

Hungarian Competition Policy as a Model-Child

SZILÁGYI Pál¹

1. Introduction

Hungarian competition law substantially changed in the last 10 years. After a blooming period before the Second World War the Soviet influence as a matter of course prevented any idea of free and undistorted competition. After the regime change in 1989/1990, the former Price Regulator was transformed to the Hungarian competition authority (Gazdasági Versenyhivatal, GVH). The first six years between 1990 and 1996 were used to develop and lay down the foundations of modern competition law. The new competition act in 1996 was then designed with an eye on the future accession of Hungary to the European Union.

The enforcement of Hungarian competition law is recognised as flexible and usually both textual amendments of the competition act and changes in the decisional practice quickly respond to new developments on European level. Nevertheless, many interesting issues might be of interest to everybody. Just to name a few: in recent decisions dynamic competition is recognised as a driving force for competition, leading to long-term increase in consumer welfare; bid-rigging of public procurements is criminalised; private enforcement is directly recognised in the competition act; etc.

Not only is competition law driven by constant development, but also the Hungarian competition authority clearly emphasises the need for spreading competition culture. The recently established Centre for Competition Culture disposes about substantial amounts dedicated to this aim. The source of it is the income – 5 percent – received from the fines imposed on and paid by undertakings in competition supervision proceedings.

The competition authority as a public authority clearly follows its self-interests. There are nevertheless some problems with enforcement. Until recently only a few dozen of lawyers dealt with

¹ dr. SZILÁGYI Pál LL.M. is the Head of the [Competition Law Research Centre \(Hungary\)](#) and teaches competition law and policy at the [Pázmány Péter Catholic University, Faculty of Law and Political Sciences](#). The usual disclaimer applies. The paper was written for the 11th Competition Law Scholars Forum Workshop, Thursday 10 April 2008, Glasgow. I would like to express my gratitude to Mr. TÓTH Tihamér, the President of the Hungarian Competition Council and Mr. SÁRAI József, Head of International Section of the GVH for their invaluable comments on the draft of this paper. All comments welcome at mail@szilagyipal.com.

competition cases, so in some cases the lack of clear and well-advocated reasons might lead to inconsistent decisions due to the high-burden on the Competition Council, the decisions making body of the GVH. Moreover, since the GVH is well-respected, the legislative organs are underperforming in scrutinizing legislative proposals. The biggest concern seems to be that the judiciary might lack the expertise to properly balance between competing arguments of the GVH and the undertakings. Further studies are needed in this regard, but since the competition authority is highly successful in litigations, the facts seem to point in this direction.

The presentation looks at the issues described above and points out how European competition law influenced Hungarian developments. The presentation gives an overview with references to the issues described above, but is not a complete evaluation of Hungarian competition policy.

2. Legislative framework

Hungarian competition law looks back to a *long history*. Stand alone legislation² was first introduced in 1923 regulating unfair competition³ and then in 1931 regulating (basically) cartels⁴. These acts were very much influenced by *German legislation* and reflected the European attitude presiding in the '30s. After short and dynamic development the Second World War and the following regime change set the development back. The Socialist system was based on *central planning and state ownership*, hardly reconcilable with competition. Despite the regime change, the acts were not abolished. Logically they were not really used, since for a long period competition was looked at like something *evil of capitalism*.⁵ In the 1960's slow changes started in the attitude of the administration.⁶ Since that time introducing competition to a limited amount in the system was luring behind the scenes and eventually some elements of market economy were introduced.

After a few decades the Hungarian Parliament adopted "*under the circumstances of an economy of scarcity*"⁷ the **Act on Unfair Business Activities in 1984**⁸. This piece of legislation was *in theory* a modern competition act, although the provisions could not have been applied in a modern way. It

² Before 1923 several acts regulated unfair commercial practices.

³ Act No. V of 1923 on unfair competition

⁴ Act No. XX of 1931 on agreements regulating economic competition.

⁵ The Act No. V of 1923 on unfair competition was expressly preserved in some parts and the courts used the prohibitions to a limited degree during the Socialist era.

⁶ For a short introduction see CSERES, K. J. (2005) *Competition law and consumer protection*, The Hague Frederick, MD, Kluwer Law International. 348-351. See also VÁRADY, T. (1999) The Emergence of Competition Law in (Former) Socialist Countries. *American Journal of Comparative Law*, 47. 231.

⁷ SÁRAI, J. & SZOBOSZLAY, G. Evolution of Competition Policy and Law in Hungary (Unpublished work).

⁸ Act No. IV. of 1984 on Unfair Business Activities. Further on Competition Act 1984

incorporated all the *basic* prohibitions that modern and integrated – including elements of consumer protection and unfair competition law – competition legislation needs to incorporate, with the exception of merger control. It started with a general prohibition on unfair competition and then went on to specify certain prohibited practices. The second limb was the prohibition of consumer deception and finally it also prohibited anti-competitive agreements, tying, abusing a dominant position and unfair prices. The act also specified that the *courts* may award *damages* for infringements and that *economic penalties* should be imposed on undertakings or natural persons in case they gain a substantial pecuniary benefit due to the infringements or cause substantial damage to consumers or competitors. It is worth mentioning, that the competition act was in principle based on a *private enforcement model*. Under the act some empowered organisations were authorised to launch public interest lawsuits in the interest of consumers. Relying on the development of modern competition laws, the legislator justified the act on three grounds, namely that up-to-date competition legislation based on unified principles was needed; the protection of consumer interests had to be incorporated; and finally that public interest required the prohibition of behaviours restricting or eliminating competition.⁹

3. Creating a modern legislative framework

The act in 1984 was in *theory* a modern competition act, but there was only limited competition within the economy, so *the prevailing economic system undermined its application*. Várady explains that “[t]he rules themselves were somewhat ahead of the 1984 realities”¹⁰. The adoption of the Competition Act 1984 was followed by a slow realisation that changes might be ahead and officials of *the former price regulator*, the Price Authority, were prepared to shift to a new regime and before the actual regime change the new competition law was already in shape. The Hungarian Parliament *adopted new legislation in 1990*¹¹ that was called by the Prime Minister the *constitution of economic life*.¹²

The **legislation of 1990** was *almost a state of the art* competition act, with some deficiencies, but it was *“the first really market-economy oriented and effectively enforced competition law of*

⁹ Official comments on the Proposal for the Act No. IV of 1984 on Unfair Business Activities

¹⁰ VÁRADY, T. (1999) The Emergence of Competition Law in (Former) Socialist Countries. *American Journal of Comparative Law*, 47. 238.

¹¹ Act No. LXXXVI. of 1990 on Prohibition of Unfair Market Behaviour. Further on: Competition Act 1990. On the Competition Act 1990 see also CSÉPAI, B. & REMETEI-FILEP, Á. (2001) Hazai versenyjogunk történeti perspektívában [Our national competition law in a historical perspective]. *Külgazdaság*, 45.

¹² See further OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD. 7.

Hungary”¹³. Tóth notes that “[t]he first competition Act of the new Hungarian market economy adopted at the beginning of the economic transformation was a kind of mixture of foreign competition laws and also reflected the special features of a country undergoing unprecedented macro- and microeconomic changes.”¹⁴ The drafting of the **Competition Act 1990** included a survey and the study of all important legislation in Europe on competition law, including that of the Communities. The preamble of the Competition Act 1990 referred to economic efficiency as a basis of free and fair competition and protected the *public interest* to economic competition, the *competitors* and the *consumers*. Some of the peculiarities were that anticompetitive agreements and concerted practices were prohibited only between competitors, with the exception of resale price maintenance. The reasons were that the legislator thought that *most vertical agreements are pro-competitive* or in other words they are less dangerous to competition.¹⁵ Beyond agreements of minor importance, cartels trying to prevent the abuse of a dominant position were excepted.¹⁶ A dominant position could have been established for example if the market share was above 30 percent or in case of collective dominant position if the combined market share was above 50 percent. This also had an effect on the jurisdictional provision of merger control. The latter was based on market shares or relevant turnover, alternatively. A merger was prohibited if it *impeded the evolvement, sustainment or development of economic competition* and could have been approved nevertheless if for example the benefits for economic competition outweighed the disadvantages.

Hungarian competition policy was based on *public enforcement with a strong and independent authority* responsible for it, the Office of Economic Competition (Gazdasági Versenyhivatal, further on: GVH). The reasons for the policy choice were that workable and free competition is public interest and the private parties have not the resources or legal possibilities to effective enforcement. The underlying principle that is still the main strength of Hungarian competition policy is the approach of the government. It is looked at like *the most important regulatory policy together with monetary policy*.¹⁷ The legislator emphasised that it is not possible to protect competition casually¹⁸, and a strong, independent and focused competition watchdog was established, but at the time

¹³ SÁRAI, J. & SZOBOSZLAY, G. Evolution of Competition Policy and Law in Hungary (Unpublished work).

¹⁴ TÓTH, T. (1998) Competition Law in Hungary: Harmonisation Towards EU Membership. *European Competition Law Review*, 19, 358-369.

¹⁵ Official comments on the Proposal for the Act No. LXXXVI. of 1990 on Prohibition of Unfair Market Behaviour.

¹⁶ s.15 of Competition Act 1990

¹⁷ Official comments on the Proposal for the Act No. LXXXVI. of 1990 on Prohibition of Unfair Market Behaviour.

¹⁸ Official comments on the Proposal for the Act No. LXXXVI. of 1990 on Prohibition of Unfair Market Behaviour.

banking, insurance and the financial sectors were exempted from its jurisdiction. A report by the OECD even states that the GVH is “*unusually independent, in structure and operation*”¹⁹.

Striving for the implementation of European standards began early. The so called **Europe Agreement** signed in 1991 and enacted in 1994²⁰ already contained provisions on the application of Articles 81, 82 and 87.²¹ This caused later some *constitutional problems*²², but was a clear sign that Hungary was committed to follow the European competition rules, approximate the national laws and was willing to accept the developments and interpretations of the European Court of Justice and the Court of First Instance. The signatory government imposed on the GVH *concrete obligations* with the legislation.²³ The **Competition Act 1990** did not last for long. Soon it became apparent that changes have to be made²⁴, “*the prospect of accession to the European Union became the most relevant external pressure to influence competition policies in Hungary in the 1990s.*”²⁵ An “internal reason” for a revision was the fact that economic situation and environment changed very fast and to a large extent during the first half of the ‘90ies.²⁶ While preserving the features of the Competition Act 1990, the substantive provisions and competition policy was fine tuned – *after a closely 2 years preparatory work*²⁷ – with **the new act of 1996**.²⁸ Shortly after the Government introduced its proposals²⁹, the

¹⁹ OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD.

²⁰ Act No. I of 1994 on the promulgation of the Europe Agreement signed in Brussels on 16 December 1991 establishing an association between the Republic of Hungary and the European Communities and their Member States (hereinafter: the: Europe Agreement). See also TÓTH, T. (1998) Competition Law in Hungary: Harmonisation Towards EU Membership. *European Competition Law Review*, 19, 358-369.

²¹ Numbering reflects the present article numbers of the EC Treaty.

²² (1998) Decision 30/1998 (VI. 25.) AB. Constitutional Court of Hungary. See further TATHAM, A. F. T. (1999) Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court *The International and Comparative Law Quarterly*, 48, 913-920. and VOLKAI, J. (1999) The Application of the Europe Agreement and European Law in Hungary: the Judgment of an Activist Constitutional Court on Activist Notions. *Harvard Jean Monnet Working Papers*. Cambridge, Harvard Law School

²³ Official comments on the Proposal for the Act No. I of 1994 on the promulgation of the Europe Agreement

²⁴ For the development of Hungarian competition policy during these years see CSERES, K. J. (2005) *Competition law and consumer protection*, The Hague Frederick, MD, Kluwer Law International. 361-364.; TÖRÖK, Á. (1997) A versenypolitika és a piacok átalakulása a magyar gazdasági átmenetben [The transformation of competition policy and markets during the Hungarian economic transition]. *Közgazdasági Szemle*, 44, 426-439. and OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD.

²⁵ CSERES, K. J. (2005) *Competition law and consumer protection*, The Hague Frederick, MD, Kluwer Law International. 364.

²⁶ See Official comments on the Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. See also VISSI, F. (1996) Piaci intézményrendszer, versenypolitika, uniós csatlakozás [Market institutions, competition policy, Accession to the Union]. *Közgazdasági Szemle*, 43, 770-782.

²⁷ SÁRAI, J. & SZOBOSZLAY, G. Evolution of Competition Policy and Law in Hungary (Unpublished work).

²⁸ Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. Accessible in English under http://www.gvh.hu/domain2/files/modules/module25/pdf/Competition_Act_2008_a.pdf. Further on: Competition Act 1996. See also CSERES, K. J. (2005) *Competition law and consumer protection*, The Hague Frederick, MD, Kluwer Law International. 365-382. and CSÉPAI, B. & REMETEI-FILEP, Á. (2001) Hazai

Parliament emphasised that competition policy should secure the *best economic and social results with free and fair competition*, the Government should legislate to achieve the obligations undertaken in the Europe Agreement and to implement the norms within the European Union.

The **Competition Act 1996** was to a very large extent harmonised with Community competition law.³⁰ Even if provisions were somehow different in wording, the day-to-day enforcement provided for similar attitude in most cases. The prohibition of anticompetitive agreements was extended generally to vertical agreements and a *complex exemption system* – reflecting the system flourishing in the EC – was put in place. The introduction of a general prohibition on vertical agreements was justified essentially on harmonisation grounds, but “*heavy discussions have been carried on*” before and economic considerations also played a role.³¹ The missing element of the cartel prohibition, namely that of prohibiting decisions by associations of undertakings, was also introduced. Regarding abuse of dominance cases, dominant position was defined solely according to Community standards. New explicit prohibitions were also listed as abuses in dominance cases, e.g. predatory pricing was explicitly prohibited. According to **s.21 c) of the Competition Act 1996** it amounts to an abuse “*to set extremely low prices which are not based on greater efficiency in comparison with that of competitors and which are likely to drive out competitors from the relevant market or to hinder their market entry*”. Finally within the substantive amendments, the dominance test was stated as the substantive test and the other provisions were fine tuned and adjusted to the logic of the new act and the experiences with the Community merger regulation. Not only substantive provisions, but the procedural aspects were also modernised, drawing on the experience of the preceding five years.³² The European Commission was so to say very satisfied with the piece of legislation and there were only some concerns regarding the legislation.³³

Subsequently the **Competition Act 1996** was amended almost 15 times, but most of the amendments were minor changes necessary because of amendments of other acts. There were

versenyjogunk történeti perspektívában [Our national competition law in a historical perspective]. *Külgazdaság*, 45.

²⁹ The decree of the Government in 1995 planned the revision and harmonisation for 1996. Government decree 2174/1995. (VI. 15.) Annex I.

³⁰ See also TÓTH, T. (1998) Competition Law in Hungary: Harmonisation Towards EU Membership. *European Competition Law Review*, 19, 358-369. and OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD.

³¹ See more extensively and discussing the issue: SÁRAI, J. (1996) Some questions of the introduction of prohibition on vertical agreements into the Hungarian Competition Act in the framework of legal harmonisation to the European legal system. 2nd Competition Conference, Brno.

³² For a detailed evaluation of the amendments and the practice see OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD.

³³ See Commission Opinion on Hungary's Application for Membership of the European Union, Brussels, 15th July 1997. Accessible at: http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/hungary/hu-op_en.pdf. Downloaded on 29 March 2008.

however *three important* revisions and amendments, in 2000³⁴, 2003³⁵ and 2005³⁶. The 2000 amendment concentrated on improving effective enforcement and provided for clarification or extension of certain provisions. The amendment of 2003 was clearly focusing on the Modernisation Regulation, but also took into consideration the ongoing debate around the Merger Regulation. The 2005 amendment on the one hand provided for the incorporation of past experience of enforcement, while also streamlining the procedural provisions.³⁷

The Hungarian **Competition Act 1996** was built up on international experience and incorporated every Community competition norm that was acceptable under the national circumstances.³⁸ As of the change in 1989/1990 the Hungarian administration was ready and keen to incorporate and follow European standards. Interestingly the former price regulator authority became the national competition authority and even a significant number of former public servants remained in place. E.g. the President of the Price Authority became the President of the GVH. This might seem a little bit odd, but in fact it is not. *Mr. Ferenc Vissi*, the first president of the GVH, was for years committed to introduce new competition legislation and was largely acknowledged both in Hungary and abroad. After the change in 1989 a well-grounded proposal for the new competition act was ready very quickly. The harmonisation process was reinforced by the early commitment to join the European Union. *After the first five years of experience*, although the Competition Act 1990 was modelled after European legislations, it became clear that a more extensive harmonisation is necessary due to the trend in other Member States and the demand for similar rules³⁹ in European countries. This harmonisation was carried out in the **Competition Act 1996** and since the entry into force, the GVH always had *one of his eyes on Brussels*. During the early years there was one often criticised gap in competition enforcement or more properly in regulating competition. The GVH did not really have a word in the privatisation and maybe more importantly in the *de-monopolisation process*⁴⁰ and this attitude had a long lasting effect on the approach of the presiding governments. This was a

³⁴ Act No. CXXXVIII of 2000 on the Amendment of Act LVII on the Prohibition of Unfair and Restrictive Market Practices

³⁵ Act No. CXXXVIII of 2000 on the Amendment of Act LVII on the Prohibition of Unfair and Restrictive Market Practices

³⁶ Act No. CXXXVIII of 2000 on the Amendment of Act LVII on the Prohibition of Unfair and Restrictive Market Practices

³⁷ See also JUHÁSZ, D. & SZILÁGYI, P. (2006) Recent Developments of the Hungarian Competition Act and the Adjunct Rules of the Hungarian Administrative Act and Criminal Code. *European Competition Law Review*, 27, 108-116. For early experience see TÓTH, T. (2005) Enforcement of EC Competition Rules since 1 May 2004 by the Hungarian Competition Office. IN LOWE, P. & REYNOLDS, M. (Eds.) *Antitrust Reform in Europe: A year in Practice*. London, International Bar Association.

³⁸ REMETEI-FILEP, Á. & SÁRAI, J. (2003) Európai versenyjog és magyar csatlakozás [European Competition Law and the Hungarian Accession]. *Európai Füzetek*.

³⁹ This approach was an explicit and conscious concept of the GVH. See *Ibid*.

⁴⁰ For a critical overview see VOSZKA, É. (2004) Darázsfészek [Vespiary] *Közgazdasági Szemle*, 51, 1-23.

deliberate political decision.⁴¹ Nevertheless the legislative framework for Hungarian competition policy was usually quickly reshaped to reflect the ongoing changes on Community and international law.⁴²

4. Competition policy

The statement of the OECD in 2000 properly reflects the present situation: “The leading role of competition policy in reform is embodied in the *spirit* and vigour of the Hungarian Competition Office [...]. This situation was designed in a way that keeps enforcement notably independent from political influence, yet also permits it to play an active, public role in policy debate.”⁴³

The early years in the 1990’s elapsed with experiencing and the GVH followed no pre-designed competition policy. Life and the markets produced the cases and contributed to the learning process of the GVH, the different governmental bodies and the undertakings. After adoption of the **Competition Act 1996** this started to change.⁴⁴ On the one hand the GVH concentrated on particular sectors, on the other hand competition advocacy started to take off.

⁴¹ SÁRAI, J. & SZOBOSZLAY, G. Evolution of Competition Policy and Law in Hungary (Unpublished work).

⁴² See in general OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD.; (2004) Hungary - Report on Competition Law and Institutions. OECD. and the general reports on Hungarian competition policy in English on http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=99&m5_doc=2321&m174_act=7

⁴³ OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD.

⁴⁴ See (1999) OECD Roundtable on Competition Authorities' Enforcement Priorities -- Note by Hungary. Gazdasági Versenyhivatal.

a. Antitrust cases and fines

Most of the antitrust cases are still a result of complaints and are summarised in the following tables.

1. table - 1997 - 2006

Antitrust cases	All cases	Cases with infringement decisions / intervention ⁴⁵	Amount of fines in HUF (million) ⁴⁶
Abuse of dominant position	355	90	1719.3
Exploitative practices	215	66	264
Exclusionary practices	111	16	1425.3
Mixed	31	8	20
Anticompetitive agreements	174	89	20949.1
Horizontal	97	59	13885.8
Vertical	57	18	65
Mixed	20	12	6998.3
Merger control	582	16	N/A
Horizontal	376	9	N/A
Vertical	61	1	N/A
Mixed or conglomerate	145	6	N/A

As we can see from *Table 1* there have been more than 1100 cases since 1997 when the Competition Act 1996 came into force. More than half of the cases are merger decision and regarding the latter there was only in less than 3 percent intervention by the GVH. Among these there were three prohibition decisions. In about half of the cases concerning cartels and vertical agreements the GVH closed the file with infringement decisions, while in the case of abusing a dominant position, only in a quarter of the investigated cases was done so.⁴⁷

⁴⁵ Infringement decisions or any other intervention by the GVH. Not all decisions listed include fines.

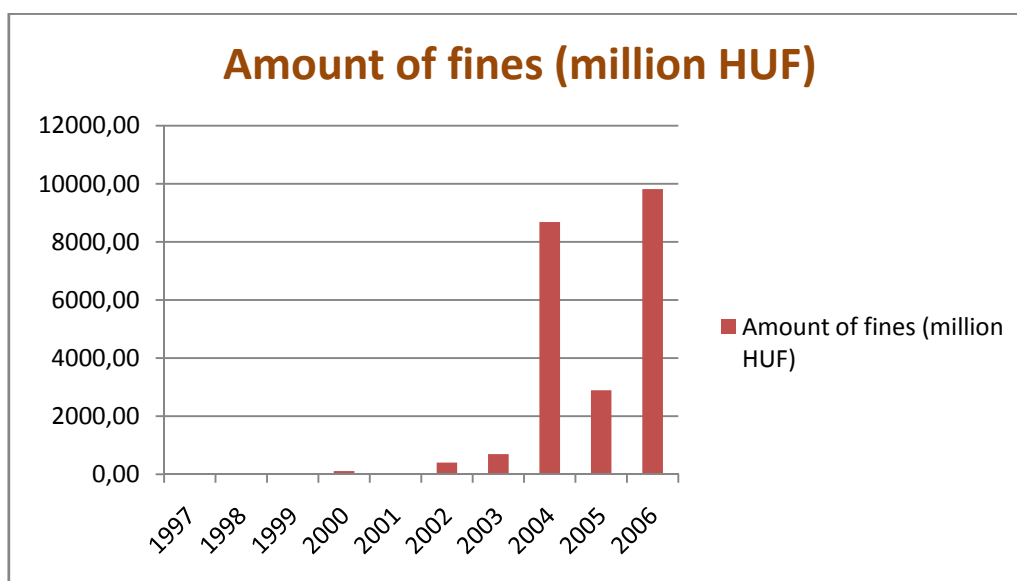
⁴⁶ Exchange rate is 1 EUR=259.626 HUF on 31 March 2008.; we did not list the fines for missed notifications.

⁴⁷ For a detailed assessment of tendencies between 2003 and 2006 see SÁRAI, J. (2007) Hungarian competition law - developments in the last decade and follow-up. *Revue Lamy de la Concurrence*.

2. table

Year	Amount of fines (million HUF)
1997	11,00
1998	34,00
1999	20,50
2000	107,80
2001	10,00
2002	400,96
2003	694,00
2004	8680,50
2005	2893,70
2006	9815,85
Total:	22668,31

3. table



We can draw some conclusions from the tables above. The GVH *let the markets learn* about competition law and the aims of competition policy and left a long time for this *learning process*. This is represented by the fact that fines were not really appreciable until 2002. After a short take off period in 2002 and 2003, the GVH made a big jump and imposed huge fines, especially if we look at other Hungarian public authorities. This properly reflects the change in attitude at the European

Commission. But we also have to note that if we do not take into account the two largest fines⁴⁸, the average fine is still very low for one case compared to the turnovers of the undertakings concerned. The average amount of a fine on one undertaking compared to turnover is not in itself a meaningful index, but it might be a useful indicator whether fines have a deterrent effect in general? Another important factor might be that most of the cases were closed without fines and cases including fines usually are about 10 in a year.⁴⁹

Regarding the cases in substance, we would like to note three particular issues⁵⁰. One of the main focuses of the GVH is clearly on bid-riggings⁵¹ and associations of undertakings, especially that of the liberal professions. Regarding *bid-riggings* it is worth noting that in its practice the GVH defines the relevant markets narrowly if the agreements are concluded in the last round of a procurement procedure, so each procurement is a relevant market in itself, and usually the market shares are divided evenly between the undertakings making it to the last round.⁵² This approach is confirmed by the national courts.

Regarding *abuse cases* we can detect a slow shift in the policy of the competition authority that can be observed best on excessive pricing cases.⁵³ In the *E.ON case*⁵⁴ the GVH expressed its views about excessive pricing and exploitative abuses indicating a possible policy shift from its former theoretical approach. After a general discourse about the profit maximizing behaviour of undertakings, the GVH went on to say that it can be *against public interest to interfere with market processes* in particular circumstances, since the competition authority has to protect dynamic competition and long-term consumer welfare. Achieving a monopoly position by excellent performance is not only – except from some exceptional circumstances – undangerous, but means that the undertaking concerned can

⁴⁸ 7.043 billion HUF (in *Case No. Vj-27/2003*) and 6.814 billion HUF (in *Case No. Vj-51/2005*)

⁴⁹ See also BASSOLA, B. (2008 (Forthcoming)) *Tendenciák a versenyfelügyeleti eljárásban 2000 és 2007 között* [Tendencies on competition supervision proceedings between 2000 and 2007. IN GAJDUSCHEK, G. (Ed.) *Rendnek lenni kellene. Tények és gondolatok a közigazgatás ellenőrzési és bírságotási tevékenységéről*. Budapest, Magyar Közigazgatási intézet - KSH.

⁵⁰ For the summary of some important cases see TÓTH, T. (2008) *Competition cases from the European Union : the ultimate guide to leading cases of the EU and all 27 member states - Hungary*. IN KOKKORIS, I. (Ed.) *Competition cases from the European Union : the ultimate guide to leading cases of the EU and all 27 member states*. London, Sweet & Maxwell. See also for short summaries on some important decisions SÁRAI, J. (2007) *Hungarian competition law - developments in the last decade and follow-up*. *Revue Lamy de la Concurrence*.

⁵¹ See HARGITA, Á. & TÓTH, T. (2005) *God Forbid Bid-Riggers: Developments under the Hungarian Competition Act*. *World Competition*, 28, 205-231.

⁵² See for example the *Pensions Insurance headquarter tender case (Case No. Vj-28/2003)*, cited in TÓTH, T. (2008) *Competition cases from the European Union : the ultimate guide to leading cases of the EU and all 27 member states - Hungary*. IN KOKKORIS, I. (Ed.) *Competition cases from the European Union : the ultimate guide to leading cases of the EU and all 27 member states*. London, Sweet & Maxwell. 637-638.

⁵³ See in particular the cases of *Case No. Vj-93/2003*, *Case No. Vj-116/2005* and *Case No. Vj-156/2005* cited in *Ibid.* 652-663. and *European Competition Law Review*, 2008, Issue 3, N-43, Reported by SZILÁGYI, P.

⁵⁴ *Case No. Vj-156/2005*, Reported in *European Competition Law Review*, 2008, Issue 3, N-43, Reported by SZILÁGYI, P.

provide a good or service on the market which others can not and the *high profits are the reward* for that. According to the Competition Council *long-term consumer interest requires the competition authority not to indispose undertakings to invest and to enterprise by ruling high prices unlawful*. While protecting public interest one can not leave aside the consideration that, if a competition authority intervenes with the price setting of the undertakings due to high prices, this behaviour of the authority prejudices the profit expectations of the undertakings, which on turn leads to the chilling of investments both generally and in the sector where intervention occurs. This kind of intervention obviously prejudices investments in the case of natural monopolies (infrastructural investments), so intervention is more than undesirable from a long-term consumer welfare perspective. The Competition Commission also considered that since the shift to market economy already happened, today *sectoral regulators* are there to intervene if it is necessary. If the competition authority would only state that prices of an undertaking are too high, that would lead to uncertainty on the market, because there would be no guidance as to the issue how far the prices are treated as lawful and at what point is the turning point, where the prices are treated as unlawful. On the other hand if the competition authority would set the “right price”, that would mean that the authority would become a price regulator, which – in the view of the Competition Council – is undesirable in a market economy. This is nevertheless qualified since the Council underlines that the above mentioned considerations *do not apply if the high prices lead to foreclosure, meaning that it affects market competition and the process of competition*.

Finally we have to say a few words about *merger policy*. Since most of the cases are dealt with in the first phase of the procedure, the GVH only publishes “*standard decisions*”, listing the same points that it usually considers⁵⁵, but there is *little guidance on substantive issues*. A particular feature of the procedure is that it distinguishes mergers with portfolio effects and conglomerate effects. The GVH explains in its *Merger Notice* that *portfolio effects* “stem from the expansion of the range of products manufactured (distributed) by the group of undertakings created by the concentration. This may have especially harmful effects on competition if the manufacturers (distributors) of complementary products (bought by the same buyers) become members of the same group. In this case if one group of the undertakings concerned has a high market share on the market of a product/certain products, the group of undertakings expanded as a result of the concentration may be able to conduct restrictive market practices (e.g. tying) on the market of other product(s)”⁵⁶.

⁵⁵ See Notice No 1/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority, as amended by Notice No 1/2005. Hereinafter Merger Notice. Available in English at:

http://www.gvh.hu/domain2/files/modules/module25/pdf/2003_1_fuzio_a.pdf

⁵⁶ Merger Notice 11. iii)

While *conglomerate effects* “arise where, even though no dominant position is created or strengthened on any of the relevant markets when examined in isolation, there is an overall improvement in the property status, financial strength and profitability of the group, i.e. in factors which are decisive in respect of dominance [(s.22 (2) point b) of the Competition Act)⁵⁷], and may give rise to the application of restrictive strategies (e.g. predatory pricing)”⁵⁸

b. Leniency policy

It is quite obvious that while on Community level leniency policy is a huge success and results in plenty of leniency applications, *in Hungary it does not seem work*. The possibility to come forward with leniency applications was formally introduced in the **Competition Act 1996** with the amendment of 2000. The provisions had to be extended with the 2005 amendment because of other provisions of Hungarian law. Nevertheless the GVH adopted a *notice on leniency applications* in 2003 and that was modified in 2006.⁵⁹ It was modelled on the European notice, but did not achieve the same success. Until today there was *only one case published* where leniency application was made and the case was predominantly a vertical agreement. In the *Kortex-Olympus case*⁶⁰ the Competition Council argued that although the case was a vertical case and the notice applies to horizontal agreements, more accurately to cartels, but the GVH accepted the application due to the fact that the agreement concerning a bidding procedure, *at the time of acceptance was difficult to categorise*. It would have seriously undermined legal certainty if the deviation from the notice was against the applicant. Moreover the agreement under investigation was such that admitting the leniency application was *in line with the aims of the leniency notice*. Nevertheless the Competition Council also stated that it is not justified to apply the leniency notice generally to vertical agreements.⁶¹

It is not yet clear why the leniency policy is not working “properly”, but several reasons are worth to be considered. On the one hand we can not disregard the fact that Hungary is a post-socialist country, where informants and denouncers are frowned upon. Taking into account the size of the country it is quite reasonable that due to *socio-economic structures* of the country leniency policy needs a little time to start working “properly”. If we add that only a few really serious cartel cases

⁵⁷ Changed by the author.

⁵⁸ Merger Notice 11. iv)

⁵⁹ Notice No 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority, as amended by Notice No 1/2006. Accessible in English under: http://www.gvh.hu/domain2/files/modules/module25/pdf/2003_3_engedekenyseg_a.pdf

⁶⁰ *Kortex Mérnöki Iroda Kft., Olympus Hungary Kft. and Mediszer Kórháztechnikai és Kereskedelmi Kft. Case No. Vj-81/2006*. Decision of the Competition Council on 18 December 2007. See HORÁNYI, M. (2007) The Hungarian Competition Office grants immunity in proceedings concerning exclusive supply agreement in the context of a public procurement tender (Olympus). *e-Competitions*. www.concurrences.com.

⁶¹ *Kortex-Olympus* paras. 94-95.

were investigated up to date and most of the large fines – with the exception of the highway-cartel – are not yet finally confirmed by courts, it is quite obvious that the detection rate and the sanctions have not yet reached the level that boosts leniency applications.⁶²

c. Competition advocacy and promoting competition culture

One of the strength of Hungarian competition policy is the competition advocacy and the promotion of competition culture carried out by the GVH. The two areas are very important limbs of Hungarian competition policy.⁶³ It was a clear policy as of the end of the 1990s to extend competition advocacy beyond state organs and to concentrate also on undertakings and consumers. For this reason the GVH on the one hand set up a *Centre for Competition Culture* in 2005, while also agreed with the *OECD* to host a regional centre. As of the end of 2005, the **Competition Act** determines the role of the GVH in the development and dissemination of competition culture. Accordingly, the GVH is responsible for the development of competition culture, particularly a) in order to *raise public awareness of competition*, for the *dissemination of knowledge* about competition policy, including the provision of information about the benefits resulting from competition or with the aim of *assisting compliance and the creation of a competitive regulatory environment*, as well as; b) for the *contribution on its part to the development of competition-related legal and economic activities of public interest*.⁶⁴ The **Competition Act 1996**, with the amendment in 2005 also created the financial basis for such an activity. **S.43/A** states that the Hungarian competition authority shall be authorised to use for the development of competition culture and for the covering of expenses of performing responsibilities concerning the competition supervision proceedings and the sectoral inquiries *five per cent as a maximum of the total amount of the fines collected and the total amount of the procedural fees and procedural fines paid, respectively, in the previous year*.

The provision might be criticised for the fact that the amount can also be used to cover the expenses of performing responsibilities concerning the competition supervision proceedings and the sectoral inquiries. The level of fines increased already before the incorporation of the provision into the Competition Act 1996, so it is hard to find causality between the two, especially if we look at international trends. It also has to be stressed that the Centre for Competition Culture is financially independent and the process of awarding support is transparent. Soon after the provision came into

⁶² On possible approximation to the ECN model leniency program see SÁRAI, J. (2007) Hungarian competition law - developments in the last decade and follow-up. *Revue Lamy de la Concurrence*.

⁶³ See for detailed evaluation the Fundamental Principles cited below..

⁶⁴ See more at http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=99&m5_doc=2380&m174_act=4

force, the Centre for Competition Culture launched a wide ranging support program that finances university research, specific industry studies, translations of competition law and policy books, events, etc.

Another important aspect of competition advocacy in Hungary is that the OECD established in 2005 its regional centre in Budapest.⁶⁵ *The OECD-Hungary Regional Centre for Competition* is a joint venture between the Hungarian competition authority and the OECD. Opened in February 2005, the Centre expands the OECD's work on competition in the *Central, East and South-East European regions*. The Centre provides capacity building assistance and policy advice through workshops, seminars and training programmes on competition law and policy for officials in competition enforcement agencies and other parts of government, sector regulators, judges and others in the Central, East and South-East European region. The Centre also works to strengthen competition law and policy in Hungary and the GVH itself.⁶⁶

The GVH also extended its advocacy activities to *cooperation with other state organs*, like the Ministry for Transport and Economy, Hungarian Energy Office, Hungarian Rail Office, National Communications Authority, etc. There are several co-operation agreements between these authorities, government bodies and the GVH frequently publishes its views on regulatory issues. E.g. the recent proposal of the Prime Minister to *break up* the monopolist Hungarian electricity wholesaler was partly the result of the study carried out by the competition authority.⁶⁷ It is not directly connected to the co-operation agreements, but it is worth to note that the GVH has a close eye on *regulated sectors* and carried out *sectoral inquiries* on the mobile telecommunication, the mortgage and electricity sectors and is currently investigating the banking and the electronic media sectors.

Finally to provide a clear understanding about what the authority's perception is about competition, it published in 2007 its approach in a document called: *Fundamental Principles of Competition Policy as Applied by the Hungarian Competition Authority (GVH)*.⁶⁸ While the document gives a detailed overview, in practice there are some difficulties. In several cases the Competition Council expressly

⁶⁵ See press release of the GVH on 16 February 2006, available at:

http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=133&m5_doc=146

⁶⁶ See more at http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=99&m5_doc=2379&m174_act=6 or <http://www.oecdhungarycompetitioncentre.org/>

⁶⁷ See e.g. Executive Summary prepared on the basis of the draft report on the inquiry into the Hungarian electric energy industry Budapest, 22 December 2005. Available at:

http://www.gvh.hu/domain2/files/modules/module25/pdf/Agazati_Villamos_energia_a.pdf

⁶⁸ Available in English at:

http://www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_alapelvek_antitrosztpolicy_2007_05_a.pdf.pdf

ruled that it is not bound and does not even have to take into account the perception described in the document.⁶⁹

5. An other side of the coin

The GVH is well equipped and has a considerable number of well-educated and well-trained professionals. While there were always plenty of lawyers working at the GVH, this was even true for economists. The Competition Council, the decision making body of the GVH, since 2002 included at least two economists with PhDs and this was strengthened recently in 2006 with a Chief Economist and his assistants to improve the quality of economic analyses and increase the role of analysing work. As noted above a shift can already be observed in the case of excessive pricing. One handicap regarding antitrust cases nevertheless originates in the fact that the GVH is partly responsible for preventing and sanctioning consumer deception and this consumes huge resources of the authority. For example in 2006 there were altogether 95 antitrust cases, including mergers, and 85 cases on alleged consumer deception. There are no official numbers yet, but 2007 is even worse.

While the competition authority seems to be up to the task, this does not seem to be true for *national courts*. Appealed decisions of the GVH will land at the Metropolitan Court where judgements are delivered by single judges. The judges at the Metropolitan Court are not specialised judges, but have to deal with plenty of other cases simultaneously. Although they have some assistance at the courts, Hungarian courts are generally in difficult position due to *large backlogs* and *poor financial resources*. This is well reflected in the fact that the case of the so called “*cinema-cartel*”⁷⁰ lasted for five years or the “*coffee cartel*”⁷¹ for ten years.. This is further strengthened by the fact that Hungarian law makes it very *difficult for judges to review competition cases in substance*. The appellate courts may both change or refer it back to the GVH. Moreover the courts can rule only on express submissions by the parties and are bound to them. In case the decision gets further appealed it will be dealt by a single panel of three judges at the Metropolitan Court of Appeal. There are no competing panels in practice, so practically every case ends up before this panel and it is only in very exceptional circumstances that a competition case can reach the Supreme Court.

⁶⁹ This was stated in relation to the Fundamental Principles of Consumer Policy as Applied by the Hungarian Competition Authority, but since the two documents have the same status, the rulings apply *mutatis mutandis*. See for example Case No. Vj-30/2007. In the decision the GVH stated that anything included in the Principles “is not a statute (adopted according to legislative procedures – added by the author) and these do not bind the Competition Council in any way, so accordingly, conformity or occurring deviation in interpretation or application does not have to be justified”. In following decisions the reference to “not being a statute” was abandoned but the second half of the sentence remained.

⁷⁰ Case No. Vj-70/2002

⁷¹ Case No. Vj-185/1994

The described features of the Hungarian judicial system makes it very difficult to get a decision by the GVH annulled. Between 1997 and 2006 *out of 248 final judgements only in 18 cases was the decision of the GVH changed in substance, in 3 cases only partly*. This means that the GVH wins more than 92 percent of the litigation before the courts, a considerable rate. This may cause concerns especially if there were several false positives within the decisions of the GVH. The situation will partly change if private enforcement takes up. Current legislation already provides for the necessary legislative framework for private enforcement. If there will be an active enforcement through private actions, there will be several courts dealing with competition issues and that might lead to competing ideas and judgements. While this might lead to lower standards for a short period, the GVH acts as *amicus curiae* in private actions, so the courts will get guidance by the authority.

Similar trends may be observed regarding the legislative process. In Hungary proposed legislation is only rarely put out to *full and open* consultation and in case it happens there is usually rather a short period for public comments.⁷² This might lead to the situation where a well justified proposal of the GVH lands before the Parliament, without competing alternatives or proper supervision and scrutiny.

We already noted that the **Competition Act 1996** was amended several times. On the one hand this reflects flexibility and adaptation, on the other hand legal certainty might be undermined if it gets modified too often or in favour of the competition authority and not in favour of protecting competition. Up to date the streamlining of the act resulted in better enforcement and more competition, but it would be desirable if proposed legislation would be put out to public consultation. Nevertheless in a continental legal system like the Hungarian it is unavoidable to modify such a legislative piece often, since the constitutional principles require for any act or decision of the authority a legal basis that was adopted according to legislative procedures.

6. Conclusions

Hungarian competition law was based on and the enforcement agency was looking at international and European developments since the late 1980ies. *“The Hungarian legislators have always been of the opinion that a close harmonisation of the national competition law to the EC norms is necessary.”*⁷³ While recognising that complete harmonisation might not always be the best solution, it was a constant aim to have similar laws to the Community. This was due to the goal of accession to

⁷² We have to note that the proposal for the 2005 amendment of the Competition Act 1996 was put out for a longer period for public consultation and induced lively debate.

⁷³ SÁRAI, J. (2007) Hungarian competition law - developments in the last decade and follow-up. *Revue Lamy de la Concurrence*.

the European Union, the acknowledged standard and to provide business players with identical level playing field.

European trends quickly get hold in national legislation and practice. We have seen some examples already, but we could also name the issue of *criminalisation* of bid-riggings in public procurement procedures⁷⁴ and the potential to *disqualify* undertakings from future public procurements or commitment decisions becoming an important tool. Although these provisions are in force for almost three years now, they have never been applied, due to the fact that no cases were closed since that time that involved public procurement conspiracies. Similar “*sleeping provision*” is – for 17 years now – the possibility to launch *public interest private claims by consumer associations*.

Currently the GVH has prepared a legislative draft for further amendments of the **Competition Act 1996**, but it was not officially published yet. In case it gets adopted it will nevertheless further enhance private enforcement and probably it will also change the substantive test in merger control to the SIEC test from the dominance test.

Hungarian competition law and policy is really a model-child. Legislators and enforcers learn quickly and the legislative framework can serve as good example of creating and maintaining a competition enforcement regime for countries with the size of Hungary and with an open-economy. There are no perfect enforcement systems, so learning and adapting quickly is good for experimentalism. If the adaptation is based on solid foundations on international and European legislative and enforcement developments the risk of introducing mistaken concepts is low and one can still be a frontrunner.

⁷⁴ See also Ibid.

7. Bibliography

- (1998) Decision 30/1998 (VI. 25.) AB. Constitutional Court of Hungary.
- (1999) OECD Roundtable on Competition Authorities' Enforcement Priorities -- Note by Hungary. Gazdasági Versenyhivatal.
- (2004) Hungary - Report on Competition Law and Institutions. OECD.
- BASSOLA, B. (2008 (Forthcoming)) Tendenciák a versenyfelügyeleti eljárásban 2000 és 2007 között [Tendencies on competition supervision proceedings between 2000 and 2007. IN GAJDUSCHEK, G. (Ed.) *Rendnek lenni kellene. Tények és gondolatok a közigazgatás ellenőrzési és bírságolási tevékenységéről*. Budapest, Magyar Közigazgatási intézet - KSZK.
- CSÉPAI, B. & REMETEI-FILEP, Á. (2001) Hazai versenyjogunk történeti perspektívában [Our national competition law in a historical perspective]. *Külgazdaság*, 45.
- CSERES, K. J. (2005) *Competition law and consumer protection*, The Hague Frederick, MD, Kluwer Law International.
- HARGITA, Á. & TÓTH, T. (2005) God Forbid Bid-Riggers: Developments under the Hungarian Competition Act. *World Competition*, 28, 205-231.
- HORÁNYI, M. (2007) The Hungarian Competition Office grants immunity in proceedings concerning exclusive supply agreement in the context of a public procurement tender (Olympus). *e-Competitions*. www.concurrences.com.
- JUHÁSZ, D. & SZILÁGYI, P. (2006) Recent Developments of the Hungarian Competition Act and the Adjunct Rules of the Hungarian Administrative Act and Criminal Code. *European Competition Law Review*, 27, 108-116.
- OECD (2000) Regulatory Reform in Hungary - The Role of Competition Policy in Regulatory Reform. Paris, OECD.
- REMETEI-FILEP, Á. & SÁRAI, J. (2003) Európai versenyjog és magyar csatlakozás [European Competition Law and the Hungarian Accession]. *Európai Füzetek*.
- SÁRAI, J. (1996) Some questions of the introduction of prohibition on vertical agreements into the Hungarian Competition Act in the framework of legal harmonisation to the European legal system. 2nd Competition Conference, Brno.
- SÁRAI, J. (2007) Hungarian competition law - developments in the last decade and follow-up. *Revue Lamy de la Concurrence*.
- SÁRAI, J. & SZOBOSZLAY, G. Evolution of Competition Policy and Law in Hungary (Unpublished work).
- TATHAM, A. F. T. (1999) Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court *The International and Comparative Law Quarterly*, 48, 913-920.
- TÓTH, T. (1998) Competition Law in Hungary: Harmonisation Towards EU Membership. *European Competition Law Review*, 19, 358-369.
- TÓTH, T. (2005) Enforcement of EC Competition Rules since 1 May 2004 by the Hungarian Competition Office. IN LOWE, P. & REYNOLDS, M. (Eds.) *Antitrust Reform in Europe: A year in Practice*. London, International Bar Association.
- TÓTH, T. (2008) Competition cases from the European Union : the ultimate guide to leading cases of the EU and all 27 member states - Hungary. IN KOKKORIS, I. (Ed.) *Competition cases from the European Union : the ultimate guide to leading cases of the EU and all 27 member states*. London, Sweet & Maxwell.
- TÖRÖK, Á. (1997) A versenypolitika és a piacok átalakulása a magyar gazdasági átmenetben [The transformation of competition policy and markets during the Hungarian economic transition]. *Közgazdasági Szemle*, 44, 426-439.
- VÁRADY, T. (1999) The Emergence of Competition Law in (Former) Socialist Countries. *American Journal of Comparative Law*, 47.

- VISSI, F. (1996) Piaci intézményrendszer, versenypolitika, uniós csatlakozás [Market institutions, competition policy, Accession to the Union]. *Közgazdasági Szemle*, 43, 770-782.
- VOLKAI, J. (1999) The Application of the Europe Agreement and European Law in Hungary: the Judgment of an Activist Constitutional Court on Activist Notions. *Harvard Jean Monnet Working Papers*. Cambridge, Harvard Law School
- VOSZKA, É. (2004) Darázsfészek [Vespiary] *Közgazdasági Szemle*, 51, 1-23.