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Question A: "*Who is/should be liable for breaches of competition law: which rules should govern the attribution of civil and (where it exists) criminal liability to the company, parent company, management & employee?"*

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List of abbreviations

Competition Act	Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
CCP	Act CXXX of 2016 on the Code of Civil Procedure
HCA	Hungarian Competition Authority (*Gazdasági Versenyhivatal*)
TFEU	Treaty on the Functioning of the European Union
ECtHR	European Court of Human Rights
Rome Convention or ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)
Civil Code	Act V of 2013 on the Civil Code
Criminal Code	Act C of 2012 on the Criminal Code
Labor Code	Act I of 2012 on the Labor Code
Legal Persons Criminality Act	Act CIV of 2001 on measures applicable to legal entities under criminal law
Antitrust Fine Notice	Notice no 11/2017 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 the prohibition of anticompetitive agreements and concerted practices, as well as the abuse of dominance and significant market power
Notice on Leniency	Notice no 14/2017 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the application of the rules on leniency pursuant to Article 78/A of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices

I. Stock taking

1. The rules

The Competition Act governs the main aspects of Hungarian competition law including the statutory provisions concerning competition law sanctions. The HCA issued its new Antitrust Fine Notice in 2017 as a guideline on the method of the setting of fines in antitrust cases.

In addition to the Hungarian competition law prohibitions, criminal law (Article 420 of the Criminal Code) also sanctions bid rigging in public procurement and concession procedures and treats these as a criminal offense. There are, however, no criminal sanctions for any other types of cartel activities in Hungary. While the general administrative antitrust sanctions focus on the behavior of the companies under investigation, the personal reach of the criminal law provisions is different as their subject is the individuals (i.e. management, employees) committing the criminal offence. We note that theoretically, criminal sanctions can also be imposed on the companies themselves (there is a separate law in Hungary for the criminal sanctions applicable for companies), however, these are rather exceptionally applied.

As regards the classification of the available sanctioning tools in Hungary, the following types of sanctions are applied for breaches of antitrust rules

- the monetary sanction (substantive fines and procedural fines on undertakings),
- the reparatory sanction (private law consequences on undertakings),
- the imprisonment sanction (criminal law consequences on individuals and, in rare cases, companies), and
- the disqualification sanction (public procurement law consequence on undertakings).

The primary sanctions are *monetary sanctions* (administrative fines) imposed on companies by the HCA. Under the Competition Act, the maximum amount of the administrative fine is 10% of the net turnover of the undertaking concerned in the business year preceding the decision of the HCA and in practice, the amount of the fine is generally calculated by taking into account the principles contained in the Antitrust Fine Notice.

While no fine can be imposed on individuals for their participation in the antitrust infringement, a procedural fine may be imposed both on companies as well as on individuals in case of obstruction of the investigation. Under the Competition Act, a procedural fine may be imposed on companies or on individuals, if their conduct has the object or result of delaying the investigation or preventing the establishment of the facts of the case. The maximum procedural fine in case of companies is one per cent of the net turnover in the preceding business year, and five hundred thousand forints for individuals (ie natural persons not qualifying as undertakings).

The potential legal consequences of private antitrust litigation and damages actions serve as *reparatory sanctions* in Hungary. The Competition Act declares that any agreement or other arrangement violating the prohibition of anti-competitive conducts is null and void under Hungarian law and the most important consequence of such nullity is the restitution of the original state. Antitrust damages actions are based on the general rules of Hungarian law governing liability for damages caused in non-contractual situations and relationships. The

applicable rules for damages actions are in line with the Antitrust Damages Directive[1], which was implemented into the Competition Act in December 2016 and which entered into force on 15 January 2017. The Hungarian regime applies the full compensation system, which ensures that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

In terms of criminal law infringement, individuals may face a *sanction of imprisonment* for the breach of the cartel offense (only in relation to bid rigging in public procurement and concession procedures): the term of such imprisonment may be up to five years.

As regards the *disqualification sanction*, it is important to note that according to the Competition Act, the HCA is not entitled to apply this type of sanction in its antitrust investigations. Nonetheless, the Public Procurement Act declares that a company is automatically excluded from public procurement procedures as a bidder or subcontractor, if a fine was imposed on it by the HCA for committing cartel infringement (See details below at Chapter 2.1.). Moreover, companies are also excluded from public procurement, if their management was found guilty in the last five years for committing bid rigging in public procurement and concession procedures by the criminal court until the dispensation of criminal record. The disqualification is applied by the contracting authority in the course of the public procurement procedure.

As stated above, criminal sanctions can be imposed also on the companies themselves, however they are rather exceptionally applied consequences of the criminal courts. (See details below at Chapter 2.1.).

It is also worth mentioning, that punitive damages claims are not available in the Hungarian civil law regime. By virtue of the "*ne bis in idem*" principle, no one can be held liable twice or more for the same conduct, i.e. the damages actions cannot aim to penalize the infringing party, the only objective can be to restore the situation that existed before the damage had been caused. The civil court proceedings' sole objective could only be to compensate the entire loss suffered by the claimant by granting damages. The Hungarian full compensation doctrine also excludes overcompensation, by means of punitive, or multiple damages.

The goals of imposing competition law sanctions are defined in several layers. The Competition Act subsection 3 Article 87 states that when imposing the fines all aspects of the unlawful behavior has to be taken into account, including among others culpability, repeat offence or frequency.
National courts frequently have to review decisions of the national competition authority, which also means the review of fines. In these cases, the courts have also defined the goals of competition law sanctions.

The Hungarian Constitutional Court confirmed in case No. IV/01697/2013 that similarly to EU law, repeating violation of competition rules can lead to fines aiming both deterrence and punishment. Especially individual deterrence might substantiate higher fines for repeat offenders. The national competition authority can take into account the frequency of an infringement in general and also repeat violations by the same undertaking. The goal of a competition law sanction is to both sanction undertakings violating the law and also to deter other undertakings in general.

[1] Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349, p. 1.

The HCA issues notices about the setting of fines. The current Antitrust Notice states that it has no binding effect. According to the notice the aim of a fine is to deter undertakings from committing unfair business practices and to safeguard fair economic competition, therefore apart from retribution, both individual and general deterrence are taken into account. This can only be achieved if the fine is substantial for the undertaking.

As described under the previous point, retribution is the primary goal of competition law fines, but deterrence is also an important factor when setting the level of fines. Compensation is not a direct goal of fines, however if there is active remedy (e.g. compensation) by an undertaking for those who suffered harm, that can be taken into account and deducted from the fine.

When setting the level of fine, the HCA in the decisions usually takes into account the following factors, in the following order (see e.g. Decision No. Vj/2-205/2015).:

- Possibility of repeated infringements;
- benefits achieved due to the infringement;
- deterrence;
- maximum level of fine;
- reduction due to leniency policy or commitments;
- possible difficulties of payments by the undertaking.

According to the notice of the HCA, the aim of fines is to deter undertakings from committing unfair business practices and to safeguard fair economic competition.
The HCA states that "it pays particular attention in order to impose fines that have adequate retention (deterrent) effect".[2] Later on[3] the HCA elaborates further on deterrence. Taking into account the deterrent effect, can both lead to the increase or reduction of the fine.

Compensation for those who suffered harm is not a primary goal but is taken into account.[4] If there is full compensation to those who suffered harm, the amount of compensation is to be deducted from the fine. (cf. e.g. also Decision No. Vj/11-334/2014 or Decision No. Vj/37-303/2014).

The HCA is following the court case law both in the fining notices and in decisions. The Competition Authority takes the following two factors repeatedly into consideration when setting the level of fines: the level of threat to economic competition by the behavior and the scope and magnitude of harm caused to final buyers.

The HCA is always very clear on the method when setting the level of fines and refers to the notice. So, both the fining notice and the individual decisions are coherent and reflect the above mentioned goals.

2. Determination/calculation of sanctions

[2] See para 51 of the Antitrust Notice.

[3] See paras 51-52 of the Antitrust Notice.

[4] See paras 67-69 of the Antitrust Notice.

2.1 Rules on how to determine the amount of the sanction (fine) in Hungary

Hungarian competition law essentially deals with the determination of sanctions in two sources of law. The first source is the Competition Act that naturally contains hard rules, which are legally binding for every undertaking and for the HCA. The second source is the Antitrust Fine Notice of the HCA. The Antitrust Fine Notice is soft law. In addition, there are other acts, which contain hard rules on competition sanctions, such as the Public Procurement Act, the Criminal Code and the Legal Persons Criminality Act. In the present chapter first we examine the hard rules, and after we move to the soft rules.

Competition Act – hard rules:

The sanction system of the Competition Act focuses on the infringing undertakings (companies (and possibly individuals, if they are regarded as undertakings) under procedure or, in general, parties) and contains several provisions in connection with the determination of the amount of the fine and in connection with the rules of the fine maximum.

Under the Competition Act, the amount of the fine is established taking into account all the circumstances of the case, in particular the gravity of the infringement, the duration of the infringing situation, the benefit gained by the infringement, the market position of the infringing party, the imputability of the conduct, the cooperation of the undertaking during the proceeding and the repetition and frequency of the infringement.

In connection with the fine maximum, it should be taken into account that the fine shall not exceed ten per cent of the net turnover achieved in the business year preceding that in which the decision is adopted. The relevant turnover is that of the undertaking or the group of undertakings which is specified in the decision and of whom the undertaking on which the fine is imposed is a member (sub-section 3, Article 78 of the Competition Act). The fine imposed on associations of undertakings shall not exceed ten per cent of the net turnover in the preceding business year of all undertakings which are members of such association (sub-section ab, Article 78 of the Competition Act).

In determining the maximum amount of the fine, the net turnover shall be determined relying on annual accounts or simplified annual accounts for the business year preceding that in which the decision is adopted (sub-section 2, Article 78 of the Competition Act).

Public Procurement Act – hard rules:

Article 62 (1) n) of the Public Procurement Act contains a sanction automatically excluding a company from any public procurement procedure as a tenderer, subcontractor or organisation participating in the certification of suitability in case of a competition law infringement committed by such company.

More precisely, the sanction applies if the infringement relates to Article 11 of the Competition Act or Article 101 of the TFEU and is established in a final and enforceable decision of the HCA, delivered within the previous three years or, in the event of a review of the decision of the HCA, by final court ruling and the HCA also imposed a fine or if such infringement of law committed by the tenderer was established by another competition authority or court within the previous three years and at the same time the tenderer was ordered to pay a fine. The second limb of this rule (the imposition of a fine) serves to avoid that leniency applicants are caught by this sanction.

In addition, Article 62 (i) o) of the Public Procurement Act also covers a situation where the contracting authority itself discovers an infringement of Article 11 of the Competition Act or Article 101 of the TFEU in the court of a given tendering procedure: in such a case, the tenderer may also be excluded, unless the given tenderer itself reports the infringement to the contracting authority and submits a leniency application to the HCA at the same time.

We note that the Public Procurement Act also contains a general provision, which may also possibly be applicable for other competition law infringements: it states that the exclusion also applies if a company has committed a crime connected with his commercial or professional activity, established by court judgment having the force of res judicata given not more than three years ago. The relationship between these rules is somewhat unclear. This issue was (in case of a very similar provision in the earlier Public Procurement Act and an earlier provision specifically applicable for anti-competitive agreements (similar to Article 62 (1) n) in the current Public Procurement Act) was subject to a preliminary reference judgment by the Court of Justice of the European Union in case C-470/13, but the court merely held that the relevant Hungarian rules were not contrary to EU law.

In addition, Article 62 (1) ag) of the Public Procurement Act also automatically excludes any person for participation who was found guilty for the infringement of the cartel offense as contained in the Criminal Code. Furthermore, if such a natural person acts or acted as an officer of a company, then the given company itself shall also be excluded from participation (Article 62 (2) of the Public Procurement Act).

Criminal Code – hard rules:

While the Competition Act focuses on infringing companies, the Criminal Code focuses on the natural persons (e.g. managers, employees), as perpetrators.

Pursuant to Article 420 of the Criminal Code any person who enters into an agreement aiming to manipulate the outcome of an open or restricted procedure held in connection with a public procurement procedure or an activity that is subject to a concession contract by fixing the prices, charges or any other term of the contract, or for the division of the market, or takes part in any other concerted practices resulting in the restraint of trade is guilty of felony punishable by imprisonment between one to five years.

The Criminal Code also provides for the imposition of penalties on any person who participates in the decision-making process of an association of companies, a public body, a grouping or similar organization, and adopting any decision that has the capacity for restraining competition aiming to manipulate the outcome of an open or closed public procurement procedure or an activity that is subject to a concession contract.

Importantly, the above behavior constitutes a criminal act when the result – namely the restriction of the competition – has occurred, that is the effect has to materialise.

The above offense can be committed not only by the manager or executive officers of the company, but also by any employee of the company. Thus, the perpetrator of the offense may be the company's executive officer, member, member of the supervisory board, employee or their agent, provided that their criminal law culpability (ie intent or negligence) in respect of the offense can be established.

With regard to sanctionable persons, the Criminal Code imposes sanctions only on natural persons. Thus, legal entities cannot be held liable for the restriction of competition on the

basis of the Criminal Code (but see the special case for the Legal Persons Criminality Act below).

It follows that criminal sanctions may arise from public procurement procedures and concession-related activities only, but such cartels and anticompetitive acts may then result in multiple sanctions**.** The same anticompetitive act can be punished at the level of the company by competition law and public procurement law (see above), at the level of the manager committing such act by criminal law resulting in imprisonment or criminal sanctions (such as confiscation of personal assets). In this respect it is noteworthy that the establishment of the infringement by the HCA (with a fine imposed) will automatically result in the disqualification of the company from public procurement procedures (see the Public Procurement Act section above) but will not automatically result in the application of criminal sanctions (although the determination of the HCA may ease the evidentiary process in the criminal case).

Legal Persons Criminality Act – hard rules:

While the criminalisation of certain anticompetitive conducts generally bears sanctions for individuals only, this Act allows the application of legal measures to companies in case the conduct specified in Article 420 of the Criminal Code was performed with the aim of providing a pecuniary advantage for the company in question or was committed with the assistance of the company and by (i) the executive officer, employee, board member of the company or the agent of any of these persons or (ii) the owner or employee in connection with the business of the company while the performance of the supervisory rights of the executive officer or board members may have prevented the crime or (iii) the company achieved a pecuniary advantage and the executive officer, employee, board member of the company was aware of the crime.

Under the Legal Persons Criminality Act, the following measures can be taken against companies: liquidation of the company, restriction of the activity of the company and/or financial penalty (equal to 3 times the pecuniary advantage achieved or planned to be achieved) imposed on the company. It is important to emphasize that criminal sanction against a company can be imposed exclusively in the frame of the criminal procedure against individuals.

The criminal law measures applicable to companies raise concerns due to potential violation of the prohibition of double assessment of crimes. Nevertheless there is no precedent in the Hungarian case law as to the practical application to these rules, thus it is not possible to assess whether HCA fines imposed on the company would reduce or, in any event, affect the sanction to be imposed on the company under criminal laws.

Antitrust Fine Notice – soft rules:

Given the limited depth of the rules set out in the Competition Act and to provide guidance on its case-law and application of the relevant rules the HCA has issued the Antitrust Fine Notice setting out the rules on how to determine the amount of the fine. While the HCA usually imposes fines on the basis of the Antitrust Fine Notice in force there have been cases where the HCA has decided to disapply its Antitrust Fine Notice and determine the amount of the fine on the basis of more general rules of Article 78 of the Competition Act. However, such derogation from the Antitrust Fine Notice needs to be justified by detailed reasoning in the

decision of the HCA. This practice has been upheld by the courts.[5] On the basis of the above it can be stated that the Antitrust Fine Notice is part of the soft law, especially since under the express provisions of the Competition Act, such notices are not binding and their sole purpose is to increase the predictability of the application of the law (Article 36 of the Competition Act). Nevertheless, the Hungarian Supreme Court accepted that – similarly to notices issued by the European Commission under EU law - such notices create legitimate expectations for the parties concerned, and therefore they bind the HCA in particular to the extent that any deviations should be duly reasoned.[6]

The currently applicable Antitrust Fine Notice of the HCA was issued on 19 December 2017 and contains stricter rules for the determination of the level of fines than HCA's previous fine notice dated from 2012 in order to strengthen the preventive and deterrent role of the fines.[7] The issuance of the Antitrust Fine Notice was justified by criticism to the 10% rate applied to the basic amount of the fine by the HCA in its Antitrust Fine Notice which was considered low in international comparisons. Accordingly, following the practice of the Commission and the majority of European countries, the ceiling of the rate applied to the basic amount has been increased to 30%.

Pursuant to the Antitrust Fine Notice, the determination of the fine by the HCA is a multi-stage procedure. First, the HCA determines the basic amount, which is based on the relevant turnover and later this sum can be modified in several steps. Based on such turnover basic amount of the fine can be calculated by multiplying the relevant turnover and the ratio of the gravity of the infringement. Subsequently, the HCA examines the mitigating and aggravating circumstances of the case.

A notable feature of the Antitrust Fine Notice is that pursuant to the Antitrust Fine Notice, the existence of a genuine compliance program may serve as a mitigating circumstance. Preliminary (*ex ante*, ie taken before the initiation of the competition proceedings) and subsequent (*ex post*, ie taken after the initiation of the competition proceedings) compliance efforts and programs are also taken into account when the HCA sets the fine, however, the HCA attributes greater importance to pre-compliance programs that were already in force before the initiation of competition procedure. At the same time, an additional mitigating circumstance may be if no high-ranking corporate executives participated in the infringement. In such cases, the HCA might reduce the fine by up to 7% depending on the preliminary compliance program. Moreover, if the undertaking provides evidence of significant added value in the context of the compliance program, the reduction of the fine may increase to 10%. In addition, the HCA may reward a commitment to develop and implement a subsequent compliance program by the HCA with a reduction of fine of up to 5%, if such

[5] See the chapter III. of decision no. 1392/B/2007 of the Hungarian Constitutional Court. The HCA thus complies with the requirement of the Supreme Court that states, "*in individual cases - in case of special circumstances - the individual decision may differ from the notice, however, a detailed justification must be given which indicates the circumstance that justifies the derogation".* (See order No. Kfv.II.37.497/2010/14. of the Supreme Court (VJ/102/2004.).)
In addition, in decision No. Vj/8-1751/2012 (the so-called Bank Data case, which is an ongoing case) the HCA decided not to apply the Antitrust Fine Notice, given that neither the EU or the Hungarian case-law were entirely clear as regards the infringement at the beginning of the initial period of the conduct.

[6] See Supreme Court judgment No. Kfv.III.37.582/2016/16. brought in case No. Vj-74/2011 (FX loan repayment).

[7] HCA: The main changes of the Antitrust Fine Notice and its background
http://www.gvh.hu/gvh/elemzesek/vitaanyagok/nyilv_konz_antitroszt_fogyasztos/a_birsagkozlemeny_fobb_valtozasai_es_hatteruk.html

commitment is taken in conjunction with leniency policy, settlement procedure and/or in parallel with proactive reparation.

3. Enforcement

As far as the enforcement of competition rules are concerned, administrative enforcement is dominant in the current Hungarian regulatory system. Competition law rules are enforced in an administrative procedure conducted by the HCA since 1991. Approximately 5-10 antitrust decisions (cartel and abuse of dominance cases) are handed down by the HCA every year[8].

As for criminal law Hungary, introduced individual criminal liability for bid rigging in public procurement or concession procedures in September 2005. (see in detail above at Chapter 2.1) These crimes are investigated in a criminal procedure, but so far enforcement has been relatively scarce and we are aware of only one final and binding conviction for the breach of the cartel offense. (see in detail below at Chapter 6)

As for private enforcement, civil law procedures are also not very common. Damages are also available for injuries suffered as a result of antitrust (cartel) actions (generally speaking they are classified as torts in civil law).[9]. Although the legislator introduced the so called "10 % presumption" in 2009[10] to foster private enforcement (whereby it is presumed that a hard-core cartel has effect of increasing the price of the cartelised product/service with 10%), still such actions have been relatively rare in Hungary for the time being.

As for competition law related prohibitions in other laws, please see Point 2.1. where the disqualification sanction regulated by the Public Procurement Act.

In line with the foregoing, the institutions involved in enforcing and punishing unlawful conduct are the HCA, in case of criminal offence the police and/or public prosecutor and the competent criminal court, moreover the competent civil court in case of private antitrust litigation.

All of these institutions have independent competence for sanctioning antitrust infringements. The authorities also, in practice, cooperate to a large extent both informally and formally in respect of the cases at hand as follows.

The HCA's antitrust investigation, the criminal proceeding and the antitrust litigation can be initiated on a stand-alone basis. At the same time, as part of its general administrative law obligation to notify any infringements of criminal law it becomes aware of, the HCA reports

[8] Nevertheless, this administrative procedure based on the criteria set down by the ECHR in the Bendenoun (Bendenoun v France, 24 February 1994 18 EHRR 54.) case, (in particular the rules on data collection and sanctions) may be considered criminal in nature, or at least quasi criminal. This conclusion is supported by the Menarini (A. Menarini Diagnostics S.R.L. v Italy [(43509/08), 27 September 2011.]) and the decision of the Hungarian Constitutional Court (30/2014. (IX. 30.))

[9] As prescribed by Articles 6:518 and 6:519 of the new Civil Code.

[10] Act XIV of 2009: Now Article 88/G of the Competition Act, which sets out a reversible presumption when stating that in lawsuits instituted for the enforcement of any civil claim against any person alleged to be an accomplice in a cartel for the purpose of determining the impact of the infringement on the price charged by the infringer, it shall be treated - until proven otherwise - that the infringement distorted the price to the extent of ten per cent.

public procurement cartel cases to the Hungarian Police. The HCA's investigation and the criminal proceedings can be conducted in parallel, however, in practice the criminal courts await the outcome of the HCA's investigation since the HCA has wider experience and resources in investigating cartel infringements. In the case of private antitrust litigations, the Competition Act expressly regulates the relationship between the two proceedings: the Competition Act declares that the court seized by the private litigation shall suspend its proceeding in the event the HCA initiates an investigation in the same matter until the final and binding decision of the HCA is passed. Furthermore, the Competition Act also states that the decision of the HCA establishing an infringement shall be binding upon the court, while, obviously, the determination of all other element of private law liability (causality, amount of damages, etc.) remains in the discretion of the court.

In addition, the Competition Act also stipulates that the civil courts shall notify the HCA without delay if any relevant antitrust issues arise in a lawsuit and are obliged to request the HCA to submit its legal views about the case pending before the court. It is important to note however, that such legal views submitted by the HCA are not binding upon the court ("amicus curiae", very similar to the possibility provided to the European Commission under Regulation 1/2003/EC).

Corporate leniency applications serve as grounds for the exemption of individual punishment within the meaning of Article 420 of the Criminal Code. As already mentioned above, bid rigging in public procurement and concession procedures constitutes a criminal offence and may be punished by imprisonment of up to five years. If an individual served as an executive officer, shareholder, supervisory board member or employee of a company at the time of committing the bid rigging, he/she shall not be punished for the criminal offence, if he/she submits an immunity application to the HCA for exemption from the administrative fine and discloses the circumstances of the infringement, provided that the HCA has not initiated an investigation already.

In the event the HCA's investigation is already in progress and an individual having served as an executive officer, shareholder, supervisory board member or employee of a company at the time of committing the bid rigging submits a leniency application to the HCA for exemption from or a reduction of the administrative fine, the criminal penalty may be reduced without limitation or can even be dismissed if the particular circumstances of the case allow such relaxation.

4. Parental liability

Under Hungarian competition law, the liability for the wrongdoing of a subsidiary cannot be imputed to the parent company, however, in certain cases, the parent company may bear (vicarious) joint and several liability for the fine imposed on the subsidiary.

In advance, it must be noted that the definition of 'undertaking' under Hungarian competition law differs from the definition of 'undertaking' under EU competition law. In accordance with the wording of the Competition Act, undertaking does not mean the entire economic unit (e.g. company group), only a single entity subject to competition law rules (e.g. the company carrying out the infringement). The Competition Act contains a separate definition for the entirety of the economic unit: the so-called "group of undertakings". According to the definition, an undertaking belongs to the same group of undertakings as the following undertakings: (i) that are directly or indirectly controlled by the undertaking (subsidiary), (ii) that control directly or indirectly the undertaking (parent company), (iii) that are directly or indirectly controlled by the controlling undertaking (sister company), and (iv) that are directly or indirectly controlled by the undertaking jointly with another undertaking of the group (joint venture). The term is used to indicate all non-independent entities, i.e. entities which can conclude an anticompetitive agreement. This difference influences the attribution of liability for infringements: liability – and in most cases the fine – is imputed to the undertaking, not the group of undertakings. Pursuant to the Competition Act, the fine is imposed on the undertaking that carries out the infringement.

Under the Competition Act, liability cannot be automatically imputed against the parent company for the wrongdoing of its subsidiary. Liability of a parent company can only be imputed for its own wrongdoing and no automatic presumption exists that its sole control over its subsidiary provides sufficient legal basis for the imputation of liability to it for its subsidiary's conduct. Therefore, while Hungarian competition law in principle acknowledges the single economic unit doctrine, it does not encompass the possibility to impute liability for an infringement in general to the parent (or any other member) of the "economic unit" to where the infringer belongs.

The "movie cartel" (Case No. Vj-70/2002) was the only case where liability was attributed to a parent company and its subsidiary. Nevertheless, in that case, both the parent company and its subsidiary were directly involved on their own initiatives in the illegal price coordination mechanism; i.e. liability of the parent was attributed for its own infringement and not indirectly for the wrongdoing of its subsidiary. In the "color picture tubes cartel" (Case No. Vj-45/2008) the investigation was initiated against several undertakings, including some foreign-based parent companies, however, in the end, the procedure was terminated against these parent companies in the absence of evidence on their participation (active role or knowledge) in the infringement. Also, in the "Budapest road construction cartel" (Case No. Vj-138/2002) the liability for bid rigging was established for a road construction company and a full function joint venture, where the road construction company had 50% ownership interest (joint control). It was actually the coordination of bids by the road construction company and its full function joint venture in the same tender that qualified as bid rigging. In this case too, the road construction company was held liable for its own actions, not as a parent company.

Notwithstanding the above, the group of undertakings is relevant for the imposition of the fine from two aspects: maximum fine and (vicarious) joint and several liability for the fine.

The maximum fine under the Competition Act is 10% of the net turnover achieved in the year preceding the prohibition decision by the undertaking or – if identified in the prohibition decision – by the group of undertakings, to which the undertaking carrying out the infringement belongs. Pursuant to the Antitrust Fine Notice, if several undertakings belonging to the same group of undertakings are held liable, the sum of the fines may not exceed 10% of the turnover of the group of undertakings.

The Competition Act provides for the possibility that, in case the undertaking carrying out the infringement failed to pay the imposed fine voluntarily and the enforcement of the fine was unsuccessful, for the fine (or its unpaid part) joint and several liability of any member of the group of undertakings indicated in the prohibition decision can be established in a separate order. According to the explanatory note of the amending act introducing this possibility in 2005 the purpose of this provision was to exclude undertakings avoiding the payment of the fine by manipulating the turnover data or the enforceable assets. The legislator considered that close economic relations manifested in a legal form (e.g. parent company) warrant a presumption of liability, which can justify the burden of detrimental consequences (i.e. the fine). In the judicial review of the "railroad construction cartel" (Case No. Vj-174/2007) two additional requirements were established: only those undertakings can be indicated in the prohibition decision for the purposes of joint and several liability, which (i) have been involved in the competition supervision procedure as a party to the proceedings and (ii) have also been held liable / expressly named as parties for the infringement. In case of the "ready-mix concrete cartel" (Case No. Vj-29/2011) two infringers were also sister companies, which is why both were indicated in the prohibition decision as a member of the same group of undertakings and therefore bearing joint and several liability for each other's fine if not paid. In case of the "vertical contact lens cartel" (Case No. Vj-55/2013) the infringer took over the relevant activity from another group company before the infringement. The other group company was involved in the procedure due to its close contractual and operative connections. In the end, it was found that there is no evidence of the other group company's participation in the infringement, nevertheless, it was indicated in the prohibition decision as a member of the group of undertakings that may bear joint and several liability for the unpaid fine. Note that this imputation of liability contradicts to the principle set forth in the final court decision in the "railroad construction cartel" (Case No. Vj-174/2007); where the court clearly required that any other group company can only be indicated in the infringement decision to be jointly and severally liable for the fine with the infringer whose liability is also established for the same infringement. The judicial review of the "vertical contact lens cartel" (Case No. Vj-55/2013) is still underway; i.e. it remains to be seen whether the simplified approach followed by the HCA in imputing joint and several liability for the (unpaid part of the) fine against the group members complies with the Competition Act or not. Nevertheless, in the meantime, this possibility may very well be applied to parent companies. In this case, due to joint and several liability, the parent company may be liable for the entire fine. No separate fine calculation is carried out, the liability of the parent company covers the fine originally imposed on the infringer. It also means that the parent company identified in the prohibition decision may bear liability for the unpaid fine regardless of any further considerations (e.g. special circumstances of the parent company or compliance efforts made by the parent company).

5. Associations of undertakings

The HCA has stated in its decision as a matter of principle that when the HCA scrutinizes an agreement that has been concluded or a concerted practice that has been exercised at a meeting of a trade association, the role of the members and that of the trade association must both always be examined[11]. In the course of such an assessment, the fact that the liability of the members is established does not automatically exclude the potential finding of the liability of the trade association[12].

Pursuant to the decision-making practice of the Hungarian Constitutional Court, liability of the trade association's member undertaking may be established only if the following two conditions are satisfied: (i) the member undertaking has participated in passing the decision infringing competition law and (ii) the member has been identified in the operative part of the HCA's decision on the merits[13].

The following decisions of the HCA are worth mentioning in the area at stake.

A) The HCA imposed a total fine of ca. EUR 9,3 million on eight ready-mix concrete manufacturers, because they divided among them orders of ready-mix concrete by a previously agreed quota and they also fixed the price level of ready-mix concrete, thus engaging in a single, continuous and complex infringement[14]. The HCA imposed a symbolic fine of EUR 3.000 onto the Hungarian Concrete Association, because its role in the uncovered infringement was restricted to administrative tasks related to the cartel. The HCA ruled that such behaviour, as the one exercised by the Federation, may be found to be liable for a single, continuous and complex infringement.

B) The HCA fined the Hungarian Association of Layer Hibrid Breeders and Egg Producers as well as several egg producing member undertakings for cartel activities. The HCA established that the a operated a so-called "price commission", recommended minimum sales prices, called its member undertakings to increase their prices, ran an authorisation system of egg imports, circulated price schedules, and obliged certain member undertakings to offer a certain proportion of their production for export. Furthermore, several companies established a joint venture in which they ran a "price commission" in order to determine sales prices and operated a compensation mechanism in order to maintain those prices agreed upon. As both the association and the member undertakings were involved in the infringement, they were all fined by the HCA.

C) It should also be mentioned that in another case the HCA only established the liability of the trade association and not that of its members despite the fact that some members have been involved in the drafting of the minimum price recommendation[15]. However, in our view, the reason behind the HCA's approach assumingly was that (i) only a few members have been involved in the drafting and that (ii) the infringement consisted not of a consent by and between the members but

[11] See Decision No. Vj-34/2003/73., para 34

[12] Idem.

[13] See Decision No. 359/B/2008 Hungarian Constitutional Court.

[14] See Decision No. -29/2011/522.

[15] See Decision No. Vj-1/2008/77. – in this case, the board of the trade association

rather of a recommendation to be published by the trade association towards its members.

D) In another decision the HCA imposed fines on undertaking rendering taxi services[16]. The taxi companies agreed among others on the prospective winners of tenders issued with regard to taxi transportation and they also coordinated their market prices. The undertakings carried out these cartel activities in the framework of a trade association, however the reason the latter was not fined was because it was not actively involved in the infringement.

In conclusion, it appears from the case-law of the HCA and that of the courts that the liability of the trade association's member is linked to the participation in the infringement and not to the mere fact of membership. Therefore, if it is established that the member undertakings exclusively used the trade association to concert their market behaviour, only the liability of the members may be identified and not that of the trade association. Furthermore, pursuant to the decision-making practice of the HCA the undertaking's membership must exist when the trade association's decision infringing competition law was passed and not during the HCA's competition supervision proceedings[17]. In other words, even if an undertaking is no longer member of the association during the HCA's investigation, this undertaking may still be held liable under the framework of secondary liability.

Under the Competition Act,[18] the amount of the fine imposed on an association of undertakings may not exceed 10% of the net turnover of its member undertakings reached in the business year preceding the passing of the infringement decision. This means that the maximum amount of the fine must reflect the turnover of the members and not that of the trade association.

As for the actual amount of the fine, the Antitrust Fine Notice of the HCA sets forth that in case of an infringement committed by the association in connection with the activities of its members, the starting amount of the fine will be based on the turnover of the members realized on the relevant market.[19] Based on case law, it seems that the relevant turnover of members is interpreted as the relevant turnover of members participating in the passing of the decision infringing competition law.[20]

According to the case-law,[21] the fact that the association's activity is lobbying (i.e. it does not have any profit raising activities) and the (in)ability of the association as infringer to pay the fine, are not aspects that may be taken into account when setting the amount of the fine.

Under the Competition Act, where the association fails to voluntarily pay the fine and the enforcement procedure does not result in the collection of the total amount of the fine, the HCA may, by a separate order, require the members of the association having participated in

[16] See Decision No. Vj-29/2008/412

[17] See Decision No. Vj-8/2012/1751

[18] Article 76 (1b) of the Competition Act

[19] Para 13 of the Antitrust Fine Notice

[20] See Decision No. Vj-8/2012/1751

[21] Metropolitan Court of Appeal 2.Kf.27.129/2009/14. and Supreme Court Kfv.II.37.268/2013/8. (Vj-51/2005)

passing the decision infringing competition law and having been identified as such in the HCA's decision on the merits, to jointly and severally pay the fine.[22]

Consequently, the association's members as identified by the HCA are entitled to challenge the HCA's decision on the merits, i.e. to dispute as to whether or not they participated in the passing of the decision infringing competition law. This is confirmed by the Hungarian Supreme Court's practice as well: the undertakings having secondary liability as members of an association must be involved in the HCA proceedings so that they are able to exercise their right to defense.[23]

In addition to this, separate legal remedy is available against the HCA's order actually ordering the members (identified in the decision on the merits) to pay the fine.[24]

It must be noted that according to the Civil Code if it is likely that the association's assets do not cover the fine imposed by the HCA, the association's managing body must convene the general meeting.[25] At the general meeting, members must take the necessary steps to cover the debts.[26] In order to cover debts (to pay the fine imposed by the HCA), associations may request their members to provide supplementary contributions[27].

In the alternative, if the members cannot decide how to cover debts, the general meeting must decide on the termination of the association. In case of termination, members cannot be held liable for the association's debts (i.e. the HCA fine) pursuant to the Civil Code,[28] but members as identified in the HCA's decision on the merits can certainly be required to pay the fine imposed by the HCA in accordance with the Competition Act.

6. Individual sanctions on CEOs/employees

There are certain sanctions and legal consequences CEOs and other senior employees may face for competition law infringements in Hungary.

First, if certain criteria are met, criminal sanctions may be applicable against individuals engaged in certain types of cartel activity. However, the requirements are strict and only the most serious infringements may be subject to criminal sanctions. (See details in Section 2.1.).

Importantly, liability under criminal law is individual, so only private person(s) who have actually participated in the cartel activity will be held liable regardless of their position within the company (that may have "benefited" from the infringement). Such criminal proceedings are run through the regular criminal system and the relevant authorities include the police, the prosecutor's office and the criminal courts. In practice, the criminal proceedings will likely rely on the findings of the HCA, so the starting point for a criminal investigation is likely to be the HCA's decision. In Hungary, there has been one case so far, where the criminal procedure resulted in a final and binding criminal conviction by the courts: in relation to a

[22] Article 76(6) of the Competition Act

[23] See Supreme Court judgment Kfv.III.37.557/2009. in Case No.Vj-199/2005.

[24] Article 76(7) of the Competition Act

[25] Section 3:81(1) of the Civil Code

[26] Section 3:81(2) of the Civil Code

[27] This is what happened in connection with the so-called BankAdat banking cartel case (see Decision No. Vj-8/2012/1751)

[28] Section 3:65(4) of the Civil Code

public procurement tender for medicine by Budapest hospitals, one private person was convicted to (suspended) imprisonment for manipulating the results of such tender (following a finding of an infringement by the HCA against the companies concerned).

In addition, certain types of procedural breaches concerning administrative proceedings are also criminalized: these are the violent obstruction of administrative proceedings (where a person acts in such an anti-social or violent conduct that is capable to undermine, embarrass, obstruct or prevent the authority's discharge of its duties, see Article 279 of the Criminal Code) and the submission of a willfully misleading complaint to the authorities (Article 271 of the Criminal Code).

Second, employees of a company may also face claims by their employer if they participated in a cartel infringement "on behalf of" the employer. Under the Hungarian Labour Code, employees can be held liable for damages caused by breach of their obligations under the employment relationship. Employees are required to act as reasonably expected during their employment and are liable for any damages caused by their failure to act according to this standard, but the burden of proving that the employee failed to comply with these requirements is on the employer. Under the Hungarian labour rules, CEOs and other senior members of management are liable for the full amount of damage caused to their employer. In contrast, there is a limit to the extent of the liability of other (lower ranking) employees, which is capped at four months' of their salary (unless the damage is caused intentionally or through gross negligence). It could be argued that personal participation in a cartel infringement at least amounts to gross negligence (especially if the given employee was provided with proper competition law training and was under the specific obligation to observe competition law rules under the company's compliance policies). We are, however, not aware of any Hungarian case-law in this respect and it is indeed questionable whether the courts would regard such claims as undermining the effectiveness of competition law sanctions on companies (as this could serve as a way for companies to "pass on" the sanctions imposed on them to their employees). The company's claims against employees can be enforced through labour courts and claims would typically rely on the HCA's decision establishing the employer's liability.

Finally, there are no administrative sanctions available against individuals in Hungary for participating in a cartel infringement. Such a sanction was to be introduced back in 2008 (an exclusion of executive officers of companies that participated in a competition law infringement for two years), however, the Hungarian Constitutional Court found these provisions unconstitutional due to procedural / due process grounds and thus they never entered into force.

7. Employee/director indirect financial liability

As for employee financial liability please see details in Chapter 6. above.

As for managing directors, if their duties are not based on an employment relationship but rather on a "mere" civil law / mandate agreement, then they will be liable for damages under civil law to the company where they act as a managing director for any damages caused by breach of contract . However, under the Hungarian civil law rules. the director causing damage to the undertaking shall be relieved of liability if he/she is able to prove that the damage occurred as a consequence of unforeseen circumstances beyond his/her control, and

there had been no reasonable cause to take action to prevent or mitigate the damage). We are not aware of any Hungarian case-law in this respect but the question as to whether such actions could reduce the effectiveness of fines as competition law sanctions is also applicable here.

Based on our limited experience director insurance policies do not cover this type of liability.

II. Are present sanctions efficient/sufficient?

The following table shows the 5 highest fines imposed in one procedure (involving more individual fines) between 2013 and 2017

Case No	Case	Year of decision	Amount of total fine	Type	Information on appeal procedure
VJ/74/2011	"FX loan repayment"	2013	9 488 200 000 Ft ca 31.6 million Euro	anticompetitive agreement / cartel	The Competition Authority's decision regarding fines was overruled by the supreme court, the new procedure is still ongoing.
VJ/8/2012	„BankAdat" (Hungarian Banking Association and International Training Centre for Bankers Ltd.)	2016	4 015 000 000 Ft ca 13 million EUR	information exchange	court procedure pending (before first instance)
Vj/29/2011	Hungarian Concrete Association and others	2014	2 790 200 000 Ft ca 9.3 million EUR	anticompetitive agreement / cartel	court procedure pending (back to second instance)
Vj/28/2013	Euromedic-Hungaropharma	2015	2 443 207 000 Ft ca 8 million EUR	anticompetitive agreement / cartel	court procedure pending (before first instance)
VJ/23/2011	Axel Springer and others (regional daily newspapers)	2014	2 164 869 000 Ft ca 7.3 million EUR	anticompetitive agreement / cartel	court procedure pending (appeal to supreme court; second instance annulled fines and ordered a new procedure)

The following table shows the 5 highest fines imposed on individual undertakings between 2013 and 2017 [29]

Case No	Case	Undertaking fined	Year of decision	Amount of individual	Type	Information on appeal

[29] NOTE: 1 061 300 000 HUF (ca 3.6 million EUR) was imposed on Auchan in 2015 in Case No Vj/60/2012 but this was not a classic antitrust case but a special one under Hungarian law (court procedure pending: appeal to supreme court; second instance annulled the Competition Authority's decision and ordered a new procedure).

				fine		procedure
VJ/8/2012	„BankAdat" (Hungarian Banking Association and International Training Centre for Bankers Ltd.)	Hungarian Banking Association	2014	4 000 000 000 Ft ca 13 million EUR	information exchange	court procedure pending (before first instance)
VJ/74/2011	"FX loan repayment"	OTP Bank	2013	3 922 400 000 Ft ca. 13.075 million EUR	anticompetitive agreement / cartel	Competition Authority's decision regarding fines was overruled by the supreme court, the new procedure is still ongoing.
VJ/74/2011	"FX loan repayment"	ERSTE BANK HUNGARY	2013	1 725 700 000 Ft ca. 5.752 million EUR	anticompetitive agreement / cartel	
VJ/74/2011	"FX loan repayment"	Kereskedelmi és Hitelbank	2013	983 300 000 Ft ca. 3.278 million EUR	anticompetitive agreement / cartel	
VJ/74/2011	"FX loan repayment"	CIB Bank	2013	835 400 000 Ft ca. 2.785 million EUR	anticompetitive agreement / cartel	

No (administrative, misdemeanour or criminal) fines have been imposed on individuals as the Hungarian legal system does not allow such fines.

There was only one case so far where the court sentenced someone for imprisonment due to the breach of the cartel offense (for 1 year, suspended for 2 years) and also ordered the individual to be disqualified from exercising her profession for three years in relation to the Case No. Vj/28/2013 (Euromedic-Hungaropharma) case.

There are several studies on fine setting in Hungary. The Hungarian Competition Law Research Centre has an ongoing research on fines. However currently there are no actual empirical studies on the effectiveness of fines. The latest study is six years old and we are on the opinion that new research is needed in order to draw conclusions on the effectiveness of fines currently.

The criminal sanction and its goal have a characteristic function in criminal law's terminology. At the beginning retaliation/revenge appeared as a central element, but later reparation, and the restorative justice became more important.

In criminal law, the nowadays conventional/accepted intermediary theory declares the criminal sanction's dual aim as follows. The criminal sanction on the one hand intends to punish the perpetrator, because he/she has committed a crime ('*special prevention*'), on the other hand its other intention is to avoid future crimes by deterring others to do so ('*general prevention*').

According to Article 79 of the Criminal Code, the sanction's main goals are special and general prevention. „*The aim of a punishment is to prevent - in the interest of the protection of society - the perpetrator or any other person from committing an act of crime.*"

But what is actually required from a sanction in order to incentive the people not to commit a crime ('*deterrent effect*')? Prevention in our view has three main means. The first one is the mere fact that if someone commits a crime there is a certain possibility of criminal sanctions. This factor of deterrence should be provided by the legislative branch of the state. The second element of prevention is the inevitability of sanctions, which depends on the executive branch of the state. Easy to realize, the mere possibility of sanctions cannot deter someone to commit a crime, if the authorities responsible for enforcement, are not able to enforce the law properly. As Beccaria[30] wrote in the XVIIIth century, it is not the severity of the sanction that has the power of deterrence, but the inevitability of such sanction. The last mean of prevention is proportionality, which means that the sanctions should be proportional with the committed crime.

To examine the question from a competition law point of view, there could be other circumstances which need to be taken into account. The absence of the enforcement of the criminal sanctions does not necessarily mean the complete absence of deterrent power. It seems likely, that the advantages of committing a cartel related crime, might be higher than the disadvantages of the sanctions concerned (as we saw earlier the number of enforced criminal cases are very low in Hungary). According to this, it seems that the criminalisation of *bid rigging* does not have enough deterrence, partly because the inadequate enforcement practice. It is also weakening prevention, that if a CEO of an undertaking which was party to a cartel is even sentenced by a court, the stigmatisation in accordance with such a crime cannot be compared to other crimes. The result of this is that the given person could easily continue to take part even in the business operations of the same industry, without having have to face any serious prestige loss him/herself.

[30] Cesare Beccaria: On Crimes and Punishments (Italy, 1764)

However, leniency policy could still restrain people from committing cartel related crimes, by creating distrust between parties taking part in the cartel. This solution, based on game theory, helps to enhance the effectiveness of detecting and thus preventing cartels.

Deterrence does not depend solely on national criminal law. Deterrence could be strengthened or weakened by other circumstances too. In Hungary, the Competition Act and the Public Procurement Act should be considered as factors strengthening deterrence. These laws, as opposed to the Criminal Code, contain sanctions against legal entities / undertakings (instead of natural persons), thus there is a possibility to apply disadvantageous legal consequences against legal entity who takes part in the infringement. Just to give an example, Article 62 (1) a) ag) of the Public Procurement Act excludes those natural persons and undertakings from the future public procurement procedures, who has committed cartel related crimes regulated in the Criminal Code.

To summarize the answer to this question, the enhancement of the severity of the sanctions by the legislator, not nearly as retentive, as many people may think. Even lower-grade punishments, which should be more or less proportional with the crime committed, are far more preventive, if the enforcement body of the state is able to execute the laws adequately, and so perpetrators have to take into account the inevitability of the (criminal) consequences. In Hungary, Article 420 of the Criminal Code does not seem to be deterrent enough, in absence of the consequent and strict enforcement. On the other hand, to restrain someone from committing a crime does not depend solely on the criminal rules, since those serve only as last resort (ultima ratio) in the legal system. In our case, the seemingly ineffective enforcement of criminal sanctions does not vanish the deterrent effect completely, thanks to other sectoral regulation such as the Competition Act and the Public Procurement Act. Such regulations use administrative legal sanctions which are capable of deterring the perpetrators from committing antitrust infringements.

Recidivism is indeed a problem in Hungary in connection with competition law enforcement, and it always has been. Without intending to be all inclusive, here are some major cases from recent Hungarian antitrust[31] enforcement, where one or more parties has breached the Competition Act for at least the second time.

i. **Case No. VJ/74/2011 – "FX loan repayment":** The major Hungarian commercial banks coordinated their market practices after the Hungarian government – in order to help consumers indebted in foreign currencies – introduced special legislation to ease the termination for risky mortgages. The HCA "honoured" recidivism by most of the major banks – who were also involved in the MIF cartel (**Case No. VJ/18/2008**) – with 50% higher fines.
ii. **Case No. VJ/29/2011 – "Ready-mix concrete"**: The major Hungarian construction companies were found guilty for market sharing by the HCA

[31] We add. that – as the HCA also has powers in connection with consumer protection cases – the HCA has numerous unfair commercial practices decisions where it takes recidivism into account as an aggravating factor.

in the ready-mix concrete market. In case of Strabag Hungary, the HCA increased the fine by 200% because of previous cartel infringements.

iii. **Case No. VJ/69/2008** – "**Mills":** The HCA fined all the major players on the Hungarian mill market for fixing prices and sharing the markets for flour. Most of the parties however have been fined before by the HCA for a similar conduct (**Case No. VJ/74/2003**). The HCA took recidivism into account as an aggravating factor when setting the fine.

iv. **Case No. VJ/174/2007 – "Railroad construction":** The bid rigging of most of the major construction companies in Hungary in connection with public tenders for railroad construction and maintenance. Szentesi Vasútépítő Kft. (a subsidiary of the Strabag group) was fined for HUF 4 300 000 000 (approx. € 13 000 000) partly because its parent company was involved in previous antitrust violations several times.

As Hungary is a small market and a small economy, the one reason which may cause recidivism is that the managers, CEOs, responsible sales leaders etc. know each other well, and has known each other for a long time. These personal, often very confidant relations may make it easier to coordinate market practices on the Hungarian markets. Another theory – often heard by HCA officials in public speeches – is that recidivism (or the frequent occurrence of antitrust violations) may be in connection with the planned economy of the previous (soviet or socialist) economic and political era. According to that theory, the managers, who were socialized before changing to capitalism in 1990, see coordination as a natural phenomenon, as it was the common way to conduct business in Hungary in the socialist era.

Be as it may, the HCA also highlighted recidivism as one of the major driving force to introduce its new Antitrust Fine Notice. The HCA stated[32] that recidivism is one of the reasons the HCA intends to set higher fines in the future for antitrust infringements.

According to para 44 of the Antitrust Fine Notice the HCA applies more severe sanctions (fines) in case of recidivism. Recidivism occurs when the same undertaking conducts the same or "similar" infringement after the HCA, the European Commission or any other European NCA established an infringement based on Article 11 or 21 of the Competition Act or Article 101 or 102 TFEU. Para 45 of the Antitrust Fine Notice uses "similarity" in a way, that a conduct is similar to the previous conduct, if it also infringes Article 11 / TFEU 101 or Article 21 / TFEU 102. In other words, an infringement is similar to the previous one if it is also counts as an anticompetitive agreement or an abuse of a dominant position. However, the Antitrust Fine Notice clearly states, that no further resemblance is necessary to establish recidivism (for e.g. a by effect information exchange infringement may count as recidivism if the same undertaking has been found "guilty" in a bid rigging case previously).

Recidivism also occurs, according to para 46 of the Antitrust Fine Notice, when the previous infringement was committed by the legal predecessor of the current infringing company. It

[32] http://www.gvh.hu/gvh/elemzesek/vitaanyagok/nyilv_konz_antitroszt_fogyasztos/a_birsagkozlemeny_fobb_valtozasai_es_hatteruk.html?query=ism%C3%A9tl%C5%91d%C3%A9s (only Hungarian text is available)

also counts as recidivism, when the previous infringer of competition rules are in the same group of undertakings as the current undertaking under investigation. Foreign undertaking's previous infringements of Article 101/102 TFEU, which belong to the same group as the infringing undertaking under scrutiny, may only be assessed as recidivism if such previously infringing foreign companies directly or indirectly control the latter undertaking.

The HCA limits the time period in ten years, when taking into account previous infringements as recidivism. Infringement decisions older than ten years do not constitute recidivism. It is important to note, that the HCA specifically states in para 48 of the Antitrust Fine Notice, that it may also consider infringements, where the appeal courts did not reach a final decision on the case yet, when establishing recidivism in a later case.

According to p para 49 of the Antitrust Fine Notice, the HCA, in order to prevent future anti-competitive infringements, takes recidivism into account as a serious aggravating factor when determining the fine. For this reason, the amount of the fine calculated according to the Antitrust Fine Notice is increased each and every time by a maximum of 100%. This means, if the same undertaking takes part in the same infringement for the third time, the fine could be three times higher than it would be in the absence of recidivism. The HCA assesses the degree of the similarity of the current and the previous conduct(s) when deciding on the elevation of the fine in accordance with recidivism. The less time elapsed between two infringements, the more the HCA is willing to increase the fines.

There are two situations, when authorities may impose sanctions on individuals, in connection with a competition law infringement. One is, when the HCA imposes procedural fines on individuals taking part in the administrative proceeding in front of it. The other case is the criminal law case against individuals taking part in a bid rigging cartel.

According to Article 61 of the Competition Act, a procedural fine may be imposed on anyone, who is obliged to perform any actions in the competition supervision proceeding in front of the HCA. This includes not just undertakings, as only such undertakings may be subject to the administrative procedure of the HCA, but individuals (witnesses, attorneys etc.) as well.

According to Article 61 (6) c) of the Competition Act, the HCA takes recidivism as an aggravating factor when setting the procedural fine on any individual. Only procedural fines imposed during the same competition supervision proceedings may be taken into account.

In Hungarian criminal law, in respect of habitual and repeat offenders (recidivist) the maximum penalty applicable to another criminal offense committed shall increase by half in the case of imprisonment, however, it may not exceed twenty-five years. The punishment of habitual and repeat offenders may be reduced only in cases deserving special consideration.[33]

The Criminal Code defines recidivist in Article 459 (1) 31) a) – b). According to these provisions, 'recidivist' shall mean the perpetrator of a crime of intent, if such person was previously sentenced to an executable term of imprisonment for a crime committed intentionally, and three years have not yet passed since the last day of serving the term of imprisonment or the day when it ceases to be enforceable until the commission of another criminal act. Habitual recidivist shall mean any recidivist who commits on both occasions the same crime or a crime similar in nature. Repeat offender shall mean a person who has been sentenced to an executable term of imprisonment as a recidivist prior to the commission of a

[33] Article 89 of the Criminal Code

crime of intent, and three years have not yet passed since the last day of serving the term of imprisonment or the day when it ceases to be enforceable until the commission of another criminal act punishable by imprisonment.

Taking into consideration the above provisions of the Criminal Code, any person who commits the felony of bid rigging cartel (Article 420 of the Criminal Code) as a recidivist, or as a habitual recidivist may sentenced to be imprisoned for 1.5 – 7.5 years (instead of the original punishment of 1 – 5 years in prison).

III. The way forward

The current issues and trends in Hungary can be summarised as follows:

- the precise deterrent effect of fines is rather difficult to measure, nevertheless it can generally be stated that the fines imposed by the HCA are a widely known sanction in the Hungarian business community that is applicable to antitrust infringements. The HCA is also generally known to be a vigorous enforcer of competition laws, who does not shy away from imposing rather significant fines in cases,

- other sanctions of illegal competition conduct (such as private damages, nullity, criminal sanctions etc.), however, are generally less widely known. This may be due to various factors, including the scarcity of damages actions in Hungary or the fact that there has only been one criminal conviction under the cartel offense so far (which was also not widely publicised in the business or general press)

- there is also a general strengthening of compliance efforts in Hungary, most lead by subsidiaries of multinational corporations but also followed by a growing number of local / medium sized enterprises as well: the sanctions for the breach of antitrust law are invariably emphasised in such compliance programs,

- there are currently no sanctions on individuals for the infringement of competition law in Hungary (with the exception of the cartel offense for public procurement cases in the Criminal Code). It is possible therefore to envisage a regime, which would also target individuals, however, great care would have to be exercised in order to devise an effective system that also complies with the test of constitutionality. As a result, the lawmaker would need to balance the need to impose a punishment that can act as a real deterrent (i.e. which can be imposed immediately as a result of a competition proceedings by the HCA), but where the individual's constitutional right to defense and right to remedy / access to courts are duly respected. The system would also have to ensure that there are no loopholes for individuals to "sneak back in" a controlling role after a sanction is imposed. In this respect, the experience from criminal law and criminal sanctions (e.g. in relation to professional disqualification) would need to be taken into account.