

HUNGARIAN COMPETITION LAW FORUM

HORIZONTAL AGREEMENTS

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HORIZONTAL AGREEMENTS

STRUCTURE OF PRESENTATION

- ENFORCEMENT ACTION AGAINST CARTELS
- SOME COMMENTS ON 'ATYPICAL' CARTELS
- SOME COMMENTS ON THE COMMISSION'S *DRAFT GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS*
- CONCLUSION

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CARTEL CASES: STATISTICS

- ◉ HAS THERE BEEN A DECLINE IN ENFORCEMENT AGAINST CARTELS?
- ◉ THE STATISTICS DO NOT SUGGEST THIS:
 - DG COMP'S STATISTICS FOR 2018-2021 SHOW THAT 2021 HAD THE HIGHEST LEVEL OF FINES, THE HIGHEST NUMBER OF DECISIONS AND THE LARGEST NUMBER OF UNDERTAKINGS FINED IN THAT FOUR YEAR PERIOD
 - IN THE SAME PERIOD THE NUMBER OF ECN CASES REMAINED BROADLY THE SAME
- ◉ NOTE ALSO THAT COVID MEANT THERE WERE NO DAWN RAIDS FOR A LENGTHY PERIOD: DG COMP HAS DONE FIVE SINCE OCTOBER 2021

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CARTEL CASES: STATISTICS

- ◉ GLOBALLY FINES INCREASED FROM \$1.6 BILLION IN 2020 TO \$4.6 BILLION IN 2021 (SOURCE: MORGAN LEWIS GLOBAL CARTEL ENFORCEMENT REPORT 2021). FOR EXAMPLE:
 - EU \$1.7 BILLION
 - SOUTH KOREA \$864 MILLION
 - BRAZIL \$655 MILLION
 - CHINA \$268 MILLION
 - US \$150 MILLION
 - INDIA \$117 MILLION

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CARTEL CASES: STATISTICS

- ◉ HAS ENFORCEMENT MOVED FROM TRADITIONAL INDUSTRIES TO NOVEL ONES?
- ◉ THE STATISTICS DO NOT SUGGEST THIS:
 - STEELMAKERS (SOUTH KOREA)
 - BREWERIES (INDIA)
 - CONCRETE PILES (SOUTH KOREA)
 - PRE-MIXED CONCRETE (CHINA)
 - TUBES AND FITTINGS (BRAZIL)
 - READY-MIXED CONCRETE (US)

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CARTEL CASES:

EUROPEAN COMMISSION DECISIONS

- ◉ ***CROSS-BORDER RAIL CARGO*, APRIL 2021, €38 MILLION**
 - SETTLEMENT DECISION
 - THE CARTEL RAN FROM 2008 TO 2014
 - DEUTSCHE BAHN'S FINE WAS INCREASED BY 50% FOR RECIDIVISM

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CARTEL CASES:

EUROPEAN COMMISSION DECISIONS

- ***SSA BONDS TRADING*, APRIL 2021, €28 MILLION**
 - THIS WAS NOT A SETTLEMENT DECISION
 - DEUTSCHE BANK WAS THE WHISTLEBLOWER AND GIVEN IMMUNITY, AVOIDING A FINE OF €21 MILLION
 - BANK OF AMERICA MERRILL LYNCH, CRÉDIT AGRICOLE AND CREDIT SUISSE FINED

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CARTEL CASES:

EUROPEAN COMMISSION DECISIONS

- *EUROPEAN GOVERNMENT BONDS TRADING, MAY 2021, €371 MILLION*
 - THIS WAS NOT A SETTLEMENT DECISION
 - NATWEST WAS THE WHISTLEBLOWER AND GIVEN IMMUNITY, AVOIDING A FINE OF €260 MILLION
 - BANK OF AMERICA AND NATIXIS NOT FINED AS OUTSIDE LIMITATION PERIOD
 - NOMURA, UBS AND UNICREDIT FINED
 - PORTIGON (WESTLB) NOT FINED AS NO RELEVANT TURNOVER IN THE LAST BUSINESS YEAR

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CARTEL CASES:

EUROPEAN COMMISSION DECISIONS

- ◉ **CAR MANUFACTURERS, JULY 2021, €875 MILLION**
 - SETTLEMENT DECISION
 - SUPPRESSION OF TECHNOLOGY
 - RESTRICTION OF COMPETITION BY OBJECT
 - VERY LARGE FINES (NB IMMUNITY FOR DAIMLER)
 - NOVEL FORM OF CARTEL: REDUCTION OF FINE BY 20%
 - NOTE THE RELEVANCE OF THIS DECISION TO THE DEBATE AROUND SUSTAINIABILITY AGREEMENTS

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CARTEL CASES:

EUROPEAN COMMISSION DECISIONS

- ◉ ***CANNED VEGETABLES*, NOVEMBER 2021, €20 MILLION**
 - HYBRID SETTLEMENT CASE: THREE OTHER UNDERTAKINGS HAD ALREADY AGREED TO PAY FINES OF €31 MILLION
 - FOLLOWS EARLIER *CANNED MUSHROOMS* CARTEL
 - THIS CARTEL LASTED 13 YEARS AND INVOLVED PRICE FIXING, AGREEING MARKET SHARES AND QUOTAS, SHARING CUSTOMERS, SHARING MARKETS, EXCHANGING COMMERCIALLY SENSITIVE INFORMATION AND BID RIGGING

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CARTEL CASES:

EUROPEAN COMMISSION DECISIONS

- **FOREX (STERLING LADS), DECEMBER 2021, €344 MILLION**
 - THIRD FOREX DECISION (*THREE WAY BANANA SPLIT; ESSEX LADS*)
 - HYBRID SETTLEMENT CASE
- **ETHANOL, DECEMBER 2021, €20 MILLION**
 - STAGGERED HYBRID SETTLEMENT; STATEMENTS OF OBJECTIONS SENT TO ALCOGROUP AND LANTMANNEN 7 JULY 2022

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CARTEL CASES:

EUROPEAN COMMISSION DECISIONS

- ***METAL PACKAGING***, JULY 2022, €31 MILLION
 - CASE TRANSFERRED FROM GERMANY TO THE COMMISSION
 - THE 39TH SETTLEMENT DECISION

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CARTEL CASES: ISSUES FOR DEBATE

- ◉ HAS THERE BEEN A DECLINE IN LENIENCY APPLICATIONS?
- ◉ IF SO, WHAT ARE THE REASONS FOR THIS?
 - HAVE COMPETITION AUTHORITIES SUCCEEDED IN ERADICATING CARTELS?
 - ARE CARTELS BETTER AT CONCEALMENT?
 - DOES AI FACILITATE CARTELS AND MAKE THEM MORE DIFFICULT TO DETECT?
 - DO DAMAGES CLAIMS DETER LENIENCY APPLICATIONS?
 - IT IS CLEAR THAT DAMAGES CLAIMS HAVE GROWN EXPONENTIALLY
 - THE TRUCKS DECISION HAS GENERATED LITIGATION THROUGHOUT THE EU

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CARTEL CASES: ISSUES FOR DEBATE

- ◉ DECLINE IN LENIENCY APPLICATIONS?
 - WHAT EFFECT DOES THE INCREASING AVAILABILITY OF COLLECTIVE ACTION HAVE ON INCENTIVES TO BLOW THE WHISTLE?
 - ◉ NOTE THE POSITION IN THE UK: THERE ARE NOW 17 APPLICATIONS FOR COLLECTIVE PROCEEDINGS ORDERS LIDGED AT THE COMPETITION APPEAL TRIBUNAL
 - DOES THE INCREASING CRIMINALISATION OF CARTEL BEHAVIOUR ALSO DISINCENTIVISE LENIENCY APPLICATIONS?
 - DO WE NEED A ONE-STOP SHOP FOR LENIENCY?
 - SHOULD AUTHORITIES BECOME BETTER AT OWN-INITIATIVE INVESTIGATIONS?

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AYTPICAL CARTELS

- ◉ AS SHOWN ABOVE, THERE CONTINUE TO BE MANY 'CONVENTIONAL' CARTEL CASES
- ◉ HOWEVER THERE IS AN OBVIOUS INCREASE ALSO IN 'ATYPICAL' CARTEL CASES
- ◉ ARE 'MIF' CASES AYTIPIICAL CARTEL CASES?
- ◉ THE BENCHMARK CASES (LIBOR, YENBOR, EURIBOR, FOREX) WERE ATYPICAL ONCE
- ◉ PAY-FOR-DELAY CASES IN THE PHARMACEUTICAL SECTOR WERE AYTPICAL (BUT NO LONGER? *GENERICS (UK), LUNDBECK, SERVIER*)

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ATYPICAL CARTELS

- ◉ THE *CAR MANUFACTURERS* DECISION OF THE COMMISSION IN JULY 2021 IS ATYPICAL
- ◉ HUB-AND-SPOKE CASES MAY BE REGARDED AS ATYPICAL; NOTE THE RECENT CASES IN PORTUGAL
- ◉ PRICE SIGNALLING HAS YET TO BE CONDEMNED BY AN INFRINGEMENT DECISION, AS OPPOSED TO TERMINATED BY COMMITMENTS (EG DG COMP (*CONTAINER SHIPPING*), THE DUTCH (*MOBILE TELEPHONY*) AND IRISH (*CAR INSURANCE*) AUTHORITIES)

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ATYPICAL CARTELS

- ◉ THERE ARE NUMEROUS INVESTIGATIONS TODAY OF LABOUR MARKETS
 - ‘NO POACH’ CASES: EG IN THE US THE DOJ IS PROCEEDING AGAINST AGREEMENTS IN THE HEALTHCARE AND AEROSPACE SECTORS; THE PORTUGUESE COMPETITION AUTHORITY IS LOOKING AT ALLEGED NO POACH AGREEMENTS IN THE FOOTBALL SECTOR
 - FIXING MAXIMUM WAGES: EG WOMEN’S FOOTBALL IN MEXICO
 - NOTE THAT THESE ARE PURCHASING CASES: SEE BELOW ON JOINT PURCHASING

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ATYPICAL CARTELS

- ON LABOUR MARKETS NOTE ALSO THE COMMISSION'S CONSULTATION ON COLLECTIVE BARGAINING FOR SELF-EMPLOYED WORKERS: DRAFT GUIDELINES PUBLISHED DECEMBER 2021 - 'BLIND EYE EXEMPTION' FOR AGREEMENTS BETWEEN SOME SELF-EMPLOYED PERSONS
- THERE ARE NUMEROUS INVESTIGATIONS TODAY OF POSSIBLE COLLUSION IN DIGITAL MARKETS
- NOTE THE G7+4 COMPENDIUM OF APPROACHES TO IMPROVING COMPETITION IN DIGITAL MARKETS

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HORIZONTAL COOPERATION AGREEMENTS

- ◉ THE COMMISSION PUBLISHED ITS DRAFT GUIDELINES IN MARCH 2022
- ◉ THE INTENTION IS THAT THEY WOULD BE ADOPTED IN THE FIRST QUARTER OF 2023
- ◉ THEY CONTAIN MANY HELPFUL INSIGHTS ON TOPICS OTHER THAN SUSTAINABILITY AGREEMENTS!
- ◉ THEY CONTAIN SOME INSIGHTS ON ‘ATYPICAL CARTELS’

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HORIZONTAL COOPERATION AGREEMENTS

◉ NOTE IN PARTICULAR:

- THE APPLICATION OF ARTICLE 101 TO AGREEMENTS INVOLVING THE PARENTS OF A JV AND THE JV: PARAS 13-14
- THE MEANING OF 'POTENTIAL COMPETITORS' POST-*GENERICS (UK)*: PARA 17 INCLUDING THE ILLUSTRATIVE BOX
- RESTRICTIONS OF COMPETITION BY OBJECT: PARAS 28-35
- RESTRICTIONS OF COMPETITION BY EFFECT: PARAS 37-38
- ANCILLARY RESTRICTIONS: PARA 39

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HORIZONTAL COOPERATION AGREEMENTS

◉ NOTE IN PARTICULAR:

- MOBILE INFRASTRUCTURE SHARING AGREEMENTS: PARAS 296-305: NOTE THE COMMISSION'S COMMITMENTS DECISION IN *MOBILE CZ/CETIN AND O2 CZ*, 2022
- PURCHASING AGREEMENTS: CHAPTER 4
- IN PARTICULAR, WHEN DOES A JOINT PURCHASING AGREEMENT AMOUNT TO A RESTRICTION BY OBJECT AND POTENTIALLY ATTRACT A FINE? PARAS 316-322 DEAL WITH THIS: SEE THE *WHISH AND BAILEY* REPORT ON DG COMP'S WEBSITE
- NOTE THE NUMBER OF RECENT AND CURRENT INVESTIGATIONS OF PURCHASING AGREEMENTS

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◉ NOTE IN PARTICULAR:

- BIDDING CONSORTIA: PARAS 386-397
- INFORMATION EXCHANGE: CHAPTER 4
- UNILATERAL DISCLOSURES OF INFORMATION: PARAS 432-434, INCLUDING A REFERENCE TO PRICE SIGNALLING AND THE COMMISSION'S *CONTAINER SHIPPING* COMMITMENTS DECISION
- HUB AND SPOKE CARTELS AND FACILITATION: PARAS 435-438
- ACCESS TO INFORMATION AND FORECLOSURE CONCERNS: PARAS 441-442 AND THE COMMISSION'S *INSURANCE IRELAND* COMMITMENTS DECISION

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- ◉ NOTE IN PARTICULAR:
 - STARDARDISATION AGREEMENTS, INCLUDING FRAND LICENSING: CHAPTER 7
 - STANDARD TERMS: CHAPTER 8
 - SUSTAINABILITY AGREEMENTS: CHAPTER 9
- ◉ QUESTION: WHAT ROLE SHOULD INFORMAL GUIDANCE PLAY IN DEVELOPING OUR UNDERSTANDING OF ARTICLE 101 AND HORIZONTAL COOPERATION AGREEMENTS?
- ◉ IN PARTICULAR ON THE APPLICATION OF ARTICLE 101(3)?

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CONCLUSION

- ◉ COMPETITION AUTHORITIES REMAIN ACTIVE IN THE BATTLE AGAINST CARTELS
- ◉ THIS IS TRUE IN RELATION BOTH TO THE 'TRADITIONAL' CARTEL SECTORS AND TO NEW ONES
- ◉ THERE WILL BE AN INCREASING INVESTIGATION OF 'ATYPICAL' CARTELS
- ◉ THE DRAFT HORIZONTAL GUIDELINES ARE OF CONSIDERABLE INTEREST - NOT ONLY IN RELATION TO SUSTAINABILITY AGREEMENTS!

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THANK YOU FOR YOUR ATTENTION!