventing the growth of abuses.*"[48] This conforms with the idea of Oualid, the initiator of the resolution, who proposed "*to entrust to a special administration, technical or judicial institutions the duty of supervising or tracking down injurious combinations and compelling them to supply all necessary information on their working, and to empower these institutions to*

43 See also Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 5.
44 Quoted by Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 5.
45 See also Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002.
46 See also McGowan, Lee: The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy, Edward Elgar Publishing, 2010, 56.
47 See also McGowan, Lee: The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy, Edward Elgar Publishing, 2010, 63–64.
48 See also McGowan, Lee: The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy, Edward Elgar Publishing, 2010, 64.

order or instigate their regularisation, prosecution, repression, or prohibition. The widest publicity is given to their decisions with a view to the deterrent disciplinary, and moral effect on the economic education of the public."[49]

In contrast, the London conference[50] represented a major step forward when it voted for the regulatory supervision and control of cartels. The delegates adopted the following resolution at the conference: *"Cartels, trusts and other analogous combines are natural phenomena of economic life towards which it is impossible to adopt an entirely negative attitude. Seeing, however, that those combines may have a harmful effect both as regards public interest and those of the state, it is necessary that they should be controlled by the state".*[51]

The 26th Assembly of the Inter-Parliamentary Union[52] discussed the report submitted by the Special Committee on Economic and Financial Questions on 27 July 1930. The rapporteur was Baron Szterényi hom Hungary. He raised the question whether the report was justified in regarding trusts and cartels natural features of economic life.[53] He was followed by Senator Alben W. Barkeley of the Unites States, who expressed the reservations of the US delegation concerning the expression 'natural phenomenon'. He closed his remarks by saying he was convinced that it is in the interest of peace that an international assembly should consider these economic rivalries which had in the past been a more fruitful cause of wars than all the armaments of nations.[54]

The London resolution referred to a special cartel commission to examine any agreements that were detrimental to the public interest. This commission was to be independent of governments and to include representatives of both consumers and workers. The commission was to investigate the facts and make recommendations to a central authority, which would be entitled to open legal proceeding through the law courts in order to have certain agreements declared null and void.[55]

3.2. European legislative models: Austria and Germany after World War I

The development of European law is rooted in the *Ius Commune* in that it lead Europeans to believe that market relations are also governed by justice, one of its main indicators being price. Furthermore, the just price became legally enforceable, and anti-monopoly prohibitions were introduced on trade.[56] European competition law, however, had its roots in the Austro–Hungarian Monarchy. By the second half of the 19th century Austria had become disenchanted with liberalism. In response, liberals came up with the idea of developing competition law.[57] By the 1890s cartels had become widespread and powerful.[58] Austrian cartels were typically secret, especially in the beginning. Nevertheless, the general public viewed even known cartels as stabilising forces rather than as harmful entities.[59]

Anti-cartel legislation was first introduced in the Napoleonic era, when a statute was enacted in 1803 setting out that any agreement between participants of an industry or sector which has the purpose of raising prices, no effort added, to the detriment of society was a criminal act. However, with the exception of special cases, the law was not enforced. An act removed this provision from the crim-

49 Quoted by Resch, Andreas: Phases of Competition Policy in Europe, Institute of European Studies, WP AY0504. (2005) 6.
50 See also Call, Arthur Deerin: The 26th Conference of the Interparliamentary Union, Advocate of Peace through Justice, 1930 (4), 259–268.
51 Schlichtkrull quoted by McGowan, Lee: The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy, Edward Elgar Publishing, 2010, 65.
52 The Inter-Parliamentary Union is an international organisation of Parliaments of sovereign states, which has been working for peace and co-operation among peoples since its establishment in Paris in 1889.
53 Quoted by Call, Arthur Deerin: The 26th Conference of the Interparliamentary Union, Advocate of Peace through Justice, 1930 (4), 264.
54 Quoted by Call, Arthur Deerin: The 26th Conference of the Interparliamentary Union, Advocate of Peace through Justice, 1930 (4), 264.
55 See McGowan, Lee: The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy, Edward Elgar Publishing, 2010, 64.
56 For more information see Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 34–35 and Gerber David J.: The Origins of European Competition Law in Fin-de-Siécle Austria, American Journal of Legal History, 1992.
57 For more information see Gerber, David J.: The Origins of European Competition Law in Fin-de-Siécle Austria, American Journal of Legal History, 1992 and Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 44–51
58 For more information see Harding, Christopher and Joshua, Julian: Regulating Cartels in Europe, Oxford University Press, Oxford, 2010, 65–85.
59 For more information see Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 52. and Kleinwächter, Friedrich: Die cartel, DOGMA, Bremen, 2012, and Resch, A.: Industriekartelle in Österreich vor dem Ersten Weltkrieg, Duncker & Humblot, Berlin, 2002.

inal law in 1870, but that also remained ineffective.[60] The beginnings of Austrian legislation at the end of the 19th century are linked with the name of Adolf Menzel, a leading Austrian legal scholar of the time, who stated that cartels were harmful as they eliminated competition; however, they could also be beneficial if their benefits exceeded their costs. This controversial assessment of cartels affected the attitude of Europeans for a long time. Menzel considered that legislation was needed to set aside and differentiate between harmful and useful cartels. He defined two principles to facilitate administrative action: a) the state needs to be able to collect information about cartels, therefore he proposed that each cartel would need to apply for authorisation and obtain state registration; b) cartels must be independent entities governed by dedicated legal rules. Eventually, the Austrian legislator proposed similar standards in 1897, focusing on the freedom of competition and propounding ideas and analytical methods in support of its arguments that are modern by today's standards as well. One central element of the proposal was for the Finance Ministry to publish data and reports about cartels and to regulate their conduct. Cartels were required to operate in line with their statutes, which had to be notarized and reported to the Finance Ministry within eight days. Particularly important decisions had to be notified within 24 hours. Under the proposal, the Ministry would have had powers to impose both civil and criminal sanctions. The proposal generated heated debate, but there was general agreement that enforcement must be an administrative responsibility. In the end the draft was not enacted, but both the proposal and the practical and theoretical debate it engendered had a significant effect on subsequent legislation. As Gerber puts it: "*Austrian competition law proposals offered the hope of a felicitous marriage between two central values of nineteenth century liberalism - competition and law. […] The competition law ideas developed in Austria at the turn of the twentieth century provided the seeds for the development of the European competition law. They provided not only a framework for analysis of the problem of economic competition, but also a model for responding to them. As we shall see, Austrian ideas, leaders and experience were to play an influential role during the parliamentary and scholarly debates in Germany that would eventually lead to the first European competition legislation.*"[61]

Before World War I Germany had undergone significant industrialisation, mostly in the direction of large-scale production and corporations through substantial vertical integration. German companies were typically export-oriented, which considerably strengthened their bargaining position vis-a-vis the Government because any restriction would have compromised their international competitiveness.[62] By 1900 there were some 400 cartels in Germany – it became a 'land of cartels'.[63] By this time there was general consensus, just as in other countries, that too much or too little competition was equally harmful, and cartels were natural responses to overproduction, they would inevitably emerge and are impossible to eliminate.

Legal problems relating to cartels appeared in Germany as early as in the 1880s.[64] Initially courts looked at cartels and the private agreements between cartel members in the context of the private law conflict between the freedom to contract and the freedom of enterprise.[65] One of the most important cases that went to court was the Saxon Wood Pulp case. In 1893 the wood pulp producers in Saxony entered into a cartel agreement. They agreed to sell their products through a common distributor; violation of that clause entailed financial penalties. One cartel member did just that and the others sued him for the penalty. The defendant, however, claimed that the cartel provision constituted an infringe-

60 For more information see Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, pp. 53–54. and Menzel, A.: Die Kartelle und die Rechtsordnung, Duncker & Humblot, 1902.

61 Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 63.

62 For more information see Richter, K.: Die Wirkungsgeschichte des deutschen Kartellrechts vor 1914: eine rechtshistorisch-analytische Untersuchung, Mohr Siebeck, 2007.

63 Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 74–75.

64 See also Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 89–95.

65 See also Richter, K.: Die Wirkungsgeschichte des deutschen Kartellrechts vor 1914: eine rechtshistorisch-analytische Untersuchung, Mohr Siebeck, 2007, 71–77 and Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 91–93.

ment of the freedom of enterprise and therefore was null and void. The Reichsgericht examined the issue primarily referring to the *Gewerbeordnung*[66] of 1869, in particular to its Article 1 governing the freedom of enterprise; however, as it concluded that the cartel agreement was not against the public good, nor did it violate personal freedom, it was legal. The court examined the public interest in the abstract, rather than from the angle of personal injury and justice, thus it was detached from the harm caused to particular persons. Thus cartel agreements became enforceable contracts in Germany. Above we already quoted from the decision of the Imperial Court, to the effect that cartels are essentially positive for the public interest. They become harmful if they serve the purpose of monopolization or unfairly exploit consumers.

In Germany legislation was not enacted until 1923, while in the Austro–Hungarian Monarchy Adolf Menzel proposed a general legal act to regulate cartels already in 1894.[67] Even though at the pressure of Parliament the governing party set up a cartel bureau, it never became operational because of the world war that erupted in 1914.[68]

In the interwar period undertakings formed cartels in unprecedented numbers all around the world.[69] This may have happened because industrial production during the war left behind unused capacities after the war ended.[70] Beneficial effects attributed to cartels included, inter alia, the allocation of capacities, as well as claims (for instance by the French Premiere) that international cartels help eliminate conflicts between national economies.[71]

Just as the cartel bureau before the war, the Act of 1923 was also created at the pressure of the Reichstag (the legislator). In 1923 the German Parliament enacted the law against the abuse of economic power.[72] "*This was the first law in Europe to establish a comprehensive - albeit loose - legal framework to combat restrictions of competition.*"[73]

The Act of 1923 empowered the Minister of Economy to take action against cartels or similar organisations endangering social welfare or the economy as a whole. The minister could oblige the cartel to terminate its founding agreement, order any member to be allowed to leave the cartel or require the cartel to submit documents, which became effective only after the members obliged. The regulation relied, on the one hand, on state supervision and on the other hand it regulated the legal relationship between members, also granting certain rights to cartel members, for instance to leave the cartel. The Act also set up a cartel court, which was not part of the regular court system; rather, it worked similarly to an administrative body. The proceeding judge was appointed by the president, and he had to satisfy requirements applicable to regular court judges. The president of the Imperial Economic Court appointed four more members to court cases: one from his own court, an independent expert to represent the public interest and one representative each for the plaintiff and the defendant.

Few decisions were adopted basel on the Act of 1923; the Minister rarely made use of his powers and, as a consequence, the Cartel Court was rarely able to pass judgement.

The mushrooming of cartels between the world wars was also attributable to the fact that governments tended to support industry consolidation, cooperation and the unity of national industries on the international market.

As explained above, in the 1920s German corporations gained considerable strength and played a major role in the global economy. Simultaneously,

66 Gewerbeordnung für den Norddeutschen Band von 1869 (26 Juni 1896), BGBl., 245.
67 Stieda W., Menzel A., Chorinsky C. and SOCIALPOLITIK Verein für: I. Über wirtschaftliche Kartelle. Von Wilhelm Stieda und Adolf Menzel: Über bäuerliches Erbrecht. Von Dr. Hermes und Carl Graf Chorinsky. Als Manuskript gedruckt. II, Duncker & Humbolt, 1894.
68 For more information see Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen, (2 November 1923) RGBl., I, 1067.
Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 95–114.
69 For more information see Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002 and Resch, Andreas: Phases of Competition Policy in Europe, Institute of European Studies, WP AY0504. (2005).
70 See also Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 5–6.
71 See also Wells, Wyatt C.: Antitrust and the Formation of the Postwar World, Columbia University Press, New York; Chichester, 2002, 10.
72 Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen, (2 November 1923) RGBl. I, 1067.
73 Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 123–124.

cartelization also gained momentum: by 1929 there were more than 3000 cartels, a marked increase from 400 in the 1900s. German businesses had an interest in preserving weak regulations, weak state intervention and the inability of judges to take action, and most lawyers also opposed the legislation. However, social democrats wanted tighter regulations, proposing the establishment of an international cartel authority.[74] After the National Socialist German Workers' Party came into power, in the 1930s cartels started to be organised or required by the state; consequently, the effect of the Act of 1923 became negligible.

4. Conclusion

Society's aversion to cartels has a long history. However, states satisfied the need of society for economic stability for a long time by being lenient in certain areas or even supporting industrial cooperation. By the beginning of the 20th century it had become evident that the classic economic principles were unable to ensure the required increase in consumer welfare without the imposition of statutory restrictions. This dichotomy is clear in the development of US law, where the legislation prohibited cooperation; still, up to World War II a significant number of cartels were in operation, sometimes with the support of the government. Also, in the period under review almost all states gave support to cartels to promote competitiveness in the international markets. History teaches the lesson that cartels are natural phenomena of economic life. In light of this, legislators found it hard to decide whether to take an understanding or hostile approach to them. The fundamentally tolerant policy described in this paper underwent major changes after World War II, and by now in developed countries cartels are considered to be chargeable offences and often criminal actions.

74 Gerber, David J.: Law and Competition in Twentieth Century Europe: Protecting Prometheus, Clarendon Press, Oxford, 1998, 146.

Tihamér Tóth*

Competition and Democracy

Abstract

Competition and democracy are the most respected and perhaps most efficient ways to organize the economy and the society. Far from resolving all the difficult issues these institutions raise, this paper will demonstrate their connections. I will argue that competition and democracy are two sides of the same coin in our Transatlantic culture. During my research, of the numerous competition schools of thoughts, I was inspired mainly by the German ordoliberal school. I explain how the freedom of choice, market access, the protection of private property, the role of checks and balances, and fair and non-misleading communication are, or should be common building blocks of both an efficient free-market system and a well-functioning democracy. A short overview of relevant texts of Catholic social teaching will show that neither competition, nor democracy can function without a strong and widely respected moral foundation.

1. Introductory remarks

The prevailing school of competition policy thought assesses the utility of rivalry primarily based on the effect of competition on consumer welfare.[1] Nevertheless, competition is a social as well as economic phenomenon, and its assessment can hardly be limited to a single measurement. Where an asset is scarce, be it water in the desert, seating in a tram, money in the purses of undertakings, voter support for politicians, competition will necessarily ensue. In the first half of the past century, partly due to the response to extremist movements on both ends of the political spectrum, the scrutiny of the relationship of economic competition on the one hand and politics and democracy on the other hand received significantly greater emphasis. In recent years, in particular after the fall of the communist regimes, the study of the functions of competition and competition law has been narrowed down to economic and in particular welfare processes. We consider it increasingly evident that we live in a democracy and in a competition-driven market economy, in fundamental freedom.

By now, approximately half of the countries of the world can be said to have a democratic framework for the exercise of political power, albeit at different levels of development.[2] Market economy driv-

* Associate professor – Pázmány PéterCatholic University – Faculty Law and Political Sciences, Lawyer – Réczicza White&Case LLP International Law Firm. This paper is part of an OTKA research project No. 109414.

1 See for instance: Fundamental principles of competition policy as applied by the Hungarian Competition Authority (GVH) (8 May 2007), point 1.4. http://www.gvh.hu//data/cms1022484/elemzesek_alapelvek_antitrosztpolicy_2007_05.pdf It should be noted that the situation is not this clearcut in EU law: there is a slight difference between the European Court of Justice's position to protect the structure of competition and the Commission's policy focusing on consumer welfare.

2 http://www.britannica.com/topic/democracy, The spread of democracies in the 20th Century.

en by the forces of competition is also the most popular method of organising the economy.[3]

The examination of the relationship of competition and democracy is hindered by the fact that neither concept has a clear, universally accepted definition.[4] There are different schools of thought about the nature of competition and the objectives of competition policy and competition law. The same applies to the concept of democracy. A comprehensive review would be beyond the scope of this short paper, *inter alia* because of the timespan involved. The two concepts are also similar in that they are difficult to examine in a pure form. We often precede them with various restrictive qualifiers. You have pure, fair, effective, efficient, workable competition. You have people's, direct, indirect or even illiberal democracy. It is anyone's choice which qualifier to live with.

Apropos elections. If, as a starting point, we try to find a common denominator between democracy and competition, the first thing that comes to mind is the importance of voting and (s)election. Competition for votes, the votes of consumers and electors. Without this, there is neither competition nor democracy. Maybe our vote has little weight, we feel that it is a drop in the ocean, but still: we choose the persons to wield political power with our combined little votes, and similarly, the demand curve affecting market trends is composed of multitude of tiny dots: consumer votes reflecting individual preferences.[5] The way and consciousness with which we cast our votes for political parties, persons or products and undertakings says a lot about the state of democracy and competition.

The running of a state administration may require a different approach to the running of a corporation, but the motives underlying the acquisition of political power and market competition are similar in a number of respects.[6] According to the textbook approach, the behaviour of market actors is always driven by a desire for higher profits. However, we should not exclude from our horizon longer-term ethical considerations such as self-realisation rooted in our human nature or the improvement of the quality of life of consumers. On the other hand, there are bound to be corporate executives whose utmost desire is market power that provides greater apparent freedom. It is easy to see without any lengthy argumentation that the leaders of parties that manifest the practical implementation of democracy are motivated by similar considerations.

In this paper I will first attempt to briefly describe the concept of democracy and competition. From among the schools of competition though I will focus on the Freiburg school, which was behind the German economic miracle, as they created a consistent system. Then I shall present how the concepts used in competition policy in the broad sense can be extended to the exercise of political power. Searching for the common moral ground of competition and democracy, I shall also cite encyclical letters, which serve as the source of Catholic social thinking, highlighting their similarities with the Freiburg school. I will attempt to answer the question whether there can be democracy without free competition or competition without free democracy. I shall do this without purporting to cover the subject comprehensively, with the objective of provoking a discussion.

3 There are many types of market economies, and as many types of democracies. Market mechanisms played some part even in community property dominated socialist countries after it became evident that it is impossible to centrally control all prices, production and consumption. These days social market economy is more appropriately called state capitalism (see China). In these countries competition in the Western sense, relying on individual capabilities, plays a lesser part.

4 The two concepts also share the element that if we dig deeper, we may find that our attitude to them is not all than unambiguous. The majority rule of the populace does not always bring optimum results, particularly if the men and women of the street do not make informed decisions. As Churchill put it: "*Democracy is the worst form of government, except for all those other forms that have been tried from time to time.*" (House of Commons speech, 11 November 1947). Competition sometimes also yields less than optimum outcomes (and by this we do not mean that it is inconvenient to compete while being a monopolist is such a reassuring feeling).

5 Gary S. Becker also analyses this relationship in his short paper 'Competition and Democracy'. Journal of Law and Economics, Vol. 1 (Oct., 1958), pp. 105-109.

6 Similarly, it may also be intriguing to examine what principles successful parties follow in indirect democracies relying on competition among parties. We might find that those leaving too much scope for internal rivalry will fall apart sooner or later, while parties led by a strong hand and radiating unity to the outside world will be successful. It may be reasonable to draw a parallel with a large corporation, where it is not democracy that is the key to success but well-organise hierarchy, supplemented by some voluntarily adopted checks and balances.

2. What is democracy and what is competition?

Both the Hungarian Fundamental Law (Constitution) and the Treaties of the European Union[7] mention the importance of democracy and competition, without offering a definition of the terms. Neither democracy nor competition can be defined with exactness, to be valid for every era and every person. These social and economic institutions can be presented through their historical development or in light of varying philosophies and schools of thought, or in a public law and in particular constitutional law context. Unfortunately, this short paper cannot endeavour to provide a comprehensive picture; in particular, the emergence and transformation of democracy and distinguishing between its various embodiments would require undue effort from the author. As a 'working concept' we shall consider democracy to be a system of institutions of political decision making were individuals may acquire public offices in perfect competition for the votes a broad scope of voters.[8] The choice of words may indicate that I shall discuss this subject primarily from the aspect of competition policy.

However, refraining from dissecting the concept of democracy will not prevent us from stating: the main difficulty of definition lies in the fact that, in addition to the concept of 'people's power', each era added different elements to the meaning of democracy. Democracy in the city states of the Antiquity had different content than a constitutional monarchy in 19th century Europe or a federal democracy today.

As to the legal concept of democracy, according to Article B) of the Foundation chapter of the Fundamental Law, Hungary is an independent, democratic state where the rule of law is observed. Tamás Győrfi emphasises in his Commentary to the Constitution that democracy has not played a central role in the work of the Constitutional Court. On the one hand, when defining the content of the rule of law, it was not linked to democracy. On the other hand, the Constitutional Court could always rely on more specific constitutional provisions than the constitutional requirement arising from the concept of democracy. Consequently, he states that democracy played a part as the principle to give these more specific rules legitimacy.[9]

László Trócsányi understands democracy as one of the utmost constitutional principles.[10] For this, he refers to Article 2 of the French constitution: "government of the people, by the people and for the people". The democratic legitimacy of power is an effective legal principle everywhere including Hungary: public power can be exercised if it is derived from the will of the people.[11] We should add that modern democracies do not operate in a manner that would comply verbatim with the French constitution quoted above: in a representative democracy, direct democracy (in particular referenda) is rarely encountered.[12] According to Trócsányi, democracy is the foundation of the legitimacy of the exercise of power, with governance on the majority principle being an important element, including respect for the political opposition (minority) and the individual, the latter meaning the protection of the inherent rights of persons that cannot be restricted by the State.

The judgments of the European Court of Human Rights (ECtHR) are also useful contributions that elaborate on democratic principles in the context of specific cases. Discussing the principle of democracy Trócsányi found it important to emphasise that according to the ECtHR, democracy does not mean the constant supremacy of the majority opinion; it is important to leave room for the minority in politics and that the majority does not abuse its dominant position.[13] In the same judgment the ECtHR states that

7 Article 7 of the Treaty on European Union establishes a consultation procedure for when there is a clear threat to the fundamental interests of the Union in a particular Member State. These interests include human dignity, freedom, equality, the rule of law, human rights as well as respect for democracy.

8 See for instance J. Schumpeter, Capitalism, Socialism and Democracy, p. 269 (1942).

9 András Jakab (ed.): Az Alkotmány kommentárja [Commentary to the Constitution], I. Századvég Kiadó (2009.), 144-145.

10 Trócsányi, László and Schanda, Balázs (ed.): Bevezetés az alkotmányjogba [Introduction to constitutional law], SZTE ÁJTK – PPKE JÁK, Budapest, 2010., 54.

11 Resolution No 38/1993. (VI. 11.) of the Constitutional Court (on the judicial power, inter alia the appointment of judges).

12 It should be noted that with advanced information technology, soliciting the opinion of 'the people' can be used for the preliminary 'sounding out' of the reception of a government measure.

pluralism, tolerance and openness are hallmarks of democracy.[14]

A required conceptual element of a democratic state is the division of powers, the separation of those wielding public power by function and the establishment of a delicate system of checks and balances.[15] Article C) of the Fundamental Law provides: "No one shall act with the aim of acquiring or exercising power by force, and/or of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way. The break-up of previously powerful monopolies, mostly state-owned in Europe and private in the US, into smaller firms is also an important objective of competition policy. Such a power to terminate monopolies had classically been granted under US antitrust law, while in Europe the Commission, and sometimes market participants, tended to apply Articles 37 and 106 TFEU and its predecessors to question the raison d'etre of state monopolies.[16] The monopolization of a market is not prohibited under competition law as long as it results from fair competition and better efficiency. Similarly, a political force may receive close-to-monopoly votes and political power in legislation and government. If an entity attempts to monopolise a market by, for instance, expanding its monopoly in one market to another one or through short-term predatory pricing, it will be punished under competition law. The acquisition of political power in unfair competition is prohibited by other legislation.

Similarly to democracy, the freedom of competition was also enshrined in the former Constitution and in the present Fundamental Law. Again, there have been very few cases when a government measure would have been declared unconstitutional on this basis alone. According to András Tóth, the Fundamental Law is a step forward relative to the former Constitution in that it refers, in Article M(2), to fair economic competition rather than just the freedom of economic competition. In his opinion, this expresses the main tenet of social market economies: the protection of individuals vulnerable in market economies by keeping competition fair. Looking at it from this angle, interventions against abuses of dominance as a competition law concept also receives a broader meaning.[17]

The essence of competition is just as difficult to capture as the essence of democracy. The competition policy principles containing the competition policy mission statement of the GVH and outlining the economic framework for law enforcement also fail to define the concept of competition.[18] According to a much used dictionary, competition is a state or activity when we want to achieve or acquire something through overcoming others.[19] An OECD document contains a useful definition:[20]

"Competition: A situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g., profits, sales and/or market share. Competition in this context is often equated with rivalry. Competitive rivalry between firms can occur when there are two firms or many firms. This rivalry may take place in terms of price, quality, service or combinations of these and other factors which customers may value."

The opinions of economist and legal scholars representing different schools vary as to the definition of 'good', socially desirable competition. They differ as to whether they consider competition as a process, a treasure-trove of opportunities[21] valuable in itself as a precondition of human self-fulfilment, or look at it as an instrument for economic efficiency,

13 Idem p. 55., referring to Case No 7601/76 7806/77 *James, Young and Webster v United Kingdom*, judgment of 13 August 1981 (right to join unions). Paragraph 63 of the judgment states: „democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any *abuse of a dominant position*" (my emphasis).

14 *Handyside* case, judgment of 7 December 1976 (Series A no. 24., p. 23, par. 49).

15 For more information see: Csink, Lóránt: Mozaikok a hatalommegosztáshoz [Mosaics to the division of power], Pázmány Press Budapest, 2014., p. 11.

16 Today it would be possible to 'break up' an undertaking abusing its dominance pursuant to Article 102 TFEU, though this provision has not been enforced to this day. There are also decisions affecting the structure of undertakings in EU merger control cases, even though with a preventive rather than punitive function.

17 András Tóth: Magyarország gazdasági rendje az Alaptörvény és a piaci verseny viszonyára tekintettel [Hungary's economic regime in light of the relationship of the Fundamental Law and market competition] – Versenytükör 2012/1 (Vol. VIII. No. 1) p. 26.

18 Fundamental principles of competition policy as applied by the Hungarian Competition Authority (GVH) (8 May 2007) http://www.gvh.hu//data/cms1022484/elemzesek_alapelvek_antitrosztpolicy_2007_05.pdf

19 http://www.oxforddictionaries.com/definition/english/competition

20 http://www.oecd.org/dataoecd/8/61/2376087.pdf

21 For Hoppmann (like for Hayek, who writes about the 'discovery procedure'), competition is a market process that is the resultant of individual freedoms. See Wernard Möschel Zur Einführung: Erich Hoppmann (1923-2007), in N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), 655.

which works well if it 'delivers results' such as a wide choice of affordable, high-quality products and, in the best case, also promotes innovation. According to Erich Hoppmann, who belongs to the ordoliberal school of Freiburg to be described in detail below, there are two sides to the 'coin of competition': one is economic liberty, the other is the realisation of various economic gains (efficiencies).[22]

3. Significance of the Freiburg school

The ordoliberal school emerged in the interwar period, in the shadow of the spread of Nazism, in a peaceful university town in South-West Germany. After World War II its main tenets were implemented by the German economic government and also in the nascent economic governance of Europe, at least in part.[23] A little later, through economic minister Ludwig Erhard, the view of the Freiburg school[24] *of economists and legal scholars about humans and the world played a key role in the achievement of the German 'economic miracle'*[25].

Franz Böhm, Walter Eucken, Alfred Müller-Armack, in contrast to the laissez-faire or Hayekian liberalism, did not envisage a de-nationalised economic regime but an economy relying on the freedom of enterprise and competition, where the State has an important role in maintaining order and upholding the framework conditions.[26] Rüstow called this new, pro-order school neoliberalism, while he termed the 19th century, 'denationalising' liberal school 'paleoliberalism'. In the phrase 'social market economy' the emphasis is on 'market economy': it is not a 'market-type socialist' form of governance. Müller-Armack understood social market economy to mean a social and economic regime that fulfils our desire for both freedom and social justice[27] through the tool-set of the market economy.[28] A well-regulated market can thus produce a positive social outcome.

Ordoliberal economic politicians had a radically different view of the world than the Marxist-socialist politicians that gained ground in this era or, in France predominantly, dirigistic, industrial policy inclined politicians According to ordoliberalists, the State should act not only as a watchdog or an all-dominant 'father figure' but as the creator of legislative framework, the protector of the pillars of economic and social order and also as a fair judge. Property, the freedom of contract and the freedom of competition represented the tree pillars to build the ideal society and economy on, leaving scope for individual initiative. Under another classification, the two main principles („*Kernprinzip*") of the ordoliberal school are a well-functioning price system and competition. There are additional principles such as the openness of markets, private property, contractual freedom, responsibility, the predictability of economic policy and the primacy of monetary policy.[29]

Wilhelm Röpke was not affiliated to Freiburg but was in line with ordoliberal thinking, represent-

22 Erich Hoppmann: Wettbewerb als Norm der Wettbewerbspolitik, in N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), pp. 660-661.

23 For more information see: Tihamér Tóth: Az ordoliberális iskola palackpostája – a piacgazdaság eszméje egykor és ma [Message of the ordoliberal school in a bottle - the concept of market economy in the past and present]; Acta Universitatis Szegediensis, Acta Iuridica et Politica LXXIII, 58., Ruszoly József Emlékkönyve, Szeged, 2010.

24 Naturally, over time these ideas were embraced by economists and lawyers in other towns, so it may be more appropriate to use the 'city-independent' term 'ordoliberal school'. As with any school of thought, the 'categorisation' of various scholars may be problematic in this case as well. On the one hand, the views of a scholar may change over time (e.g., Hayek was initially considered to belong to the Freiburg school, while later he developed an independent, more pro-market line; similarly, Wilhelm Röpke can be seen as being in the liberal corner of the ordoliberal school while he also represents strong Christian moral philosophy views). For an overview in a tabular form see: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), 10.

25 Ludwig Erhard tried to distance himself from the 'Deutscher Wunder' notion when he emphasised that economist, after all, did nothing extraordinary apart from leaving scope for human initiative and creativity in an orderly framework. Ludwig Erhard: Wirtschaftsminister, nicht Interessenvertreter, in: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), 521.

26 The aforementioned scholars were not in full agreement on the desirable role of the State. The 'mainstream' Freiburg school intended the State to have a role in creating and safeguarding the framework of regulations, while Müller-Armack envisaged market economy under state control, even if not on the level of French dirigism or Keynesian policy but attaching importance to state mechanisms to dampen the swings of economic cycles. See: Christian Watrin: Zur Einführung Alfred Müller-Armack, in: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), p. 454.

27 This might be called the duality of 'freedom and safety'.

28 Alfred Müller-Armack: Stil und Ordnung der Sozialen Marktwirtschaft (1952), in: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), p. 466.

29 See Nils Goldschmied: Zur Einführung: die Politik der Wettbewerbsordnung, in: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), 195.

ing 'a humane economy' and searching for the 'soul' of the market economy.[30] He regarded as fundamental conditions for a market economy a social and moral order compatible with Christianity, monetary policy to assure a stable currency, the self-regulatory power of free competition, a fiscal policy that does not strangle the economy and brave entrepreneurs with initiative unshackled by state regulations.[31] Röpke warned in advance about the danger of placing ever more responsibilities on the State in the name of extreme welfare policy and state investment policy. This 'treasury socialism' eventually hinders the optimum functioning of the fundamental institutions of a market economy.

One of the essential tenets of the ordoliberal school was that the social, economic and moral orders are inseparable and closely related. This was more than a competition or economic policy school of thought; they tried to discover multidisciplinary laws. Market economy is an economic regime that is associated with a certain type of social and moral order. The market may guarantee optimum results only where there is individual initiative, bravery, responsibility, independence rooted in property, economy and provision for the future. It is also necessary that individuals should have close links to the family, communities and nature and, eventually, to the divine order[32].

The key element of ordoliberal economic policy was competition policy leaving room and providing a framework for individual initiative, with interventions against cartels and concerns representing the concentration of market power and dominant undertakings taking market opportunities from others as its cornerstones.

Representatives of the Freiburg school saw a close connection between democracy and free competition. Professor of economics Walter Eucken criticised the German economy for being overly politicised and for the weakness of the State struggling in the grip of economic interest groups already in 1932.[33] Their wisdom spanning various regimes lied in action and resistance against the various group interests, which is rooted in the 'theory of order'. The elimination of positions of power striving for exclusivity was an important objective for them in the economy and politics alike. Eucken warned against the political centralisation of economic power: this would allow the administration to obtain excessive power over the entire lives of individuals and life would be deprived of privacy.[34]

The use of the concept of economic constitutionalism[35] is a good indication of the ordoliberal thinking spanning the economy, society and politics. Just as the exercise of public power is governed by constitutional principles and rules, economic operators also work in a pre-defined regulatory environment set up by the State, economic governance is not haphazard and driven by lobby interests, while the safeguards to protect the economic order are enshrined in the constitution.

The study of Böhm on market power published in 1928 is an excellent example for the uniform approach to the economic and political order. In this paper he argues for the necessity of competition regulation by saying that (1) in relationships regulated by civil law legal transactions between equal parties are legalised by the free expression of will of the parties, (2) in the relationship of the public power and the individual, the actions of the State are legalised by the existence of statutory authorisation, (3) legal transactions between an entity possessing economic power and its client are concluded without

30 After the Nazis gained power, he left Germany and taught in Istanbul, then in Switzerland. In Geneva he worked with Ludwig von Mises, a leading figure of the Austrian economic school. In 1947, together with Hayek, he co-founded the liberal Mont Pelerin Society. See: https://mises.org/library/biography-wilhelm-r%C3%B6pke-1899-1966-humane-economist; http://www.theimaginativeconservative.org/2012/01/humane-economy-of-wilhelm-roepke.html;

31 See for instance Wilhelm Röpke: A Humane Economy – The Social Framework of the Free Market pp. 125–126 (English ed., ISI Books 3rd ed. 1998), 102. One of his most famous books is Jenseits von Angebot und Nachfrage, 1958, Eugen Rentsch (Zürich-Stuttgart).

32 Naturally, the latter was emphasised by scholars closer to Christianity such as Böhm or Röpke.

33 Staatliche Struktuwandelungen und die Krisis des Kapitalismus; cited by Goldschmidt and Wohlgemuth, idem p. 1.

34 Walter Eucken: Über die zweifache wirtschaftspolitische Aufgabe der Nationalökonomie (1947), in N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), 146.

35 „Wirtschaftsverfassung", see for instance: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), 24.

any legalisation, merely through the will of the stronger party.[36]

4. Consistency of democracy and competition in the US

Today the US is certainly the most influential promoter and 'exporter' of democracy and competition-based market economy.[37] There may have been no other country where democrats could embark on the establishment of a social, economic and political order relying on the rule of the people as a 'green-field project'.

This is probably attributable to the fact that the founding fathers were members of various Protestant denominations, where the Church officials were elected – why should politics be any different? [38] On the old continent, feudal absolutist regimes of various shades gave way to different democracies. As Amato aptly notes, the Sherman Act adopted in 1890 was a reflection of Jefferson's idea of society in the economy and market in terms of its original objectives. Jefferson's ideal democracy was composed of a large number of producers, each with a small share of the market, which was ideal because due to their approximate equality there were no redistribution problems or threats of abuse of market power, excessive wage claims by massive numbers of workers or the suppression of politics by economic interests.[39] As Senator Sherman, initiator of the Bill, put it, if a group of undertakings had too much market power, that would provide them with royal privilege, which in turn is incompatible with the American form of government.[40] Can this be the reason why we in Europe are more forgiving to monopolies?

5. Common denominators of competition and democracy

Harmful economic and social effects of monopolies

Economics has gone to great lengths to identify the negative economic effects of monopolies. The 'reasons why we dislike monopolies' lists tend to include the loss of allocative efficiency due to overpricing, the deadweight loss in the form of goods not sold or not produced. The broader harm caused by monopolies has become the focus of competition policy mostly in German-speaking countries[41] – probably for a reason –, even though assisting the Davids in the fight of the large and small was also an objective of antitrust in the US in the initial decades. However, monopolies and market power may have the advantage of having more resources available due to their size, or at least to cheaper funding; thus, if there is sufficient incentive, they can afford to spend more on research and development. Nevertheless, competition policy has always been suspicious of the behaviour of undertakings with large market shares, and has tried to prevent their emergence through concentration by its merger control activities.

In the political dimension us Hungarians may have personal memories of the era of monopolies. It is worth reminding those who might consider that a single political force could be 'efficient' in governing of the hegemonic reign of the Hungarian Socialist Workers' Party.[42] In what we call Western culture it is practically impossible that anyone could obtain power without having been put to the test of elections.

36 Franz Böhm: Das Problem der privaten Macht, in N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), 57.

37 It should be noted, though, that the US Constitution does not expressly contain the words 'democracy' or 'competition'.

38 It would be hard to leave out the two-volume work of Alexis de Tocqueville on the American democracy of the first half of the 19th century. In the original French, *De la démocratie en Amérique*; 1838 in English: Democracy in the United States, New York.

39 T. Jefferson, "Notes on the State of Virginia", Query XIX, in *Writings* (The Library of America, New York, 1984) p. 290. Cited by: Giuliano Amato: Antitrust and the Bounds of Power (Hart Publishing, 1997.), 97.

40 Ibid., 98. Amato also agrees that there is a large degree of similarity between the ordoliberals' concept of the curtailment of power and the original American antitrust theory.

41 During World War I powerful concerns emerged in the industry converted to military production; curbing their power was an important objective of the Weimar Republic build on the ruins of the empire. The strengthening of trade unions resulting from the benefits offered to disarm workers' movements presented another challenge.

42 It is only in times of a social-economic emergency that a wise dictator may make better decisions that politicians seasoned in political debates.

Competition in the market, competition for the market

The functioning of the democratic state is in a number of respects similar to those markets where we do not make economically relevant decisions on a daily basis, where competition is not in the market but for the market. There are services that are most efficiently provided by a single actor; in these sectors periodically conducted 'who stays in the field' competition may lead to the optimum outcome. To his end, the markets of services relying on essential facilities are often regulated, for better or worse, through concession agreements. In these cases increased consumer welfare depends on whether this competition reopened every few years results in the selection of the right undertaking to act as a temporary monopolist in the coming years. If the competition is open and fair, and the term of exclusivity is not overly long, consumers and, eventually, society does not suffer any harm.

The same occurs with the fight for political power. In established democracies members of Parliament and governing parties serve their mandates, typically of four years, then they are assessed again. What is open competition, equality of opportunities or in EU jargon 'level playing field' in the economy is the regulation of suffrage in political democracy. If the suffrage is sufficiently broad and general and every citizen capable of making important decisions may cast his ballot, then we can hope that the fair competition will result in the victory of the best, or at least the entity best complying with the current expectations of the public. It would go beyond the scope of this paper to delve into questions of whether individual or list constituencies or a mixed system is the ideal arrangement, how to fairly draw the borders of constituencies, who exactly can vote or be elected, how to calculate the necessary majority, etc. These are all important issues for the regulator, just as in the case of the arrangement of a frequency use or tobacco shop tender. Evidently, competition does not occur in a vacuum but in a regulated environment, and the extend, depth and main features of that regulation have a major impact on the outcome of competition. I hope it will not sound unsubstantiated if I draw a parallel in that incumbent firms are always tempted to shape the terms of the upcoming competition so that they may win again.

Balances

In competition policy, when market power is to be demonstrated we start from the market share of the undertakings, that is, we examine the structure of the market. It may also be important, however, to look at the other participants in the market and the value chain because they may easily counterbalance a seemingly overwhelming undertaking. Competition authorities routinely investigate, particularly when assessing the expected competitive effects of concentrations of undertakings, whether the increased market share would result in greater market power (in particular the ability to set prices). An undertaking may be counter-balanced by a variety of other actors: for instance, large supermarket chains and important suppliers or manufacturers may be mutual checks for each other. Potential competitors not yet present on the market may also act as a counterweight of sorts.[43]

In the field of politics the environment changes almost as often as in an easy-to-enter market. Those in power may be relegated by voters in the upcoming elections. The party or parties currently in power govern the country in the knowledge that if their voters are dissatisfied, they will find themselves in opposition in the next term. Thus because of the four-yearly regular elections a wise politician in government always responds to voters (essentially to the public opinion), thus voters represent an ever-present counterweight in a democracy. Modern state structure also ensures in more sophisticated ways, in the short term, that the power of election winners is curtailed. Mention should be made of the separation of powers (in particular the independent judiciary), the requirement of qualified majority vote for the amendment of the constitution or key legislation, the often required consensus for the election of certain important officials, the placement of monetary policy and certain economic surveillance functions in the hands of an institution independent of the government (competition authorities also tend to enjoy a certain degree of independence). Similarly to the rules protecting minority shareholders, minority parties in Parliament are generally protected

43 If they can enter quickly with enough clout, the market definition may need to be broadened, while the probability of a somewhat slower but still deterring entry plays a part in assessing market power.

by special rules. For the sake of completeness we should also note the institutions of the Constitutional Court and the ombudsman.

At this point we can establish that one prerequisite of a well-functioning market and democracy is ensuring that even if an entity obtains a position of power (which is almost inevitable in politics), there would be other actors or forces to counterbalance their power. Failing that, common human traits such as becoming too comfortable, indolence, excessive self-confidence or violence may have detrimental consequences for the undertaking or politician concerned as well as for the whole economy and society.

Property

The soundness and legal protection of ownership, the ownership status of the highest number of individuals is indispensable for both a democracy based on the rule of law and for an efficient market economy. The acquisition of property necessary for self-fulfilment, which was embodied in the acquisition of land for centuries, had a decisive influence of the social, political and economic regimes of countries. Suffice it to refer to the obvious difference between the North American and South American routes evolving following the colonisation of the Americas starting in the 16th century. There were a number of similarities in the settlement of the Spanish in the South and of the English, Germans, Dutch and other nations in the North (which can hardly be called a 'greenfield project' due to the eradication of the native population). There was an important difference though, which had an impact on democratic processes and economic success: while the Spanish conquistadors brought with them European absolutism, feudal structures and the concomitant concentration of land ownership, in the North strict limits were placed on the amount of land that any one person could acquire. This made the economy, society and politics more polarised and people-oriented.

For the sake of completeness we also need to note that ownership entails not only rights but also obligations and responsibilities. Ownership fulfils its social function if it contributes to the well-being of not only one person but the entire community. Sharing the fruits of ownership with others as a moral requirement is an important pillar of the Catholic faith, but it is also present in the Hungarian Fundamental Law.

The responsibility entailed in ownership is most obvious in competition law in the case of monopolies in possession of essential facilities; in such cases they may be forced to share this essential facility (e.g. railway infrastructure, high-voltage grid) with their competitors to ensure more intense competition in such services. Competition law may interfere in ownership relations in other ways as well: examples include the break-up of undertakings in the event of the systematic abuse of dominance or the disinvestment of a part of the group of undertakings often imposed in merger cases.

Global competition, global democracy?

Interesting problems have arisen as a result of the free trade intensifying after World War II and then the process of globalisation. Some markets became regional or even global, and because of the strict rules of economies of scale only a few, large undertakings could survive. Corporations working on the global scene presented new challenges to the national competition authorities as well as government-level policymakers.[44] Legal regulation is unable to go after market actors that outgrew the national boundaries: extraterritorial enforcement may bring procedural problems while international law does not have any real clout. In the context of economic integration the EU is the only good example, where the geographical expansion of the markets was mirrored by the legal and institutional system.

In the foreword to his book Das Kapital, which is effectively a humorous letter to Karl Marx, Reinhard Marx acknowledges that his namesake was right in connection with the concentration of capital. While the unregulated capitalism of the 19th century was a hotbed of Marxist ideas, today the unregulated global economy may have similar consequences but on a larger, global scale. These days social injustice is a global, rather than country-level problem (in many countries, in particular in the West, it has been reduced substantially). If we were to call any-

44 This is not a new issue: in the area of shipping trade and discoveries, British and Dutch companies were granted monopolies and accumulated huge wealth, competing or getting intertwined with the political (at the time royal) power.

one making less than 2 dollars a day poor, then 2.5 billion persons should be classified as such. On the other hand, more than half of the wealth is owned by 2% of the population, while the poorer half of mankind has to make do with 1%.[45] Fukuyama was wrong when he envisioned the end of history in 1992, seeing that the countries of the former Soviet empire were embracing democracy and the market economy one after the other. In reality, partly because of cultural differences, freedom and affluence have not become the norm everywhere. In several Western countries, including Germany, the regime called market economy that neglects ethical standards and focuses on maximising capital income has returned to the state of 'primitive capitalism'.[46]

The relationship of democracy and competition can and must be assessed in a broader context. Competition in a number of markets recognises no frontiers, which has not been accompanied by the democratisation of the exercise of power across nations. If we build democracy and competition on the global level, we should also consider whether well-functioning democratic states may exist when there are such enormous differences in wealth and income levels. If market processes result in such distribution, can we be certain that individuals do their duty and states and international organisation perform their functions under the principle of subsidiarity?

The conditions of activity in the market and in a democracy

Neither democracy nor market economy may exist without individuals who influence political or economic processes with their conscious, well-considered decisions. Through regulating voting rights we try to ensure an optimum outcome, that is, potential voters who are unable to make sound decisions due to their age or mental state or who have no close ties to the country concerned may not cast their ballot. We also argue whether each person should have one vote or whether the number of dependents should increase the weight of votes.

The situation is less clear-cut in the market, at least on the side of consumers. Here 'money talks', there is not even apparent democracy, at least not in the sense that we do not have proportional voting rights. If you have more purchasing power, you can buy more and your decision has more weight.

On the other side of the election markets, that of the politician and parties, or undertakings offering their products, we see some similarity in that there is a certain regulation on who may enter the ring. Wealth plays a part again: those who have more supporters or sponsors can expect to have more successful campaigns. It is enough to cast a look at the US, the homeland of modern democracy and competition, where the 'qualifiers' for the Republican and Democratic presidential candidates are under way: even though on paper any citizen born in the US can run for President,[47] without powerful sponsors no one will be able to fund the campaign and outperform the other candidates. In the economy undertakings with a stronger capital base are also better positioned to promote their products.

The legal framework also shapes competition on the supply side: there may be 'qualifying rounds' in the political race, and parties collecting a low number of votes often get no seats in the legislative body. In the economy market entry is often conditional on regulatory authorisation, in the optimum case due to considerations of the protection of consumers, the environment and other public policies, rather than naked protectionism. It is not easy to get the ideal scope and depth of such regulation right, but it obviously has a crucial influence on the outcome. If entry conditions are too stringent, supply will be insufficient and some consumers will not find what they like. In contrast, the absence or overly permissive nature of rules may allow rouge firms to enter the field, who cause more harm than good with their enticing promises.

Deceived voters

Reflecting further on the role of the human factor: it is a common problem of political democracy

45 Reinhard Marx: Das Kapital (Szent István Társulat, 2009), p. 20.
46 Ibid, 248-249.
47 More specifically, someone born abroad may also run if at least one of his parents is a US citizen; there are two more requirements: a minimum age of 35 years and at least 14 years of living in the US.

based on voting and market economies driven by consumer choice that the wrong decision may be taken if consumers are deceived. As we are aware, this is strictly forbidden under competition law and consumer protection regulations, which set the standard of protection fairly high. In contrast, raising the stakes of promises by politicians, who make decisions in highly important public matters, is constrained by nothing but their moral scruples. Politicians failing to deliver on their promises are not subject to any legal sanctions, as opposed to a manufacturer of a shampoo which, despite its advertising claims, fails to gets rid of the dandruff only the heads of all its users.

Even in the US, where the freedom of speech is considered a fundamental value, there is no constitutional obstacle to placing legislative constraints on misleading commercial communication – unlike on the avalanche of political promises.[48] The Supreme Court has noted three considerations behind this difference. In most cases the validity of commercial communication is easier to verify than of a political promise.[49] Also, it is often more specific and enforceable than a political promise of reducing unemployment over the span of several years. Advertisements tend to refrain from being too specific, there are lots of phrases such as 'by as much as', 'may' and 'possibly', which is understandable in that certain results are impossible to guarantee because they depend on the individual consumer or particular circumstances. Secondly, the Supreme Court judges also hope that the communication of market participants out to make profits and heavily relying on advertising is curtailed less by government regulation than political speech.[50] Finally, the regulation of commercial advertising has the objective of preventing or minimising economic harm that would otherwise be incurred.[51]

6. Beyond democracy and competition: common moral ground

The issue of self-control, a requirement for the democratic exercise of power, leads us to the moral fundamentals beyond considerations of competition policy and democracy in the narrow sense. Is it possible to have a well-functioning democracy or competition-based market economy without a general consensus on fundamental moral issues? Neither system will function well without the 'sanctity' of property and willingness to share that arises from the concomitant responsibility for the community, the freedom of contract and the commitment for the public good which places implicit constraints on that freedom and human dignity to be protected against short-sighted market or political interests. Both democracy and competition are rooted in correctly interpreted human freedom. If we work with a distorted concept of humanity and misconceived ideal of freedom, our communal, social and economic systems will also remain a torso.

In such fundamental social and economic issues the Catholic[52] social ideals, honed by hundreds of years of experience and believed to rely on divine revelation, may provide useful guidance. The papal encyclical letters reflecting that teaching often discuss the fundamental moral linkages between democracy and competition. The views put forth in these encyclicals are worth considering irrespective of religious or denominational affiliation and the provoke thought in Europe, which views itself as having Christian roots.

Pope John Paul II, who came from the Communist block, paid special attention to the issues of political and economic freedom. In his encyclical *Centessimus annus* he reminds that authentic democ-

48 With regard to the government regulation of accuracy, the leading judgment is *Central Hudson Gas & Elec. v .Public Serv. Comm'n* (1980) 447 U.S. 557.
49 *Va. Pharmacy Bd. v. Va. Consumer Council,* supra, 425 U.S., p. 772, fn. 24.
50 On the probably absence of the 'chilling effect' see: ibid.
51 *44 Liquormart, Inc. v. Rhode Island,* supra, 517 U.S., p. 499.
52 Below the social views of Catholicism are discussed because its tenets are expressly linked to the papacy. It would be difficult to identify substantive differences from the relevant teachings of today's Calvinist or Lutheran churches, but we might hazard that similar rules of conduct could be derived from the Jewish faith as well.

racy is possible only in a State ruled by law, and on the basis of a correct conception of the human person.[53] Increasing the "subjectivity" of society is part of this: citizens focus not only on their own daily affairs but also participate in organising their broader community. The pastoral letter of the Hungarian Bishops' Conference published at the time makes the critical remark that the change in government did not lead to a sufficient degree to the participation of society in public life. "Without this, the practice of institutionally-guaranteed democracy becomes an impossibility".[54]

The *Centessimus annus* also highlights the problem that, on the foundations of agnosticism and sceptical relativism such a political democracy is emerging which regards those who are convinced that there is a truth irrespective of what is determined by the majority are considered unreliable from a democratic point of view. After the fall of the Communist regimes John Paul II reminds us that democracy without values sooner or later turns into open or thinly disguised totalitarianism.

We also find the democratic credo of the Catholic church in this encyclical[55]:

"The Church values the democratic system inasmuch as it ensures the participation of citizens in making political choices, guarantees to the governed the possibility both of electing and holding accountable those who govern them, and of replacing them through peaceful means when appropriate. Thus she cannot encourage the formation of narrow ruling groups which usurp the power of the State for individual interests or for ideological ends."

Moving to the present day, Pope Francis called on European politicians to protect democracy in his speech delivered in the European Parliament on 25 November 2014.[56] The European Parliament has "the responsibility of keeping democracy alive for the peoples of Europe." Democracies "must not be allowed to collapse under the pressure of multinational interests which are not universal", the Pope warns.

Similarly to the social and political regimes, Catholic social teaching also has a conservative but firm position on the establishment of the economy on the ground of free market competition. In both cases it derives its expectations from the protection of the dignity of man created in the image of God.

Catholic social teaching never believed in competition based on unharnessed freedom and in the absolute nature of markets, but it also rejects the other extreme of an economy controlled by the State or ruled by private monopolies.[57] Capitalists craving for more profit for its own sake cannot be regarded as the ideal subjects of Catholic social teaching. From time to time, competition-driven market economies are criticised for being unable to assure the distribution of goods avoiding glaring disproportionalities within or between countries. Market economies have another harmful side effect: the excesses of consumer society and the expansion of a culture of consumption which damage the Christian image of man.[58]

Taking the *Centessimus annus* further, Pope Benedict XVI also emphasises the right balance of the market, the State and civil society.[59] According to *Caritas in veritate,* we need a market which allows both profit-oriented and non-profit enterprises to operate freely. In the encyclical the Pope urges for "building economic democracy", so that alongside profit-oriented private enterprise and the various types of public enterprise, there must be room for commercial entities based on mutualist principles and pursuing social ends to take root and express themselves. "Charity in truth", in the case of the economy, requires that economic initiative, without rejecting profit, aims at a higher goal than the mere logic of the exchange of equivalents, of profit as an end in itself. In other words, if the market is gov-

53 John Paul II Holy Father '*Centesimus annus*' encyclical letter on the hundredth anniversary of *Rerum Novarum,* 1991, paragraph 46.
54 Toward a more just and brotherly world. Pastoral Letter of the Hungarian Bishops' Conference, paragraph 69.
55 This is particularly exceptional because the Catholic Church itself is not organised along the principle of popular sovereignty; despite this, or maybe because of this, it has been around for more than two thousand years.
56 Available in English at http://en.radiovaticana.va/news/2014/11/25/pope_francis_address_to_european_parliament/1112318
57 For more details, see: Tihamér Tóth: A katolikus egyház versenypolitikai üzenete - avagy létezik-e "vatikáni iskola" [Competition policy and the social teaching of the Catholic Church: is there a 'Vatican School?']; in: 120 éves a Rerum novarum enciklika, Pázmány Press 2011.
58 See for instance *Sollicitudo rei socialis* , paragraph 28.
59 Encyclical letter *Caritas in veritate* (2009), paragraph 38

erned solely by the principle of the equivalence in value of exchanged goods, it cannot produce the social cohesion that it requires in order to function well. "Without internal forms of solidarity and mutual trust, the market cannot completely fulfil its proper economic function."[60]

Linking our subject to the competition school described above, the following quote from the encyclical illustrates the shared view of Catholic social teaching and the Freiburg school on the role of the state and the sensitive balance of individual freedom and the need for order:

"Economic activity [...] cannot be conducted in an institutional, juridical or political vacuum On the contrary, it presupposes sure guarantees of individual freedom and private property, as well as a stable currency and efficient public services. [...] The absence of stability, together with the corruption of public officials and the spread of improper sources of growing rich and of easy profits deriving from illegal or purely speculative activities, constitutes one of the chief obstacles to development and to the economic order."[61]

It may not be a coincidence that several scholars belonging to the ordoliberal school expressly based their economic and social policy views on Christian values. In their study of the economic and social order published in 1943, Dietzer, Eucken and Lampe rely explicitly and specifically on the teaching of love of the New Testament.[62] They would set the Lutheran rather than Catholic teachings as the social and economic ethical model. As regards the common ethical ground of democracy and competition we should note their statement that any attempt at autocracy, even in the form of collectivism, whether in the field of society, politics or the economy, is a sin against the First Commandment.[63]

Mention should be made of Joseph Höffner as representative of both the Freiburg tradition and Catholic social teaching. Höffner, bishop, archbishop, then cardinal, first published his book on Christian social teaching in 1962. In his work there are clear traces of the ordoliberal ideas, which is hardly surprising as he studied economics and became professor in Freiburg. In his work on property he justified the need for private property from three aspects.[64] First, private property is necessary to give a purpose and meaning to individual initiative; furthermore, it reinforces individual responsibility. Second, it is necessary for the clear delineation of competences and responsibilities, which is indispensable, for instance, for the social and economic distribution of labour under the principle of subsidiarity. Finally, as a statement of particular relevance for my paper: private property is the safeguard of human dignity and freedom. Existing socialism is a good example that deprivation of economic freedom is sooner or later followed by the limitation of religious and political freedom. Social and economic order constitute an indivisible whole.

Summary: competition without democracy, democracy without competition?

Coming to the end of this brief discussion I am inclined to conclude that in our Western culture based on individual freedom competition and democracy are the two sides of the same coin.

Competition assumes a series of freedoms of choice on both the supply and demand sides. Free market is hardly conceivable in a political regime devoid of freedom, just as a well-functioning democracy is inconceivable without the freedom of competition. It is a slightly different issue whether it is possible to produce economic growth with an autocratic political government and a partly or wholly centrally managed economy. Some would say that in the short term a stable autocracy may attain a better-functioning economy than a weak, unstable democracy can. In the long term, at least in the occidental culture attributing high value to human freedom, lasting economic welfare is impossible without the freedom of ownership and contract.

The 'Siamese twins' character of democracy and competition is not contradicted by examples from the past and present where economic power is con-

60 *Caritas in veritate*, 35.
61 *Centesimus annus*, 48.
62 Constantin V. Dietze, Walter Eucken and Adolf Lampe: Wirtschafts- und Sozialordnung, in: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), p. 99.
63 Ibid, 101. The First Commandment provides: "You shall worship the Lord your God and Him only shall you serve."
64 Joseph Höffner: Die Funktionen des Privateigentums in der freien Welt., in: N. Goldschmidt, M. Wohlgemuth: Grundtexte zur Freiburger Tradition der Ordnungsökonomik (2008), p. 533.

centrated in a regime based on the rule of the people. Barankovics, an outstanding figure of Hungarian Christian Democratic politics recognised that, "as attested by the 19th century states, the democracy of political freedom does not prevent economic power concentrated in the hands of a few becoming a tool for the economic oppression of millions and resulting in the degradation of political freedom to a mere formality."[65] This, however, will sooner or later distort democracy itself because the real power to shape and form society is shifted from voters to powerful corporate executives.

There is a real-life relationship between economic competition, or rather free markets, and democracy. Autocratic governments wanting to act independently from the popular will need financial and economic power to keep their rule. The ideal arrangement to attain this is to have a few near-monopolies with substantial resources to maintain mutually advantageous relationships with. In contrast, the exercise of power based on popular sovereignty is paired with a decentralised economic model devoid of any positions of power.

Both political forces in a democracy and undertakings in a market economy need checks and balances (regular free elections may represent some control in themselves).

There is no well-functioning democracy without a bourgeoisie that emerges from a multi-player market economy and manages its property responsibly. In general, well-functioning free markets create economic wealth.[66] The strengthening of the third estate is as important for the market as for a well-functioning democracy. It is salient feature of all democracies that the broadest possible public find it important to have a say in matters of public interest. This requires a certain degree of financial independence as well as time and energy to rise above the struggle for our daily bread. We might say that people living in poverty as a result of economic inequalities are easier to manipulate by antidemocratic political forces.

In the model of perfect competition consumer decisions determine prices and undertakings are forced into a price-taking role: the consumer becomes 'king'. The democratisation of political processes must also mean that the voter becomes king (or at least kingmaker). The political equivalent of an economy ruled by cartels or monopolies is absolutism or the exercise of power by the aristocracy – the rule of a few.

Neither democracy nor market competition are perfect, but they are still more likeable than doing business or making politics from a position of power.

65 Barankovics, István: A kereszténydemokráciáról [On Christian Democracy], Katolikus Szemle – 1989. 3.sz. pp. 1-20. Available at: http://barankovics.hu/az-alapitvanyrol/nevadonk/beszedek-irasok/barankovics-istvan-a-keresztenydemokraciarol

66 This is not in contradiction with the phenomenon of the simultaneous increase of income differences between social classes. The poor of a country with a market economy are still in a much better position that the poor in a non-market economy or in an inefficient market.

Ferenc Vissi*

The Development of Competition Supervision in Hungary

Abstract

The article provides insight on the establishment of the Hungarian Competition Authority in 1990 through the eyes of the author who was the first president of the Hungarian Competition Authority. The article thoroughly describes the Hungarian economy between 1970–1990, the role of the National Price Authority in shaping the Hungarian competition law and the decision-making processes which led to the establishment of the Hungarian Competition Authority. The reader can get an interesting and personal view on moot questions (e.g. the tools or the name of the authority, scope of the law, etc.) that arose during the shaping of the Hungarian competition law.

1. Foreword

After I had decided to write this study, I started to re-read documents written 30-35 years ago. Although the Hungarian Competition Authority has been operating for 25 years but as we will see, the foundations of competition regulation had been started in Hungary earlier, about 35 years ago during the socialist era, but in effect it had been present since 1923.

Although I have reviewed several old papers, the current report remains subjective in a number of regards. First and foremost, I can only describe the circumstances of economic control and in particular the problems of the foreign trade imbalance between the end of the 1970s and the end of the 1980s by way of reference. At the same time, these are the circumstances under which I should illustrate what the reform process of economic control meant at the time and how it included the different proposals made for the establishment and development of competition regulation. And finally, the basis of this subjective recollection is my participation, which also helped in selecting the topics for this current introduction.

The situation had become rather complicated by the end of the 1970s as the policy adopted to address the ups-and-downs in oil and commodity prices of 1972–73 remained mostly unsuccessful, the deterioration of the terms of trade that ensued could not be offset by improved competitiveness, and the country went into indebtedness. Then came the second wave of oil price increases from 1979, and part of the terms of trade losses inevitably had to be passed on to the population, most notably in the form of the regulatory price increases in the summer of 1979. From that time on, the improvement of the foreign trade balance has moved to the top of the list of priorities of

* President of the Hungarian Competition Authority between 1991 and 1998; competition policy consultant.

economic policy (mostly with regard to the USD foreign trade balance and the balance of payments).

Economic governance was running at full throttle, the working committees established by the government, and the leading bodies of the MSZMP - the Hungarian Socialist Workers' Party – spent the ten years between 1977 and 1987 working out and discussing economic management reforms (price reform, wage reform, corporate management reform, tax reform, bank reform, etc.). These reform proposals all considered the increase of the role of the market and of competition as well as the elaboration of an institutional system appropriate for a market economy[1] to be the necessary measures. The majority of the designers of economic governance increasingly believed that the competitiveness of the country cannot be improved without substantive changes in the economic mechanism, which was rather successfully proven during the years between 1973 and 1978. Parallel to the reform activities, economic governance was also busy imposing restrictions on USD-settled imports, introducing special "incentives" for USD-settled exports and making interventions to relieve the concomitant domestic shortages, without which it would have been impossible to force the economy towards even a minimum shift in the direction of a better foreign trade balance. Hence, the instruments of administrative control regained their ground at the beginning of the 80s. Some of us may have considered this as a short-term inevitability, but no matter how we tried the government was unable to get rid of either the imbalance or the command economy model.

It was in this dichotomy of the necessity for governance reforms drastically increasing the role of the market and of competition, and the somewhat contradicting practice of the command economy that the idea of the need for a modern competition regulation was born, and a commitment was made to the development of both regulatory and institutional proposals. The National Planning Office prepared a briefing on the proposals for the Planning and Budget Committee of the Parliament in June 1983. The preface to the briefing included the following:

"*Recent activities have been coordinated by the Consultation Committee of Economic Governance[2] established by the National Planning Committee with the participation of public administration professionals and representatives of advocacy organisations and academic institutions. The motion on the directions of the further development of economic governance has also been discussed by the Economic Working Group of the MSZMP.*

[...] the concept of the overall development of the system of economic governance has been elaborated [...] Our report gives an overview of the main directions of the overall further development of the system of economic governance, and touches upon the main changes foreseen for 1984[3] as well as the preparatory programme of further development for the 7th five-year planning period."

"As regards economic competition", the aforementioned report to Parliament contains the following:

"*It is an urgent task to elaborate the comprehensive economic and legal foundations for the attributes of fair competition and the ethical side of economic competition which is compatible with and forms an integral part of economic governance, and also to develop competition policy and the legal rules of fair competition.*"

The Council of Ministers and the State Planning Committee approved an updated programme on the development of economic governance year by year, in which they tried to keep the conceptual direction and also defined the most important actions to be specifically taken during the following year. This work of ours led later to the most significant changes of the 1980s, as a result of which the price system could gradually be adjusted to the market, and new company management forms emerged resulting in increased corporate autonomy. A tax reform was implemented, a two-tier banking system was introduced, we had a new company law, we started the

1 During this period, official studies and proposals on economic governance made within public administration bodies mostly used the term of socialist market economy as this would not lead to political problems. Under the cover of this term even the capital market could be discussed freely, even though we had to wait until the second half of the 80s for the time to be ripe for the introduction of multi-party democracy and market economy without any attributes attached.

2 Apart from being the head of the Economic Governance Department of the National Planning Office, I was also the general secretary of the Consultation Committee on Economic Governance.

3 Many of us undoubtedly reckoned that we would be able to introduce an effective economic governance reform in 1984, but finally the party leadership only approved of a rather moderate version.

development of the capital market, privatisation was launched, etc. If I am to elucidate how competition policy and its contents were shaped, we first of all need to review their environment, the market surveillance system and the main attributes of the price system of the time, together with the programme elaborated for the development of competition regulation.

2. Description of the market surveillance system[4]

Although the reform of economic governance in 1968 put an end to the system of the command economy, certain administrative requirements regulating product distribution remained part and parcel of the system up until the end of the 80s. Administrative/regulatory instruments included partial regulatory product distribution, the assignment of an exclusive buyer or seller, the prescription of a minimum level of inventory and the imposition of an obligation to contract. State regulation of the market – price regulation, financial and administrative (command-type) measures – still applied to 75% of domestic sales at the end of the 60s[5].

Product distribution required coordination between the different organisations of economic governance, hence the Inter-Ministerial Price and Product Distribution Committee ("TÁTB") was established as early as in 1968 with a mandate to manage imbalances with the least possible social losses. The TÁTB also had decision-making competence endowed upon it by the Economic Committee, which operated alongside the Government. The TÁTB operated under the management of the National Material and Price Office ('Price Office') up until 1979, when the Economic Committee of the government took over the operative tasks of economic governance as well. Nevertheless, the Price Office remained the coordination body of market surveillance, and after 1980 – following the reorganisation of the line ministries – it became the central organisation of market surveillance with a national remit.

From this time on, market surveillance focused on the domestic market, the continuous analysis of factors influencing demand and supply, and the elaboration of measures that became necessary in order to make further progress towards the equilibrium. The government issued a decree on market surveillance and its duties in 1980. Market surveillance was divided into market organisation and market regulation duties. Market organisation meant the elaboration of the organisational framework necessary for a market regime to facilitate reasonable economic competition, the reduction of distribution costs and the achievement of energy and material saving objectives. Pursuant to legislation, market organisation also had to facilitate import substitution by economical production. The primary task of market regulation was to influence corporate pricing policies, but it also included the management of central (state) reserves, and in exceptional cases the issuance of orders to ensure smooth distribution.

At this time, the distinctive features of markets with "three different sets of values" had to be taken into consideration for the purposes of both market surveillance and the price system. (1) The so-called capitalistic world market existing in developed countries was an objective reality for us both on the import or the export side, therefore price effects were also mostly objective. (2) It was intergovernmental agreements that provided a common framework for the exchange of goods within the CMEA, while Hungarian producers and distributors had to make do with the application of rather particular, artificial settlement systems fundamentally different from the system used in the Western world market. In order to honour the obligations undertaken in intergovernmental agreements and at the same time keep the indebtedness of our country under control, CMEA prices had to be transformed into domestic prices using various financial bridges to cre-

4 This section is partly based on one of my earlier publications: VIII. Termékforgalmazás és piacfelügyelet [Product Distribution and Market Surveillance]. In: A szocialista gazdaság irányításának néhány magyarországi tapasztalata [Hungarian Experiences with Socialist Economic Governance]. Kossuth Könyvkiadó 1987, and partly on some reports on market surveillance and its further development prepared by the National Material and Price Office.

5 It is not incidental either that the political leadership demanded the implementation of safety measures before the reform of 1968 was launched. To allow the few % inflation that went with the introduction of profit-orientation, the prices of building materials, sugar, etc. were reduced to compensate for the ensuing price increase. The impact of this "safety" attitude was felt even in the 1970s.

ate incentives for companies while also satisfying macroeconomic considerations.[6] This was because domestic prices used in inter-company relations were adjusted to the set of values of a third market, namely (3) of the domestic market[7]. This triple system could only be operated with complicated price regulation and subsidisation mechanisms.

In the years between 1980 and 1983 there was an increasing shift in the focus of market surveillance towards the elimination of the imbalance created by the controversial "three sets of market values"; therefore, the need for a change was beyond question. This was the background of the various proposals worked out in the framework of the reform. There was a change, albeit not a drastic one, in market surveillance in 1984. On the one hand, the responsibilities of market surveillance were curtailed, and on the other hand, its toolset was expanded. A market intervention fund was set up in 1985, which attempted to redress market disturbances with quasi-banking instruments. The new market surveillance decree centralised the competences of issuing restrictive regulations, the use of the intervention fund and the management of central stocks (state reserves) in the Price Office. Compared to the standard practice of previous years the regulatory type of market surveillance was significantly reduced or discontinued except in energy management[8]. Market surveillance was partly retained by the line ministries in the areas of postal, telecommunication, health, water management, cultural and art services. To give an indication of proportions: in 1985 central directives for product distribution (quotas) applied to 16 product groups, minimum inventory levels to 6 products, and the assignment of an exclusive seller or purchaser to 21 products. There was a mandatory contractual obligation on certain life protective equipment, central state reserves and certain products supplied to the armed forces. These regulatory requirements covered about 10% of the total domestic trade volume, which indicates that the role of regulatory intervention in product trade decreased substantively from the extremely high level of the late 60s.[9]

At the beginning of the 1980s several forms of small business were institutionalised. This was the time when private business partnerships and 'sideline' production units in agricultural cooperatives proliferated and started to produce at their discretion any product that was in demand. This was when the first joint ventures with companies of developed capitalist countries were established. In effect, this was the time when capitalism started to reappear in Hungary, but substantive changes required the adoption of the new act on business associations. It is not incidental that in addition to the changes in market surveillance in 1984, another new legal institution, the competition act was also introduced.

3. The Act on the prohibition of unfair economic activities

Act IV of 1984 on the prohibition of unfair economic activities, which was the first competition act in the socialist era, was an important milestone in the general regulation of commercial relations between business organisations and individuals. This

6 In the wake of the first oil and commodity price explosion we introduced extensive producer price adjustments both in 1975 and 1976 in Hungary. At the time, I was the head of the Foreign Trade Pricing and Financial Department within the National Material and Price Office, and it was among my duties to "reconcile" the three markets and their different values. To make this clear: one of our fundamental problems was that CMEA countries mutually bought from each other the products that were uncompetitive in developed countries, which meant that a lot of things could be sold on this market, which brought all of us economic growth. However, competitive products also sold better in the CMEA, and a higher dollar import content in itself could make a product more competitive. Everyone was striving for foreign trade surplus in case of hard goods, and for foreign trade deficit in soft goods, which could have had the unfavourable effect of growing dollar indebtedness. We however needed to avoid getting into more debt at any price, to which end we made imports from the West more expensive and levied taxes on CMEA export, or introduced some mandatory pricing rules for companies on the domestic market, which we thought was also in the interest of our country.

7 This set of values or rather system of principles was described in technical literature following the reform of 1968 as prices needing to reflect expenditures, market valuation and state preferences. I cannot discuss this question in detail at this point, let me just note that the expression of valuation by the market remained the most politically sensitive issue for a long time, despite the safeguards introduced. In the language of economics this means the decision on whether prices should be allowed to rise to the market-clearing level where there is a scarcity of goods.

8 The Council of Ministers merged the three Industrial Ministries in 1980, and their competences as price authorities were assumed by Price Office.

9 To avoid any misunderstanding let me mention that in addition to product distribution rules, the regulatory price setting powers of the authorities also represented state intervention, which covered another 10% of domestic sales.

Act specified and prohibited infringements that compromised social justice in business relations. The chapter on unfair competition[10] expressly prohibited defamation and competitive conduct threating or prejudicing credibility. It also prohibited the unlawful acquisition of business secrets and their unauthorised disclosure. Prohibitions were also introduced on the types of behaviour where economic actors withhold goods to obtain unjustified benefits, thereby creating a scarcity of goods so that they can subsequently obtain a more favourable position by increasing their prices, etc.

The Act also contained a blanket prohibition of misleading consumers: it prohibited all kinds of deception regardless of the seller's economic interests.

The prohibition of the restriction of economic competition[11] was an important element of the regulation, which also included the prohibition of concerted practices. The regulation allowed for the restriction of competition for the benefit of an economically justifiable common goal, and as far as vertical restraints were concerned, it only prohibited the imposition of resale prices or the enforcement of their application. The concept of the regulation was clearly to promote the development of economic competition and to this end it also introduced rules against restrictive practices.

This law prohibited the abuse of dominant positions, the imposition of unilateral advantages or influencing the other party in any way to prevent the enforcement of their legitimate contractual claims.

The approach adopted by the act is particularly interesting and demonstrative of the various compromises made at around 1984. As expressed by the title of the act, it regulated the prohibition of unfair economic activities in its entirety to protect both consumers and competitors, and also to give protection against all visible forms of unfair economic activity. Apart from the prohibitions on unfair competition, the act also considered unjustified restrictions of competition and the unfair exploitation of dominance to be forms of unfair economic activity. The same concept also gave birth to the separate chapters on the prohibition of tied selling and of the enforcement of unfair prices. The latter one was regulated in detail in a government resolution.

It might be interesting to note that the draft legislation – as a draft law-decree – was discussed by the legal, administrative, justice, planning and budgetary and industrial committees of the Parliament. Having regard to the outstanding importance of the regulation, the MPs unanimously decided to adopt the regulation in the form of an act of Parliament. The motion of the Minister of Justice makes special mention of this circumstance.[12]

The Act granted outstanding roles to courts and advocacy organisations in its implementation, and authorised them to propose economic fines. Government agencies, especially those with a market surveillance remit, also received those competences.

The legislation on market surveillance[13] also entrusted market surveillance agencies with the important details of the enforcement of the competition act, and some responsibilities were also endowed on the National Material and Price Office. However, the act never became a strictly enforced legal provision, for several reasons. On the one hand, the organisations of market surveillance entrusted by the government with the tasks of administrative economic governance were to be involved in the implementation of the Act. We did not foresee the conflicts inherent in this situation at the time when the competition act was elaborated. On the other hand, mainly in respect of the restriction of competition and abuse of dominance, this legislation did not give sufficient guidance on the possible contents of the different concepts or the criteria of deliberation. It also became clear in our analyses after 1986 that a given company could legitimately argue that they were only victims of certain circumstances (e.g. shortage of imported raw materials), and it also happened, albeit indirectly, that an inevitable public ad-

10 This paper does not set out to describe the history of Hungarian competition law. I only want to mention that the first act on unfair competition was introduced in 1923. See Act V of 1923 on unfair competition, promulgated in the National Law Gazette on 3 January 1923. This act established detailed rules for unfair competition and could be considered as extremely progressive. By 1984, of course, some of the substantive law provisions of the act had become outdated. Act V of 1923 and its modification by Act XVII of 1933 were repealed by Act IV of 1984.

11 "Act XX of 1931 on agreements regulating economic competition" was the first piece of legislation on cartels. The act was promulgated in Volume 12 of the National Law Gazette on 7 July 1931.

12 Motion submitted to the Council of Ministers on the regulation of the prohibition of unfair economic activities and economic fines. Budapest, June 1984. Submitted by the Minister of Justice.

13 Government Decree No 37/1984.

ministrative measure caused the behaviour that would otherwise have been illegal under the Act. Therefore it is not accidental that when the Price Office submitted motions to the court proposing a fine for breaching the act on the prohibition of unfair economic activities, they were often rejected by the court. This indicated that the enforcement of a new legal institution was a new task for the courts as well, an issue that the competition authority was confronted with even during the initial years of the GVH. In retrospect, we can admit that we might have expected too much from advocacy organisations in terms of the implementation of the 1984 competition act, although the authorisation given to them by the competition act still played an important role in the development of the institution of public interest action.

In this short introduction I wish to highlight the peculiarity that the forward-looking ideas of governance reform and the 'fire-fighting' operative government measures coexisted in a necessary symbiosis and a necessary conflict throughout the 80s even if one objective of economic policy governance was to restrict operative measures to the narrowest possible scope. On the other hand, I will also explain why it was almost self-evident that the price authority played a decisive role in the renewal of competition regulation and the preparation for the establishment of the competition authority. The Price Office (to be renamed the National Price Office in 1988, following the reorganisation of market surveillance and the price authorities) – in addition to its role played in operative governance – also had an important role in establishing the system of market prices, another fundamental subsystem of a market economy. After 1984 we prepared several reports each year[14] on the position of market surveillance and the necessary changes to be introduced in the pricing system and the price mechanism and submitted them to the government agencies.

4. Joint programme of competition and price regulation development

The Price Office compiled a programme in 1986 "for the concerted development of market behaviour and price regulation". In accordance with the programme, three working groups were formed: one was dealing with market event analysis, the different cases of dominance and competitive restrictions and the analysis of the structure of the economy; the second one was collecting foreign experiences about competition and price regulation; while the third group undertook to formulate proposals for the further development of the institutional system of price and competition regulation.

It is almost certain that no studies had existed on the status of competition in Hungary or the market structure of the economy that would have been as detailed as the ones prepared by the first working group at that time. Most of this work was carried out by the staff of the price authority[15]. We examined hundreds of companies for behaviours considered to be unfair business practices, and we considered their causes and consequences[16]. We looked into the obstacles and problems in Hungarian legal regulation and enforcement, and analyses aiming to improve price and market surveillance were constantly on the agenda as a matter of course.

Some of the scholars of the Institute of Law under the Hungarian Academy of Sciences played an outstanding role in collecting the experiences of developed countries[17], considering the fact that the analyses and experiences of the institution provided a conceptual basis for the development of the competition act of 1984. Both the employees of scientific institutions and public administration professionals participated in foreign study tours and consultations; their focus was on West-Germany, France, England and the Nordic countries, as well as the ex-

14 I consider references to my participation justifiable because I managed a large part of the market analysis, price regulation and competition regulation efforts in my positions as the vice president of Price Office from August 1984 and president of the National Price Office from February 1989.

15 Several research institutes carried out sectoral market analyses (KOPINT, TGI, etc.) under this project; their findings were incorporated in the summary conclusions of the price authority.

16 The price authority and the working group dealing with market analyses prepared two summary documents: i) Analysis and proposals for the options of regulating competition, ii) Summary on exploring typical cases of abuse of dominance and restriction of market competition.

17 I would highlight the studies made by Imre Vörös: Typical models of economic competition regulation and its institutional background based on the foreign experiences of competition regulation. Volumes I., II. and Proposal for the further development of Hungarian competition law.

periences of the European Economic Community and the analysis of the practice pursued in the United States. The acquisition of experiences on site, the consultations and the study tours were financed mostly from an earmarked fund of a World Bank restructuring loan signed at the end of 1986[18]. The delegations prepared memos and reports on all foreign consultations.

The work on the institutional system of competition regulation was partly done by the staff of the Institute of Law and partly by public administration professionals. There was an understandable duality in the analysis of the institutional system of price and competition regulation as classic price control differs from the institution of competition supervision. At the time when the programme was started the examination of the institution of price control and the analysis of possible competition supervisory institutions were separated in our work. The price control organisation was a political reality of the time. The working group for the improvement of price control comprised delegates from the Price Office, the Finance Ministry, the Hungarian Chamber of Commerce, the Council Office of the Council of Ministers and the Central People's Control Commission.[19]

We regularly discussed the analyses and studies prepared in the working groups and we gave regular reports to the government on our conclusions[20]. Parallel to this work, conceptual changes to the system of economic governance were also implemented – as I noted in connection with the work done by the Consultation Committee on Economic Governance– without which the new price and competition regulation and its institutional reform would not have been possible.

5. Alignment to the development of the price system and the price mechanism

Without knowing the price system of the 1980s it is not easy to understand why the entire system of price and competition regulation had to be changed in concert. In this paper I would only note the changes between 1987 and 1988. On the one hand, transposing the price effects of the tax reform to the price system required comprehensive rearrangement, and on the other hand, the conceptual change of economic governance including the price system and price mechanism was designed in view of the ongoing introduction of the market price system and the elaboration of the new system of competition regulation. The government discussed conceptual price system related issues in the proposal of the president of the price authority in August 1987 and then in March 1988, and recreated the basic principles of price system regulation and the mandate of the Price Office.[21]

The document submitted to the government underlines that the main thrust of the development of the price system should be the construction of a market based price regime, a longer term objective,

18 The availability of an earmarked fund from the World Bank restructuring loan for the purposes of the development of economic governance also meant that during the negotiations about the terms of the loan the Hungarian government proposed the elaboration of the new competition and price regulation, which met with the approval of the lenders (World Bank, IMF). Miklós Pulai, vice president of the National Planning Office, who was also the Hungarian Governor of the World Bank, played an outstanding role in arriving at this arrangement, and (perhaps) so did I. After this I always met the World Bank and IMF delegations negotiating in Hungary. They were very much interested in our progress with the programme. If memory serves me, we had about 300 thousand dollars of the World Bank fund available for the development of economic governance, which we used to collect foreign experiences of competition regulation and to write studies, accompanied by the appropriate financial statements and documentation.

19 In effect, it only became obvious at the end of 1989 and the beginning of 1990 that the systemic change would also facilitate the replacement of the existing price control bodies.

20 The scope of the present study does not allow me to elaborate on the contents of individual reports. Nevertheless, one of the most detailed information documents was prepared by the president of the National Price Authority for the Economic Planning Committee in August 1988. This document included the following points among the operational conditions of competition regulation: new type of integration policy, the concept of mutual market liberalisation, parallel establishment of the institutions of product, capital and labour markets, the clear demarcation of the non-competition sphere, etc. Furthermore, there were fairly detailed appendices covering the following subjects: (i) the economic environment of competition regulation, (ii) presentation of sub-market studies, (iii) a programme to discuss the work to be done for the modernisation of competition regulation at different fora, and (iv) control of cartel agreements and monopolies, giving consideration to institutional and procedural arrangements. The document foresaw the modernised competition regulation to take effect in 1990.

21 For more details see: (i) Motion to the Council of Ministers: Proposal for the further development of the price system and the price mechanism. Budapest, August 1987. (ii) Proposal to the Council of Ministers on the competences of the price authority and on the duties and powers of the president of the National Price Authority. Budapest, March 1988.

although a number of factors were already in place to make a move in the conceptual direction. There was a dual task; on the one hand, in areas where supply and demand was balanced and no uncontrolled monopoly existed, regulatory interventions into pricing were to be avoided. On the other hand, where the market does not yet have solid foundations, "*the instrument of regulated prices need to be applied to ensure the necessary constraints on price development, [...] keeping any inherent subjective elements to the minimum.*"

The regulation issued by the government on the basis of the proposal was important as:

- it restricted the sphere of regulated prices in the production sector to fuels, transport, communication and water management services, which was coupled with the important change of replacing formerly fixed prices by maximum prices,
- the former regime of price taking, mainly in foreign trade relations, was retained, with changes in certain rules governing commodities and semi-finished products,
- the mandatory notification of proposed price increases remained in place but its scope was narrowed,
- indirect instruments of influencing corporate pricing, notably price consultations and price agreements were introduced in the system as new elements. The official role of price consultations was partly the monitoring of the inflationary pressure and partly the communication of the official price policy expected under the given market conditions to the companies. The uniqueness of this arrangement lied in the fact that the prices were made public by the price authority. Even the companies consulted and the agreements made with them were published in the official journal of the authority. The motion submitted to the government highlighted that no agreement should remain the secret bargaining between the authority and the company, which meant that publicity played an important role in the enforcement of the agreements made during the consultations.

It is certainly true that by the 1980s corporate autonomy had grown, pricing restrictions had decreased, differentiation between the price regulations of the different sectors had been reduced, and the price setting role of the market had spread to an ever broadening sphere. Legal price regulation issued under the competence of line ministries had dropped to a minimum level. Under those circumstances it was expedient to centralise the remaining official price control competences in the Price Authority, which was also reflected in the change of the name of the office into National Price Authority. Market surveillance was naturally discontinued at the Price Authority, which increasingly focused on the monitoring and analysis of inflationary processes, as well as inflation planning, which was a joint task performed together with functional governance bodies.

All I want to illustrate with the above comments is that the price system in terms of several of its elements did not yet reflect the targeted price system, which would not interfere with competition and would be applicable in a market economy model. If therefore we wanted a new type of competition policy and competition law, we also needed to recreate price law. That is why the elaboration of the new price act and the elaboration of the new competition act were inseparable.

Between 1986 and 1989 the price authority assumed an important role not only in the price and competition regulation reform but – as I mentioned before – also in market surveillance. Naturally, in our competition policy analyses we emphasised that in an open economy like Hungary it was impossible to even think about market economy and competition without the possibility of import competition. Fortunately, asynchrony changed for the better when in 1988 the government approved and introduced an import liberalisation programme, which was scheduled to occur in three stages. Free importation of technologies and capital goods was allowed in the first step, raw materials and semi-finished goods in the second step, and consumer goods in the third step. The issues to be resolved were rather similar during the formation of the market based price system, first of all the overhaul of the system of price subsidies, the introduction of normative taxation (mostly within the framework of the 1988 tax reform), some of the controversial methods of domestic pricing on the basis of foreign market prices, and later the phasing out of the institution of price consultations.

These examples hopefully cast a light on why it was important to consider competition policy (and

also price policy) as an integral part of economic policy, because several asynchronous situations had to be resolved by way of an overarching concept. In the second half of the 1980s any substantive change in the aforementioned areas could be envisaged only in integration with economic policy. A broad interpretation of competition policy in conjunction with economic policy allowed the concept of the regulation of competition to be based on the creation of the conditions for economic competition, and of competition itself, and the protection of competition.

6. Key underlying principles of competition policy

Our work of competition regulation was based on several basic principles. As these principles – by the nature of the situation – were not always fully aligned, debates about certain topics only came to rest upon the submission of specific bills to the government. There is detailed information on the underlying principles in the document submitted to the Committee of Economic Planning, and even more in the document entitled *Competition and Price Regulation in the Model of Market Economy* signed by myself as the president of the National Price Authority and submitted to the government[22]. The appendix to this document summarized the *Market and Competition Policy Guidelines*. Below I present extracts from this document and the guidelines.[23]

We considered it as a basic principle that a model of market economy had to be built, where the freedom and fairness of competition would become a fundamental principle in the economy. Competition itself is a force of growth, indispensable for the achievement of the necessary economic output growth. This is what the programme of the government for economic transformation and stabilisation built on, setting the objective of the introduction of the institutions of market economy, the achievement of the reform of ownership, an opening to the world economy, the elimination of redundant state controls and the elaboration of the system of monetary control. Introduction of the model of market economy became a general guiding principle of economic policy.

According to the proposal, market and competition policy could rely on the values of economic democracy. This includes the freedom of property acquisition, the freedom of financial management and business life, freedom to manage assets of all types, but it also means the freedom of entering or leaving the market, and even actions against government agencies and institutions of public authority in all cases when economic formations or profit making were about to be restricted in fair competition. General protection has to be given to the free functioning of the markets and competition. As the protection of the freedom of competition was missing from the legal system of the time, it had to be created through the new rules of competition law. In order to ensure a proper basis for the provisions of the new act, the principle of the freedom of enterprise and freedom of competition had to be reflected in the Constitution. The Constitution had to spell out the freedom of businesses to choose their economic activity and its form. This could only be restricted by law and for public policy considerations.

The properly restricted economic role of the State was another pillar of market- and competition policy. In 1989, the government set the aim to separate its role as pubic authority and its economic functions as an owner as soon as possible. "*One of the current obstacles in the way of developing market conditions is that the state with its restrictions and rules is the largest and most unpredictable economic actor. […] yielding to the pressure of various interest groups and political lobbies the state (government) assumes a controversial role, dishevelling the market.*" the submitted document states[24].

Consequently, it was not incidental that the **competition policy guidelines** addressed the following:

- necessity of a shift in the foreign trade strategy with the implementation of export expansion and import competition, the need to manage CMEA trade on a market basis,

22 Document submitted to the Council of Ministers: Competition and Price Regulation in the Model of Market Economy. Budapest, June 1989. Submitted by the president of the National Price Authority.

23 Transition to the multi-party democracy political regime, and the construction of the market economy (free of any attributes) had been decided by this time.

24 See the above-mentioned document submitted to the government, June 1989.

– ownership integration, the establishment of the remaining institutions of market economy (securities market, commodities exchange, etc.),
– deregulation,
– business facilitation and last but not least
– the basic principles of the regulation of economic competition.

I also need to emphasise that the competition policy guidelines also addressed the issue of ownership reform, "*... there is full professional consensus that the problem of ownership is the weakest link of the whole market model today. Our current economic situation in itself renders unnecessary the detailed justification that even the repeated fundamental modifications in the governance methods of traditional state-owned companies have been unable to ensure higher efficiency that would increase wealth and profits. [...] This is why some part of state property has to be privatised into the business sector.*"

It also transpired during the work that not all state leaders were happy about the proposed new price system, but the paper submitted to the government stated firmly:

„*If the market and competition are to be the forces to set the norm, it is indispensable to eliminate the autonomous (self-regulatory) price regulation and price control prevalent for the past forty years, which, being subject to an erroneous interpretation of economic policy and other power considerations, institutionalised the [...] paternalistic approach of the state by disorganising the price system and relative price differences and increasingly hindered economic growth.*"

It was highly significant that most of the government and especially Prime Minister Miklós Németh supported the new system. I will not give a full description of the price act here, all I should mention is that the price act failed to put an end to the price regulatory role of the state (government), though it did introduce restrictions and only allowed for the operation of those forms that were transparent and in line with the new competition policy. According to our idea at the time, the price act was intended as framework legislation, and the system of modern price regulation applicable to individual sectors would have been created through the revision of sectoral acts.

The government made a decision on the basis of the proposal. The title of the resolution was *Decision 1094/1989. (4. VII.) of the Council of Ministers on the principles of developing competition and price regulation.*

The government, in agreement with the competition and price regulatory concept submitted by the National Price Authority, pronounced that the proposed new regime of competition and price regulation and the competition policy guidelines providing its basis in economic policy had to be managed as integral parts of the government's economic transformation and stabilisation programme. The government agreed that the new competition act and the new price act should be in line with the submitted principles, and ruled that the draft wording of the competition act should be formulated by the Codification Committee[25] and that the acts should be submitted to the government by the president of the Price Authority and the Minister of Justice. The government called all ministries and organisations with national competence to use the draft wording of the sub-market analyses and of the competition and price acts as a basis to assess which legal provisions should be repealed upon the introduction of the two new acts, what new government measures would be necessary that require either transitional or permanent authorisation by law. There was another question of how the legal provisions issued under the competence of sectoral price authorities can be repealed, and what temporary measures should be taken regarding procurement by the armed forces.

In order to enforce the new competition and price acts, the government consented to the establishment of the **Competition and Price Authority**, and commissioned the president of the National Price Authority to design the organisation of the Competition and Price Authority and to coordinate the necessary operative measures including the training of professionals.

25 The Codification Committee was headed by Tamás Sárközy, deputy minister of justice.

7. Some important controversial issues[26]

I will refer to the disputes that emerged about some topics during the elaboration of the new system; however, their classification does not indicate any order of priority, or mean that we did not have disagreements on other issues. Disagreements started at the very beginning of our work: in some cases debate led to a solution, while others continued to be debated until the very end of our work. I will briefly touch upon the following issues:

- What specific provisions derived from the economic policy concept should the new act include?
- What action shall be taken against monopolistic organisations?
- Which part of the economy should remain outside the scope of the act?
- Which instruments of price regulation should remain with the competition authority?
- Who should supervise the new authority and what name should it receive?
- Special considerations regarding the decision-making system of the authority.

7.1. Representation of adherence to the economic policy concept in the competition act:

As I mentioned above, the government interpreted and approved this concept as part of its economic transformation and stabilisation programme. Consequently, it was not sufficient to introduce legal provisions to protect competition as an institution but we also wanted the wording of the act to incorporate some key economic policy objectives. At the same time, it was also clear that such wording could cause disturbance in a pure enforcement model. Naturally, we continued these debates in the Codification Committee, and finally, we arrived at compromises except for one single question.

Such compromise based proposal was for instance the formulation of exceptions from the cartel prohibition to the effect that *"an agreement shall not be prohibited if its aim is to prevent any abuse of dominance, or concerns exports which have no anticompetitive effect on the domestic market and does not prejudice any obligations undertaken in an international convention"*. We did not consider the prohibition of abuse to be sufficient to combat the multitude of existing dominant positions. Our market analyses made it clear that it was worth supporting the inter-company agreements which did not have the sole aim of restoring the necessary cooperation between the companies, but also had the potential to create some counterbalance vis-à-vis the dominant firm. We could not resist the demand of export increase as an economic policy objective; we could take this on board to reduce the indebtedness of the country.

There were similar considerations behind some of the rules regulating possible exemptions from the cartel prohibition.[27] Benefits considered when deciding about exemption included technical or technological progress, the favourable trend of prices, improved product quality, improved terms for contract fulfilment, the shortening of distribution chains or the improvement of the environmental situation. We wished to enforce these principles in the area of merger control as well.

7.2. What actions should be taken against monopolies?

The only remaining conflict of opinions between the Minister of Justice and the president of the price authority regarded the demerger of companies. The government considered the break-down of monopolies and dominant positions to be an important economic policy objective. To facilitate this, large com-

26 You may forgive if I, being an economist, only mention the topics that concern economic policy and that I consider important, by which I do not intend to deny the importance of other issues of substantive law, procedural law, decision-making or organisation, etc.

27 We discussed various ideas with regard to exceptions and exemptions, the possible subjects and forms of exemption. Initially we favoured the maintenance of a cartel register by the competition authority as this was the system in place in several Western countries. As regards exceptions, we took the agreements under international (inter-governmental) conventions for granted. Some of our proposals also wanted to involve interest advocacy organisations in the assessment of proposed cartel exemptions. I will not enumerate the "peculiar" legal issues, for instance the topic of an agreement becoming null and void, which elicited endless debates. It was also raised whether an agreement or market conduct could be qualified as being against the interests of the people's economy if it does not otherwise violate the competition act. We also invested a lot of time into the elaboration of the official decision-making system, we deliberated various versions before we voted for the institution of an autonomous Competition Council operating within the Authority.

panies could be sometimes broken up into smaller enterprises when the operation of the company in the old structure would have jeopardized the freedom of competition or would have led to economic dominance. This demerger competence would have been delegated to the Competition Authority, which did not meet with my personal approval mainly because a rather large proportion of monopolies identified in our research would have been ended with commercial liberalisation anyway, and the fate of the demerged and uncompetitive parts of the large companies could not have been settled on a competition protection basis. It was proposed that the competition authority should arrange for the distribution of corporate assets, issues related to the employees' legal status, the allocation of claims by creditors, and all related issues of legal succession.

Naturally, we were aware that any actions against monopolies were facilitated only in merger regulations in the competition laws of developed countries (with the exception of regulated industries). However, our market analysis often identified monopolies on both the supplier and customer sides, which made the government's decision to reduce these situations in unregulated industries justifiable. When we formulated our proposals, we could not yet assess the imminent consequences and effects of the three-stage liberalisation and the cessation of the CMEA after 1990. These consequences brought down a high number of monopolies.

Even in retrospect I would say: the first government after the systemic change made the right decision when it left the demerger of companies out of the competencies of the competition authority – to a large extent in view of privatisation and its treatment as a special political priority.[28]

7.3. Which areas should remain outside the scope of the competition act?

As far as I remember, the different stakeholders reached an agreement on this issue relatively quickly. We decided the new competition law had to be created initially to cover the traditional markets of goods and services, which meant that the supervision of competition for the money and securities markets and for the banking and insurance sectors would be delegated to the Securities Supervision, the Bank Supervision and the Insurance Supervision with separate acts applicable to their procedures. This was the arrangement approved by the Parliament.

7.4. Which instruments of price regulation should remain with the competition authority?

As regards instruments of price regulation, a rather peculiar situation emerged by 1989. On the one hand, the whole price system clearly moved in the direction of market principles with only 20% of domestic sales in terms of producer prices and only 19% in terms of household consumption remaining in the regulated price zone. Price-taking from foreign markets was gradually abandoned, representing only 17% of domestic sales. Products subject to a notification obligation represented 11% of the domestic sales of materials and 12% of consumer goods. The group of companies involved in price consultation covered 7% of purchased household consumption[29]. Effectively, the whole arrangement of price regulation seemed manageable, and I thought at the time that the ensemble of the Competition Authority and the Price Authority would be able to provide for the remaining price and competition related duties. Regulated prices would have covered the areas that they cover today. This solution was not unknown to us, we had a wealth of information available in the working groups, and I personally had discussions with the Price and Competition Office in Sweden. In Sweden the areas of regulated prices were basically the same as in our country; in this respect there was no major difference between the Swedish and the new Hungarian price control competence to be in-

28 I was already the president of the Hungarian Competition Authority when I was informed that a similar competence was introduced in the Polish competition act in 1990. The then president of the Polish competition authority said that it was not easy to live with this competence. Although the competition authority took relatively quick decisions in demerger cases, litigation about assets and other related issues took years; the unfavourable, debilitating consequences of this had not been anticipated.

29 All the quoted data are averages, which means that there was a significant variance with regard to the specific product groups.

troduced[30]. At the same time, I found it rather disconcerting that during our consultations with public administration bodies several institutions adhered to the retention of regulated prices, which I for one proposed to be eliminated. Others kept bringing up the proposal to extend the existing price consultation competences of the new office, and even to empower the office with the competence of imposing price caps. These proposals irritated me to no end and as I was aware of the consequences of these arrangements, I was also convinced that such powers would ruin or debilitate the substantive competition protection work of the new competition authority. In the end, two "price competences" remained with the competition authority in the draft text submitted to the government in agreement with the minister of justice: one said that the approval of the competition authority would have to be obtained before the increase of the prices of a very limited range of products, and the other was a competence whereby the competition authority could impose a maximum price, for a period not exceeding one year, on a company engaging in illegal pricing. This was a compromise I could live with.

7.5. Who should supervise the new authority and what should be its name?

There were three names in the proposals before the systemic change: Competition and Price Authority, Cartel Authority and Competition Authority. The name primarily depended on the extent that price regulation would remain in the competence of the office, and the enforcement model it would opt for.

Apart from the name, the real question in the political sense was whether the new office would report to the government or to Parliament. In January 1990 the proposal and the draft legislation were submitted to the government in two versions. According the version (A): the office should operate under the supervision of the Parliament with its president elected by the Parliament, and according to version (B): the office should operate under the supervision of the Council of Ministers with its president appointed by the government.

7.6. Special considerations with regard to the decision-making system of the authority

Before anything else I need to explain that the questions regarding the decision-making system were mostly connected with the proposed dual status of the office. It was to be a government organisation on the one hand, which had to participate in the implementation of the governmental-competition policy duties as part of the government's economic policy, and on the other hand it was to be an organisation responsible for law enforcement which had to act in accordance with the provisions of the competition act. This duality was unavoidable, as I noted above when discussing the broader context of competition policy. The formal arrangement we adopted to satisfy these requirements was for the president of the authority to take direct responsibility for the governmental tasks[31], while the Competition Council (or its president) assumed responsibility for decisions taken on the basis of the competition act.

In this dual arrangement it was our priority to assure that the office had full autonomy in procedures initiated pursuant to the competition act, and that it could not be instructed in its competition supervision proceedings.

The design of the decision-making system of the authority was closely related to issues of substantive law. For example, when we were still discussing a cartel register, the related procedural and decision-making system had to be integrated into the decision-making process of the office, which is clearly a different type of issue than for instance a condemning decision brought in supervision proceedings. Thus the decision-making system of the office developed gradually; for instance, in the initial stages we often made references to the participation of interest advocacy organisations in the work of the office. As

30 What is more, in the Swedish model there was first a Price Office, which later became the Price and Competition Office, and then the Competition Office. As far as I know, the same path was taken by Norway, Finland and probably also Denmark, and I found out from the president of the Australian competition authority a few years later that there had been a similar institutional development both in Australia and New Zealand in the 1980s. It is not incidental therefore that we also considered this for a while as a workable solution for Hungary.

31 Just to mention one example of governmental duties, the task of commenting on draft legislation with an impact on competition gave a lot of work to the Hungarian Competition Authority in its first years.

the provisions of substantive law and the status of the office became clearer, the model of decision making proposed was changing accordingly.

In a proposal submitted in May 1989[32] we propounded that *"The individual decisions on cartels and monopolies are taken by 3-5 member panels along the lines of the judicial system"* within the Competition and Price Authority. I am highlighting this because for me it was important that the panels making the decisions on behalf of the office should comprise economists, as familiarity with economics is indispensable in antitrust cases (cartel, dominance, merger).

The final arrangement was probably influenced by the following factors:

- I wanted to break away from the decision-making regime of the price authority, where the resolutions of the authority in the first and the second instances were adopted by the same department (person). The responsibilities of the price authority at the time required close cooperation with companies as well as detailed and regular exchange of information as it was in the interest of both the companies and the price authority to arrive at prices that were justifiable and well-grounded. This kind of cooperation was unimaginable at the competition authority.
- After we had agreed that there would be no two-instance decision-making in matters of substantive law at the competition authority, the main question that remained was how to ensure some degree of internal control, how to make sure that the decisions proposed by the investigators could be changed by the Competition Council where justified. We needed an arrangement under which the investigators and the decision-making Competition Council were mutually interdependent but remained separate. This could be achieved by making the decision-making body (the competition council proceeding in the case) institutionally rely on the work of the investigators, and the final decision-making forum had to be separated from the experts who prepared the investigation reports.
- On top of all this, the Competition Council I envisaged was only subjected to law and nothing else, which meant that they cannot take instructions even from the president of the authority.

8. The situation at the time of the systemic change

The introduction of competition regulation and the establishment of the competition authority were linked with the political round-table negotiations of 1989 from two perspectives. On the one hand, an agreement was reached during the negotiations that the Németh government would not submit to the Parliament any legislative bills with a substantive effect on the future. Accordingly, the government ruled in its decision No 3032/1990 that it would not submit the draft competition and price bills (already submitted to the government) to the Parliament, but stated that it would consider their discussion necessary as soon as possible after the elections. In this resolution the government authorised the president of the National Price Office to carry out the organisational, training and other tasks necessary for the establishment of the Cartel Authority so that effective work can immediately start after the acts is passed.

Also, the 6th working committee had discussed the issues of competition at its round-table discussion before this government resolution was adopted. We distributed our proposals made for the government at the working committee session; therefore, after the systemic change this topic was already familiar to the participants and the new political forces.

The new National Assembly after the elections closed down the National Price Authority and distributed its powers among ministries, essentially as we had requested in our proposal submitted to the Németh government half a year earlier. Part of the price regulation powers was transferred to the Finance Ministry, and when I handed over the matters in progress to Finance Minister Ferenc Rabár, he communicated a request from Prime Minister József Antall that I should help the new government with

32 See: Nemzeti Árhivatal: Verseny és árszabályozás a piacgazdasági modellben [National Price Authority: Competition and price regulation in the model of market economy]. Budapest, May 1989. This proposal was the basis of the proposal referred to above, which was submitted to the government one month later.

the negotiations of the two new acts in the government and in Parliament and should conduct the work necessary to organise the competition authority because the new government agreed with the concept. Although the price authority ceased to exist, its staff was partly taken over by the new price authorities or by the Finance Ministry, but there were about 40 of us still waiting for the establishment of the competition authority, and – apart from our support given to the Finance Ministry in the form of sorting out the remaining "price regulatory" powers – we continued the discussion of questions that arose by nature relating to the establishment of the competition authority.

After the systemic change the minister of justice submitted a proposal to the new government on the competition and price acts in August 1990. The draft competition act and the proposal provided that the name of the office should be Hungarian Competition Authority, and that the Authority should operate under the supervision of the government with its president and vice presidents to be appointed and released by the prime minister for an indefinite term. The political parties were generally against subordinating the office to the government during the discussion of the draft bill in Parliament and in the evening of the first day of parliamentary debate the minister of justice announced that the government would change its position. Accordingly, the Hungarian Competition Authority was not subjected to the government but became an institution reporting to the National Assembly. The competition act was passed by the Parliament with a large majority, almost unanimously, on 20 November 1990.

Following the approval of the acts, I consulted Prime Minister József Antall on the National Competition Authority on two occasions. On the second occasion he said: *"I talked to my people and you are my only nominee for the position of president"*. I thanked him for his trust and after I had received free hand in selecting the professionals for the Authority I promised: *"I would do my utmost to make the office operational as soon as possible similarly to the way in which competition offices are working on the Western side of the river Leitha."*

By early December 1990 there were about 40 highly qualified professionals remaining from the Price Authority with whom we had been working on the preparation of the competition authority for years. We issued a call for about 30-35 new positions for the actual start of operation of the authority, and we received more than 70 applications in less than a week. We recruited the other half of the staff from these applicants. We were also convinced that we had done our utmost to make a good start and we produced volumes of internal rules and procedures necessary for the operation of the office because the act did not provide for such issues. The Hungarian Competition Authority as the first independent competition authority in Hungary officially started its operation on 1 January 1991.

9. Closing remark

In the summer of 1990 the heads of the two federal competition authorities of the US visited Hungary[33]. One morning I told them about the principles we relied on for the planning of the Hungarian competition authority. I also told them about our economic policy and price system related problems as I saw them at the time. We met at a conference about fifteen years later and Jim told me: *"Now I have to admit that I did not really believe back in 1990 that you would manage to establish and operate a competition authority under the given circumstances. Anyways, please accept my sincere congratulations."* I took it as a compliment and understood that his comment was addressed to everybody who turned a stone to move the cause of the competition authority forward.

33 James Rill was head of the DOJ, and Janet Steiger head of the FTC; in subsequent years we often met in the OECD's Competition Policy Committee or at international conferences.

József Zavodnyik*

Consumers and experiments

Abstract

Behavioral experiments founds that the consumers decisions can be easily manipulated. These experiments contribute to the understanding of trading habits influence consumers decisions. Their statements can be helpful to the Hungarian Competition Authority to make valid decisions.

1. Introduction

The effect of commercial communication on consumers that relates to the irrational aspect of decision making have been long known; it is hardly surprising that behavioural economics, which look at the rules governing the behaviour of individuals in the market based on psychological considerations, has recently come to the fore, underpinning the validity of the differentiated approach of the commercial practices of undertakings when they take aspects other than rational thinking into consideration[1] and emphasising that the assessment of the consumer decision making process cannot be simplified to rational elements. Sense and sensibility together drive consumer decisions, and undertakings are well aware of this when they try to influence consumers.[2] This approach is also reflected in more than one deci-

* Ministry of Justice, head of the Department for Competition Law, Consumer Protection and Intellectual Property

1 On behavioural economics see Bar-Gill, Oren: The Behavioral Economics of Consumer Contracts. Kormányzás, Közpénzügyek, Szabályozás, 2010/1., Bónis, Csilla–Zsohár, Ágnes: Viselkedés-gazdaságtan és versenypolitika [Behavioural economics and competition policy], Versenytükör 2012/2. 4–8., Koltay, Gábor–Vincze, János: Fogyasztói döntések a viselkedési közgazdaságtan szemszögéből [Consumer decisions from the aspect of behavioural economics]. Közgazdasági Szemle 2009/6., see also Balogh, Virág: Fogyasztóvédelem, szabályozás, hatékonyság [Consumer protection, regulation, efficiency]. Iustum Auquum Saletare 2012/3–4., Dudra, Attila: A fogyasztói döntések szabadságának védelme, elméleti és gyakorlati fejlemények, versenypolitikai összefüggések [Protection of the freedom of consumer decisions, theoretical and practical developments, competition policy considerations]. Versenytükör 2010/1–2., Vincze, János: Miért és mitől védjük a fogyasztókat? Aszimmetrikus információ és/vagy korlátozott racionalitás [Why and from what to protect consumers? Asymmetrical information and/or limited rationality]. Közgazdasági Szemle 2010/9. On certain aspects of advertising and psychology see for instance Sas, István: Reklám és pszichológia [Advertising and psychology], Kommunikációs Akadémia, Budapest, 2007.

2 József Zavodnyik: Értelem és érzelem. A kereskedelmi gyakorlatokkal megcélzott fogyasztó [Sense and sensibility. Consumers targeted by commercial practices], Gazdaság és Jog 2010/7–8., 20.

sions of the Competition Council and in the case-law of the courts.[3] Nevertheless, consumers themselves often incorrectly assess the rationality of their decisions, regarding themselves as reasonable beings if at all possible – while according to Anthony Pratkanis and Elliot Aronson, we tend to act rather irrationally and we rationalise our actions in retrospect.[4] On the other hand, less than rational actions are not haphazard but, as Dan Ariely emphasises, systematic and predictable.[5]

The better understanding of advertisements and commercial practices aiming to influence the behaviour of consumers may be promoted by the findings of disciplines studying the human brain and behaviour, in particular social psychology, which focuses on the effect of people on each other's opinions and actions[6] and on studying social-societal behaviour.[7]

Various social psychology experiments have demonstrated how easily influenced our decisions are, and these experiments may contribute to the understanding of the effect of commercial practices on consumer decisions.

Below we shall describe examples of findings and research results to support the reasonability of the approach reflected in the Competition Council's decisions in competition supervision proceedings. Our purpose is solely to raise interest in the subject; we do not endeavour to provide an in-depth analysis of consumer behaviour.

2. Price and discount in commercial communication

Price is an important characteristic of a product, fundamental for the consumer's decision, and any price reduction and the rate of discount may influence consumers. The decision making of consumers is influenced by the fact of the discount itself: this sends the message that the purchase is a good opportunity because this price would not normally be available. Pursuant to Section 6(1)(c) of Act XLVII of 2008 on the prohibition of commercial practices that are unfair to consumers ('UCPA'), applied in numerous proceedings[8], a commercial practice is regarded as misleading if it contains false information or represents factually correct information in such a way, including overall presentation, that makes it deceive or be likely to deceive the consumer in relation to the price of the goods or the manner in which the price is calculated or the existence of a special price advantage, and thereby causes the consumer or is likely to cause him to take a transactional decision that he would not have taken otherwise.

As Daniel Goleman puts it, price is a concept that we all understand. In his somewhat extreme opinion, accordingly, prices represent the only driver of the method of the production and marketing of objects.[9] Dan Ariely considers that the purchasing

3 The decision in Case No Vj-3/2010. emphasised that the behaviour of consumers is the result of a decision making process which is complex and influenced by diverse factors; consequently, the consumer's decision may not be regarded as the result of purely rational considerations because it is affected by other (emotional, impulsive) factors as well. In this context the Competition Council emphasised that Section 4(1) of Act XLVII of 2008 on the prohibition of commercial practices that are unfair to consumers ('UCPA') does not require the authority, when assessing a commercial practice, to focus on a consumer who makes a choice between alternatives with a cool head, in full possession of all the information required for the decision, aware of his own preferences and making a fully rational decision in his own best interest. A consumer acting 'with the care and circumspection that can be expected under the circumstances' is not the same as a consumer acting based exclusively on rational considerations. For the purposes of the enforcement of the law, the standard is a consumer who makes his decisions influenced by diverse intellectual and emotional motives, driven by both rational and irrational factors. In its decision in Case No Vj-54/2011, the Competition Council concluded that when assessing the transactional decisions of consumers, in order to evaluate the effect of commercial communication on consumer behaviour it is necessary to be aware that the same consumer may behave differently depending on the product, market or commercial practice concerned, and thus rational elements may be more or less pronounced in his behaviour. In the case of routine purchases, consumers may (rationally) act with little circumspection, and undertakings acting with professional care must take this into account when shaping their commercial practices. In its Judgment No 2.Kf. 27.231/2011/9. (Vj-154/2009.) the Budapest-Capital Regional Court of Appeal stated that consumer decisions may not be regarded as the result of pure rational thinking as they are also influenced by other (emotional, impulsive) factors. In connection with the rationality of consumers see Zavodnyik, József: Nagykommentár a tisztességtelen kereskedelmi gyakorlatról szóló törvényhez [Commentary on the Act on unfair commercial practices], Wolters Kluwer Kft., Budapest, 2013, 110-117.

4 Pratkanis, Anthony–Aronson, Elliot: Age of Propaganda: The Everyday Use and Abuse of Persuasion, AB OVO Kiadó, Budapest, 1992, 35.

5 Ariely, Dan: Predictably Irrational, Gabo Könyvkiadó, Budapest, 2011, 264. According to Ronald De Sousa, emotions are fundamentally rational. Quoted by Damasio, Antonio R.: Descartes' Error. Emotion, Reason and the Human Brain, AduPrint Kiadó és Nyomda Kft., Budapest, 1996, 199.

6 Aronson, Elliot: The Social Animal. Akadémiai Kiadó, Budapest, 2008, 29.

7 Forgács, József (Joseph P. Forgas): Interpersonal Behaviour, Kairosz Kiadó, 2002, 12.

8 E.g. Vj-40/2012.

9 Goleman, Daniel: Ecological Intelligence, Nyitott Könyvműhely, Budapest, 2009, 79.

decisions of most consumers are determined almost exclusively by the price.[10]

Hilke Plassmann concludes from her research on consumer decision making that our concepts about price shape our expectations, which in turn bias our experience and purchasing decisions. The brain activity during decision making reflects this bias, equating price with quality. A lower price lowers our expectations of a product while a higher price raises them. When Plassmann gave experimental volunteers what they thought was a discount wine, they liked it less than a supposedly high-priced wine, even though the wine in each glass was the same.[11]

Similarly, Daniel Kahneman and Amos Tversky point out that consumers start from the premise that high-quality products are more expensive, therefore if something costs a lot of money, they infer that it has high quality. If there are two bottles of wine on the counter and one costs more than the other, then he assumes that the pricier one is also better.[12]

In an experiment conducted by Micahel Hiscox and Nicholas Smyth, a store in Manhattan sold towels with a label stating: *"These towels have been made under fair labor conditions, in a safe and healthy working environment which is free of discrimination, and where management has committed to respecting the rights and dignity of workers."* The sales of products that featured the 'Fair and Square' logo continuously increased. Profitability also increased when the labels were placed on other similar towels. Sales continued rising after the prise was upped. A 10% price rise resulted in 20% higher sales, while a 20% price increase brought a 62% sales growth. The higher price of the towels made the claims about the stricter standards and better working conditions more credible to consumers.[13]

The presumed relationship between price and the value of the goods offers an excellent opportunity to manipulate consumers. This was highlighted by the case described by Robert Cialdini, when the owner of a store specialised in Indian jewellery had difficulty selling its turquoise jewellery, though they were good quality for the prices asked. It was the peak of the tourist season. The owner tried several sales techniques, to no avail. Then she decided to get rid of the products no matter what, and before leaving on a buying trip for several days, she left a note to her head saleswoman: *"Everything in this display case, price x 1/2."* When she returned, she was pleased to see that the turquoise jewels were gone. The shock came when she discovered that the saleswoman had misread the message, mistaking ½ for 2, and sold the jewellery at twice the original price.[14] What was the reason for the unexpected success? Well-to-do customers looking for valuable jewellery followed the typical logic, based on common heuristics, that valuable products tend to be more expensive, and this relationship also works the other way around: whatever is expensive must be valuable. Consequently, the higher price tag convinced them that the product was a good buy.[15]

Manufacturers often set a 'suggested retail price' for their products while, as Richard Thaler notes, the relationship between the market price and the suggested retail price varies from product to product. In some cases the two prices are identical while in other instances the suggested retail price exceeds the market price by 100% or more. According to Thaler, one explanation for the suggested retail price exceeding twice the normal commercial price may be the fact that the suggested retail price is in effect a 'suggested reference price', in which case a lower sales price provides positive transaction utility. Inexperienced consumers may regard the suggested retail prices as an indicator of quality, while the recommended consumer price is more successful as a reference price the less often the product is purchased , and the suggested retail price serves as a quality indicator mainly where the consumer has difficulty determining the quality in any other way (for instance by inspection). Deep discounting relative to the suggested retail price is observed for infrequently purchased goods whose quality is hard to judge (for instance home furniture which is always 'on sale', or silver flatware where "deep dis-

10 Idem. 80.
11 Described by Goleman (2009) 128–130.
12 Described by Aronson (2008) 141.
13 The experiment is described by Goleman (2009) 127–128.
14 Cialdini, Robert B.: Influence: The Psychology of Persuasion, HVG Kiadó Zrt., Budapest, 2009, 18.
15 Simon, George: In Sheep's Clothing. Understanding and Dealing with Manipulative People, Háttér Kiadó, Budapest, 2009, 284–286.

counting - selling merchandise to consumers at 40% to 85% below the manufacturer's suggested retail price" has become widespread practice.[16]

3. Promise of 'free'

Pursuant to Section 3(4) of the UCPA and Section 20 of the Schedule to the UCPA, describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and taking possession or paying for delivery of the item constitutes an unfair practice. In recent years the Competition Council has examined the fairness or unfairness of free-of-charge promises in commercial communications in several proceedings.[17]

Does the promise of non-payment have such a substantial effect that it is justified to include the related commercial practice in the Schedule to the UCPA and thereby classify such conduct as unfair *per se*, irrespective of any other criteria? In view of the findings of Dan Ariely relating to 'free', the decision of the legislator seems appropriate.

According to Dan Ariely, free offers have power, *"zero is not just another discount. Zero is a different place. The difference between two cents and one cent is small. But the difference between one cent and zero is huge!"*[18] He describes an experiment were two kinds of chocolate were offered: high-quality Lindt truffles and average Hershey's Kisses. The price of a Lindt truffle was set at 15 cents (it would normally cost approx. 30 cents) and a Hershey's Kiss at one cent. The participants of the experiment acted rationality: they compared the price and quality of the Kiss with the price and quality of the truffle, and then made their choice. About 73 percent of them chose the truffle and 27 percent chose a Kiss. Then the prices of the chocolates were changed: the Lindt truffle was offered at 14 cents and the Kisses free (the word Free was displayed on a sign next to the product). While the price difference between the two products did not change (14 cents), now 69% of the customers chose the free Kiss.[19]

Ariely asked the question: Why is free so enticing? Why do we have an irrational urge to jump for a FREE! item, even when it's not what we really want? He believes that this is because most transactions have an upside and a downside, but when something is free, we forget about the downside. Free gives us such an emotional charge so that we perceive what is being offered as immensely moire valuable than it really is. The real attraction of free is rooted in the fear of loss. When we choose a free item, there is no visible possibility of loss.[20]

This is also illustrated in an earlier case also described by Ariely, when amazon.com offered free shipping above a certain order size. Unlike in other countries, sales in France did not increase. This was because French customers were reacting to a different deal. Instead of offering free shipping on orders over a certain amount, the French division priced the shipping for those orders at one franc. This does not seem very different from free, but it was. When Amazon changed the promotion in France to include free shipping, France also produced a sales increase.[21]

4. Promise of a gift

The promise of obtaining a product as a gift or of receiving a gift along with a product purchased is capable of influencing consumers.[22]

In proceeding No Vj-127/2009 advertisements published in the press claimed that through the promised gift (varying by advertisement, such as a 'magic square', aurus numerus' coin; confidential, personal and detailed prophecy; magnetised 'fortune catalyst'; the personal Birth Chrystal, lucky numbers and lucky charm of the consumer, the 'golden astral number' of the consumer and an important study on astral subjects) the lives of consumers would take a turn for the better and financial difficulties would be resolved, and that the

16 Thaler, Richard: Mental Accounting and Consumer Choice, in: Szántó, Richárd–Wimmer, Ágnes–Zoltayné Paprika, Zita (ed.): Döntéseink csapdájában. Viselkedéstudományi megközelítés a döntéselméletben. Alinea Kiadó, Budapest, 2011, 199–200.
17 For instance Vj-11/2010., Vj-93/2010., Vj-105/2010., Vj-113/2010., Vj-126/2010., Vj-127/2010.
18 Ariely (2011) 86.
19 Idem 75–77.
20 Idem 78–79.
21 Ariely (2011) 82–83.
22 From the case-law of the Competition Council, see for instance Case No Vj-22/2006.

return packages to be received after the coupon is sent to the undertaking as well as the gift would make it easier to win in games of chance.

Undertakings using gifts often abuse the principle of reciprocity, which goes *"If I do something for you, you must also do something form me to return the favour"*, Anthony Pratkanis and Elliot Aronson claim.[23]

Robert Cialdini mentions the example of the Hare Krisna Society. From the 1970s they have been using a fund-raising tactic that was capable of overcoming any negative feelings towards the person asking for money. The passer-by is given a gift of a flower, which he is unable to give back. It is only after this gesture that the request for a donation is made, based on the reciprocation rule.[24] According to Anthony Pratkanis and Elliot Aronson, many undertakings use this tactic, even if less conspicuously, examples including free tasting in supermarkets, small new year gifts, 'No commitment' samples.[25] Cialdini emphasises that normally, if a consumer receives a gift, he will be willing to purchase a product that he would not otherwise have bought.[26]

George Simon notes that there are direct marketing or multi-level marketing (MLM) companies which rely on the 'give before you ask' strategy. For instance, one of these firms have a so-called 'bug' collection of various household chemicals, which the salesman leaves with the potential buyer for three days without any payment or obligation, asking her to try the products. When the salesman returns, the consumer is already in the trap of the obligation of reciprocation and places an order voluntarily.[27]

5. Repurchase/take-back guarantee/right

In certain cases undertakings include a repurchase[28]/take-back guarantee[29] in their commercial communications, or sometimes they refer to the right of take-back.[30] In its decision in Case No Vj-36/2012 the Competition Council stated that for a consumer without in-depth knowledge of the law, a take-back guarantee is an opportunity whereby the original situation before the conclusion of the contract can be restored (the product can be returned without cause, within the period specified in the contract, the product is taken back and thus the contract is terminated), which includes the repayment by the undertaking of any fees paid, potentially in advance, by the consumer.

In the context of the presentation of the repurchase/take-back guarantee/right in commercial communications we should point out that undertakings appeal to the sense of ownership generated in their customers. As an example for trial promotions, Dan Ariely mentions the case where an expanded cable television package can be tested for a few months at a discount rate. During this time, we will get used to the digital picture quality, begin to incorporate our ownership of it into our view of the world and ourselves, and quickly rationalize away the additional price. Our aversion to loss of the extra channels and poorer picture quality also urges consumers to keep the tested package (at the standard rate).[31] Another example given by Ariely is the 30-day money-back guarantee, which is an incentive to buy. *"We fail to appreciate how our perspective will shift once we have the new sofa at home, and how we will start viewing the sofa – as ours – and consequently start viewing returning it as a loss. We might think we are taking it home only to try it out for a few days, but in fact we are becoming owners of it and are unaware of the emotions the sofa can ignite in us."*[32]

In a similar vein, Barry Schwartz points out that the endowment effect helps explain why undertakings can afford to give a money-back guarantee on their products. Once people have possessed a product, they feel its return as a loss. He also describes an experiment which compared the way in which

23 Pratkanis–Aronson (1992) 140–141.
24 Cialdini (2009) 49.
25 Simon (2009) 290–293.
26 Cialdini (2009) 50.
27 Simon (2009) 293–294.
28 For instance, Vj-6/2009, Vj-149/2009., Vj-126/2010.
29 For instance, Vj-36/2012.
30 For instance, Vj-171/2006. In some cases the Competition Council considered it a mitigating circumstance when establishing the amount of the fine that consumers have the option to return the product (e.g. Vj-14/2011., Vj-70/2011., Vj-1/2012.).
31 Ariely (2011) 162.
32 Idem 163.

the endowment effect influences people to make car-buying decisions. In one case, people were offered a car loaded with options, and their task was to eliminate the options they didn't want. In the second condition, they were offered the car devoid of options, and their task was to add the ones they wanted. People in the first condition ended up with many more options than people in the second. This is because when options are already attached to the car being considered, they become part of the endowment and passing them up entails a feeling of loss. When the options are not already attached, they are not part of the endowment and choosing them is perceived as a gain. But because losses hurt more than gains satisfy, people judging, say, a $400 stereo upgrade that is part of the car's endowment may decide that giving it up (a loss) will hurt worse than its $400 price. In contrast, when the upgrade is not part of the car's endowment, they may decide that choosing it (a gain) won't produce $400 worth of good feeling. So the endowment effect is operating even before people actually close the deal on their new car.[33]

Thaler and Sunstein also emphasise that people hate losses and roughly speaking, losing something makes you twice as miserable as gaining the same thing makes you happy. To illustrate the loss-aversion of people, they describe an experiment where half the students in a class are given coffee mugs with the insignia of their university. The other half of the class is asked to examine the mugs. Then mug owners are invited to sell their mugs and non-owners are invited to buy them. They do so by answering the question: *"At each of the following prices, indicate whether you would be willing to (give up your mug/buy a mug)."* The results show that those with mugs demand roughly twice as much to give up their mugs as others are willing to pay to get one. Thousands of mugs have been used in dozens of replications of this experiment, but the results are nearly always the same. Once I have a mug, I don't want to give it up. But if I don't have one, I don't feel an urgent need to buy one. What this means is that people do not assign specific values to objects. When they have to give something up, they are hurt more than they are pleased if they acquire the very same thing. It is also possible to measure loss aversion with gambles. Suppose I ask you whether you want to make a bet. Heads you win $X, tails you lose $100. How much does X have to be for you to take the bet? For most people, the answer to this question is somewhere around $200. This implies that the prospect of winning $200 just offsets the prospect of losing $100.[34]

6. Origin of the product

Pursuant to Section 6(1)(c)(bc) of the UCPA, a commercial practice is regarded as misleading if it contains false information or represents factually correct information in such a way, including overall presentation, that makes it deceive or be likely to deceive the consumer in relation to the origin or place or origin of the product, and thereby causes the consumer or is likely to cause him to take a transactional decision that he would not have taken otherwise.

In recent years the GVH conducted several proceedings against undertakings that applied the marking 'Hungarian product' or similar on their products (Vj-88/2010., Vj-8/2011., Vj-17/2011., Vj-21/2011., Vj-18/2012.). The adoption of Decree No 74/2012. (VII. 25.) of the Minister of Rural Development on the use of certain voluntary distinctive signs on food changed the legislative environment. The Decree defined the terms of use of distinctive elements placed on the product voluntarily by undertakings to grab the attention of consumers on the marking, presentation or advertising of food products. The Decree specifies, inter alia, the criteria to be satisfied before food products can be marked as 'Hungarian product', 'domestic product', 'product processed in Hungary' and equivalent phrases.

But does origin have any significance for the decision of consumers?

In an experiment described by Daniel Goleman, two groups of participants were offered a glass of wine in a restaurant. One group was told it was a 'new California wine', the other were served the same wine but were informed that it was a 'new North Dakota' wine, while in reality both wines were

33 Schwartz, Barry: The Paradox of Choice. Why More is Less. Lexecon Kiadó, Győr, 2006, 78–80.
34 Thaler, Richard H.–Sunstein, Cass R.: Nudge. Improving Decisions about Health, Wealth, and Happiness, Manager Könyvkiadó, Budapest, 2011, 42–43.

a cheap Cabernet Sauvignon. But when the restaurant goers thought the wine was from North Dakota, they drank less of it, and also ate less of their meal, compared to those who had that same wine labelled from California.[35]

7. Rationed products

Pursuant to Section 6(1)(b)(bb) of the UCPA, a commercial practice is regarded as misleading if it contains false information or represents factually correct information in such a way, including overall presentation, that makes it deceive or be likely to deceive the consumer in relation to the quantity of the product, and thereby causes the consumer or is likely to cause him to take a transactional decision that he would not have taken otherwise. Consequently, if an undertaking misleads the consumer regarding the quantity of goods in the course of its commercial practice, it constitutes deception. This can relate either the number of products or the volume (weight, size etc.).

In paragraph I.6.8. of the Decisions on matters of principle relating to the UCPA the Competition Council underlined that the quantity of products that can be purchased by a single consumer at the discount price is a material element capable of influencing the transaction decision of consumers in case of products sold in promotions facilitating the purchase of a product at a special price.

The case described by Daniel Kahneman supports the validity of this statement. Supermarket shoppers encountered a sales promotion for Campbell's soup at about 10% off the regular price. On some days, a sign on the shelf said 'limit of 12 per person'. On other days, the sign said 'no limit per person'. Shoppers purchased an average of 7 cans when the limit was in force, twice as many as they bought when the limit was removed. One of the explanations is the anchoring effect to be explained later, but rationing also implies that the goods are flying off the shelves, and shoppers should feel some urgency about stocking up.[36]

8. Consumers driven by a compulsion to gamble

In Case No Vj-154/2009 the Competition Council differentiated between consumers with a gambling addition or showing a greater-than-average interest in gambling and thus influenced in their decisions by that compulsion and consumers without such traits. It was emphasised that the irrational elements of consumer decision making were stronger in the case of consumers who are particularly vulnerable due to their credulity. One source of credulity is addition to gambling, a vulnerability due to the greater-than-average attraction to gambling, in which case the rational side of consumer decision making is overshadowed by irrational elements, making the consumer vulnerable to aggressive commercial practices capable of distorting his decision. The Competition Council established that the entirety and presentation of the television game concerned was capable of exerting a psychological pressure that could interfere with the decision making process and significantly restricted, or was capable of restricting, the freedom of choice or behaviour of consumers regarding the product or his capability to make an informed decision, and thus encouraged, or was capable of encouraging, the consumer to make a transactional decision that he would not have made otherwise. The commercial practice was capable of influencing the consumer's decision making with the proviso that the effect was stronger on consumers with a gambling addition or showing a greater-than-average interest in gambling and thus influenced in their decisions by such addiction.

In the context of consumers with a gambling addiction we should refer to the statement of Whelan (quoted by Eric Abrahamson and David H. Friedman) that gamblers not only believe in their systems but are also erroneously convinced that the ratio of the winnings and losses will eventually confirm their conviction. This is based on a psychological phenomenon, the so-called confirmation bias: if you assume that a statement is true and also want it to be true, you will be particularly sensitive of things and comments confirming your belief and will bet-

35 Goleman (2009) 176.
36 Kahneman, Daniel: Thinking Fast and Slow, HVG Kiadó Zrt., Budapest, 2013, 147.
37 Abrahamson, Eric–Friedman, David H.: A Perfect Mess. The Hidden Benefits of Disorder, HVG Kiadó Zrt., Budapest, 2007, 298.

ter remember them than those that conflict with your theory, often disregarding or forgetting the latter.[37]

Mihaly Csikszentmihalyi underlines that what people enjoy is not the sense of being in control, but the sense of exercising control in difficult situations. One type of activity seems to constitute an exception: games of chance. These are enjoyable, yet by definition they are based on random outcomes presumably not affected by personal skills. The 'objective' conditions, however, happen to be deceptive, for it is actually the case that gamblers who enjoy games of hazard are subjectively convinced that their skills do play a major role in the outcome. Poker players are convinced it is their ability, and not chance, that makes them win. If they lose they are much more inclined to credit bad luck, but even in defeat they are willing to look for a personal lapse to explain the outcome.[38] Elliot Aronson explains that studies have amassed a large volume of evidence to support that we try to attribute good things to ourselves and deny bad things, thus gamblers will attribute their successes to their skills and their failures to bad luck.[39]

9. Information on the internet

According to the Competition Council, with takes into consideration the characteristics of the various communication channels when making its decision, the internet by its nature is capable of making all the relevant information on a particular product available quickly and conveniently. However, the large volume of information that can be, and is actually, made available on the internet also means that the adoption of decision by consumers relevant for competition law purposes is not hindered by the lack of information but by the difficulty of selecting among the large volume of information, identifying, choosing and processing the relevant data.[40]

The avalanche of electronic information we now face is such that in order to solve the problem of choosing from among 200 brands of cereal or 5,000 mutual funds, we must first solve the problem of choosing from 10,000 web sites offering to make us informed consumers, says Barry Schwartz.[41]

The wealth of information available on the internet indicates that in this case the difficulty is not the acquisition of information but its processing and selection. This is not a new concept, however, as György Ádám points out: "*We have known since Henri Bergson that the essence of human intelligence is not so much the 'collection' and accumulation of information but rather the exclusion of the data and knowledge already collected, that is, the elimination of facts unnecessary for the balanced operation of the brain that represent an undue burden for the though process.*"[42]

According to J. P. Changeux, learning means scrapping[43] – because of the sheer volume of information on the internet, this 'scrapping' places an ever growing burden on consumers.

10. Confirmation of claims by undertakings through research findings

Pursuant to Section 14 of the UCPA, undertakings are obliged to substantiate the validity of claims made as part of their commercial practice at the request of the proceeding authority. If the undertaking fails to comply, the factual claim in question is deemed to be untrue.

In some cases the undertaking is not allowed to substantiate its claims, in particular where it uses advertising claims that are prohibited by legislation. In respect of claims where the undertaking is allowed to present substantiation, it should be noted that the undertaking is not simply obliged to give some explanation about the validity of a claim but they must present evidence that proves its validity beyond doubt. If the undertaking submits documentation of studies made on subjects regarding the claim, this must satisfy the criteria of soundness of the study documentation. The Competition Council

38 Csikszentmihalyi, Mihaly: Flow. The Psychology of Optimal Experience, Akadémiai Kiadó, Budapest, 2010, 92–93.
39 Aronson (2008) 182.
40 Vj-89/2008.
41 Schwartz (2006) 59–60.
42 Ádám, György: Az emberi elme színe és fonákja [The front and back of the human mind], OKKER Kft., Budapest, 2002, 62.
43 Quoted by Ádám, György: A rejtőzködő elme, Vince Kiadó, Budapest, 2004, 80.

has set out its expectations regarding study documentation in several of its decision.[44]

However, various social psychology studies have highlighted that such findings must be approached with particular care because the research findings can be influenced in various ways and, as shown in the examples below, with relative ease.

Anthony Patkanis and Elliot Aronson quote the coursebooks for lawyers on cross-examination techniques, to the effect that you should never ask a question unless you know the answer. Or in other words: Never ask a question that will not yield the answer you want to hear.[45]

The fact of the study itself and in particular the nature of the test instruments promise a particular result, and the question itself suggests to the subject that an answer exists. György Csepeli underlines that the effect is even stronger if the researcher asks a closed question, where the alternatives are given. According to the example of Sándor Keleszta, respondents are likely to answer the question 'What is your favourite colour?' even it they had never though that they might have one.[46]

Thaler and Sunstein note that those who engage in surveys want to catalogue behaviour, not to influence it; nevertheless, when people are asked whether they are likely to engage in a certain behaviour (to vote, to lose weight, to purchase certain products), the attempt to measure people's intentions affect people's conduct. The 'mere-measurement effect' refers to the finding that when people are asked what they intend to do, they become more likely to act in accordance with their answers. A study of a nationally representative sample of more than forty thousand people asked a simple question: Do you intend to buy a new car in the next six months? The very question increased purchase rates by 35 percent.[47]

László Mérő emphasises that when we make a judgment in an uncertain situation, we often grab some starting value from the work ding of the task or from the initial steps of the calculation and adjust our decision accordingly. In an experiment, Amos Tversky and Daniel Kahneman asked high school students to estimate the product of the numerical expressions 1x2x3x4x5x6x7x8 and 8x7x6x5x4x3x2x1. The estimate for the first sequence was around 500, while the estimate for the second sequence was around 2,200 (the correct answer is 40,320); this shows that the result of the estimate was influenced by the sequence of the numbers to be multiplied.[48]

In another experiment Kahneman and Tverky used a rigged wheel of fortune which stopped only at 10 and 65. The university students participating in the experiment were asked two questions after spinning the wheel and asked to write down the number on which the wheel stopped: Is the percentage of African nations among UN members larger or smaller than the number you just wrote? What is your best guess of the percentage of African nations in the UN? The average estimates of those who saw 10 and 65 were 25% and 45%, respectively.[49]

This is related to the so-called anchoring effect. Richard Thaler and Cass Sunstein noted that if you start with some anchor (in the above cases the number you know), you adjust in the direction you think is appropriate. The bias occurs because the adjustments are typically insufficient. The findings of Thaler and Sustein indicate that in addition to anchoring, the sequence of questions also influences the result. In one experiment, college students were asked two questions: How happy are you? How often are you dating? When the two questions were asked in this order the correlation between the two questions was quite low (.11). But when the question order was reversed, so that the dating question was asked first, the correlation jumped to .62. Apparently, when prompted by the dating question, the students use what might be called the 'dating heuristic' to answer the question about how happy they are. "*Gee, I can't remember when I last had a date! I must be miserable.*" In view of this the authors highlighted that we can influence the figure you will choose in a particular situation by ever-so-subtly suggesting a starting point for your thought process. When charities ask you for a donation, they typically offer you a range of options such as $100, $250, $1,000, $5,000, or

44 For instance, Vj-104/2009., Vj-78/2010., Vj-101/2010., Vj-96/2011.
45 Pratkanis–Aronson (1992) 58.
46 Csepeli, György: Szociálpszichológia [Social Psychology], Osiris Kiadó, Budapest, 2006, 107–108.
47 Thaler–Sunstein (2011) 76–77.
48 Mérő, László: Észjárások. A racionális gondolkodás korlátai és a mesterséges intelligencia [Ways of Thinking: The Limits of Rational Thought and Artificial Intelligence]. Akadémiai Kiadó–Optimum Kiadó, Budapest, 1989, 190.
49 Kahneman (2013) 139. Mérő (1989) 191.

'other.' If the charity's fund-raisers have an idea of what they are doing, these values are not picked at random, because the options influence the amount of money people decide to donate. People will give more if the options are $100, $250, $1,000, and $5,000, than if the options are $50, $75, $100, and $150.[50]

The sequence of words in the questions may also affect the results of the experiment. David Kahneman explains the experiment conducted by Solomon Asch, where participants were presented descriptions of two people and asked for comments on their personality:

> Alan: intelligent – industrious – impulsive – critical – stubborn – envious
>
> Ben: envious – stubborn – critical – impulsive – industrious – intelligent

Even though the same characteristics were attributed to these persons, more people viewed Alan more favourably than Ben. The initial traits in the list changed the meaning of the traits that appeared later.[51]

The results of experiments may be influenced through external factors as well. People's judgments about strangers are affected by whether they are drinking iced coffee or hot coffee while answering. According to the results of an experiment described by Richard Thaler and Cass Sunstein, those given iced coffee are more likely to see other people as more selfish, less sociable, and colder than those who are given hot coffee.[52]

The outcome of the comparison of two products may also be affected by the name of the products. The participants in an experiment described by Daniel Kahneman were asked to evaluate the prospects of fictitious Turkish companies on the basis of reports from two brokerage firms. One of the reports came from an easily pronounced name (e.g., Artan) and the other report came from a firm with an unfortunate name (e.g., Taahhut). The reports sometimes disagreed. The best procedure for the observers would have been to average the two reports, but the participants gave much more weight to the report from brokerage firm with the easily pronounced name. According to Kahneman, if possible, people want to stay away from anything that reminds them of effort, including a source with a complicated name.[53]

Since the entry into force of the UCPA the Competition Council has established on several occasions that an undertaking has attributed medicinal effects to its product illegally[54], and found more than once that an the undertaking failed to substantiate its claims of medicinal effects, the claim must be regarded as false, and thus the undertaking was found to have violated Section 3(1) of the UCPA.[55]

In agreement with the views of György Ádám, we must be aware that *"unfortunately, quackery has had, and will have, its place in all times, nonsensical ideas will be reborn in every generation. They are rooted in man's anxiety and fear, the bleakness and lack of perspective of the answers to the 'ultimate questions' of human existence"*.[56]

György Ádám emphasises that the placebo effect (which is a real brain process and psychological mechanism) does exist, is beneficial and promotes healing. *"The placebo effect, however, is only temporary, unlike the effect of real treatment. When treatment begins, the real and placebo effects go neck by neck, as the patient looks forward to both and anticipates getting better. After some time, however, the placebo effect, which works exclusively through associative or cognitive learning, disappears. In contrast, the effect of real treatment remains, even though at a curative level somewhat below*

50 Thaler–Sunstein (2011) 33–34. This experiment is also described by Kahneman (2013) 119–120. The anchoring effects influences not only the decisions of consumers but also of persons with sufficient expertise. Daniel Kahneman describes an experiment where German judges with an average of more than fifteen years of experience on the bench first read a description of a woman who had been caught shoplifting, then rolled a pair of dice. The dice were loaded so every roll resulted in either a 3 or a 9. Then the judges were asked whether they would sentence the woman to a term in prison greater or lesser, in months, than the number showing on the dice and were instructed to specify the exact prison sentence they would give to the shoplifter. On average, those who had rolled a 9 said they would sentence her to 8 months; those who rolled a 3 said they would sentence her to 5 months. Kahneman (2013) 146.

51 Kahneman (2013) 99.

52 Thaler–Sunstein (2011) 78.

53 Kahneman (2013) 78. Kahneman also relates that stocks with pronounceable trading symbols outperform those with tongue-twisting tickers. A study conducted in Switzerland found that investors believe that stocks with fluent names will earn higher returns than those with clunky labels (81.).

54 For instance, Vj-102/2010.

55 For instance, 8/2009. Vj, 46/2009. Vj, 62/2009. Vj, 101/2010. Vj, 13/2011. Vj, 1/2012. Vj, 56/2012.

56 Ádám (2002) 59.

the initial, almost exaggerated expectation level (placebo level). As the much-quoted ironic wisdom of the French Trousseau goes: *"Let us cure as many patients as possible with the new drug while it still has its curative effect!"*[57]

Nevertheless, we know little about the placebo effect which makes patients respond positively to a given preparation, and as Antonio Damasio puts it: "*we have no idea about the degree of error the placebo effect has created for so-called double-blind studies*".[58]

Dan Ariely describes the case where the energy drink SoBe claims to provide *"energy for your mind."* Half of the students would buy their SoBe at full price, and the other half would buy it at a discount. After consuming the drinks, the students would be asked to watch a movie for 10 minutes. Then they would be given a 15-word puzzle, with 30 minutes to solve. Previously established baseline of a group of students who had not drunk SoBe: 9 words on average, students who had bought it at the full price also got on average nine answers right while the discounted SoBe group averaged 6.5 questions right. So SoBe didn't make anyone smarter. In the second stage of the experiment the following message was attached to the quiz booklet: *"Drinks such as SoBe have been shown to improve mental functioning, resulting in improved performance on tasks such as solving puzzles."* We also added some fictional information, stating that SoBe's Web site referred to more than 50 scientific studies supporting its claims. Both the discount group and the full-price group, having absorbed the information and having been primed to expect success, did better than the groups whose quiz cover didn't have the message. When we hyped the drink by stating that 50 scientific studies found SoBe to improve mental functioning, those who got the drink at the discount price improved their score by 0.6, but those who got both the hype and the full price improved by 3.3 additional questions. The experiment showed that the message and the price was arguably more powerful than the beverage itself.[59]

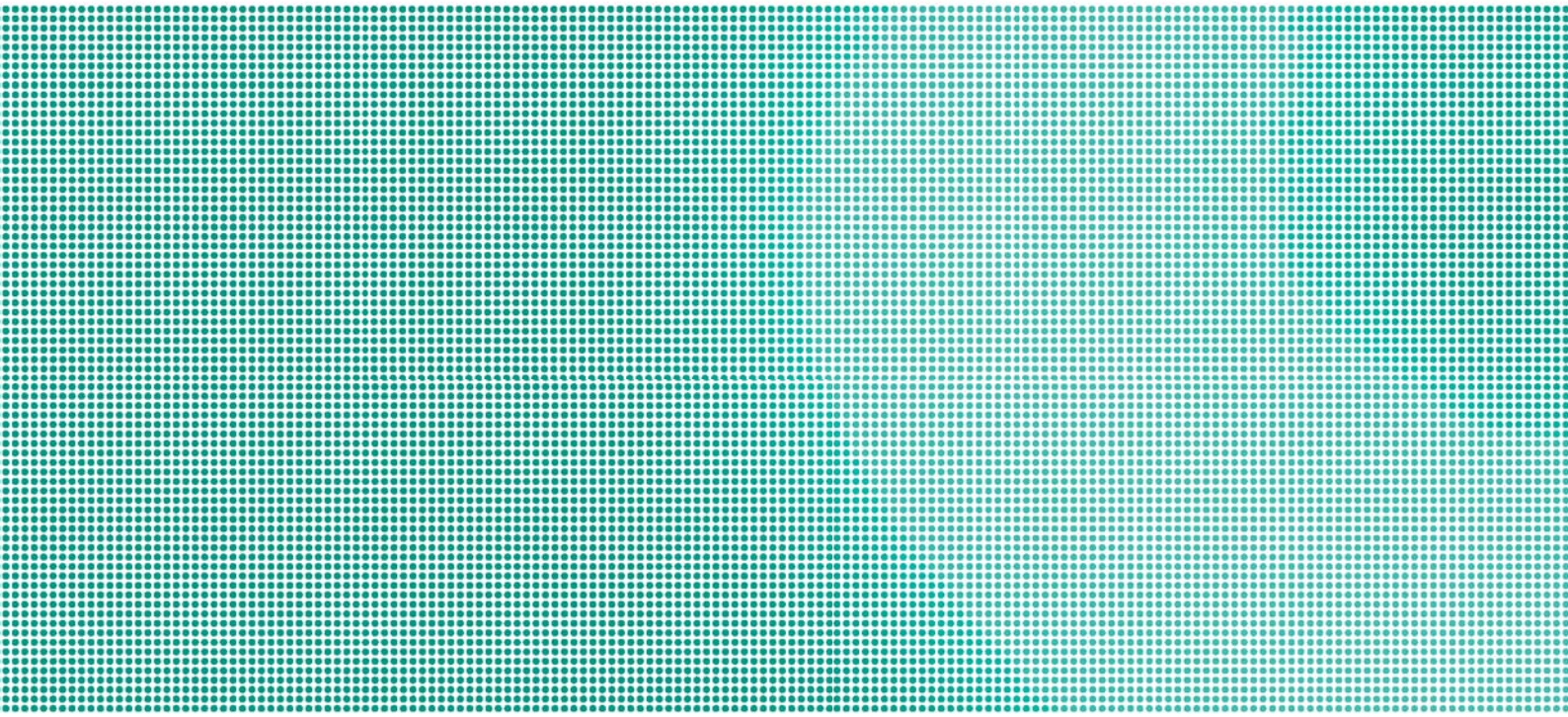
11. Conclusion

The proceedings of authorities assessing business-to-consumer commercial practices under the UCPA offer exciting challenges to law enforcers because they can rely on the findings of disciplines not directly related to law to gain a deeper understanding of the motivations behind consumer behaviour. Social psychology in particular offers various findings based on studies which may help in assessing the effects of commercial practices on consumers, facilitating to bridge the gap resulting from the fact that while undertakings with substantial financial resources and engaging in intensive advertising have sophisticated instruments to understand and influence consumer behaviour, the toolset of authorities assessing such commercial practices is lacking in this respect. This underlines the fact that in the context of the UCPA it would be worth considering the systematic collection of (social) psychology findings and research results relating to the various provisions and to analyse them, thus assisting enforcement.

57 Idem 141–143. See also Ádám (2004) 92–99.

58 Damasio (1996) 247. It should be noted that advertisements attributing some curative effect to products often feature scientists (or persons appearing as such), who may have a kind of halo effect. József Fogács describes Wilson's experiment, who told Australian students that the guest speaker was a professor, associate professor, senior lecturer, lecturer or student at another university. After the presentation the students were asked to estimate the height of the speaker. Students who had been told that the speaker was a professor gave an estimate almost 6 cms higher than those who through that he was a student. Forgács (2002) 61.

59 Ariely (2011) 210–211.



Gazdasági Versenyhivatal | *1054 Budapest, Alkotmány u. 5. Telephone: 472-8865, fax: 472-8860, www.gvh.hu*