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SANCTIONS IN ANTITRUST CASES

Contribution by Hungary

-- Session IV --

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SANCTIONS IN ANTITRUST CASES

-- Hungary --

1. Determination of the basic fine

1. The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) has the right to determine and impose fines in antitrust cases. The decision of the GVH can be challenged before the court, which may overrule the decision or change the amount of the fine. The **Hungarian Competition Act** (Act LVII of 1996 on the Prohibition of unfair and restrictive market practices – Competition Act) provides the legal basis for the GVH to impose fines. In addition, the GVH also applies its **Fining Notice**[1] when determining the amount of the fine. The Fining Notice entered into force on 1 February 2012, and the last time it was amended was on 2 November 2015.

2. Besides the administrative procedure carried out by the GVH, agreements restricting competition in public procurement and concession procedures are qualified as crimes in the Criminal Code. The criminal courts apply the Criminal Code[2] and may impose a jail term, criminal fine, community service, or a combination of these sanctions.

Type of sanction	Institution imposing the sanction	Legal basis
Administrative (pecuniary)	GVH (Hungarian Competition Authority)	Competition Act Fining Notice of the GVH
Criminal	Criminal courts	Criminal Code

3. When setting the amount of the fine, "the GVH considers it important that any fine that is imposed is proportional to the infringing practice. To this end, a fine that is imposed on an undertaking pursuant to the Notice[3] is commensurate with the gravity of the infringement in question and the mitigating and aggravating circumstances and not with the fines imposed on other undertakings possibly involved in the infringement". In addition, it has to convey a clear deterrent message. The decision has to make it

1 According to Art. 36(6) of the Competition Act, the President of the GVH together with the Chair of the Competition Council are empowered to issue notices which describe the basic principles of the law enforcement practice of the GVH. These notices have no binding force; their sole function is to provide substance to the provisions of the law that are applied by the GVH. Notice No 1/2012 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the method of setting fines in case of market practices infringing Articles 11 and 21 of Act LVII of 1996 on the Prohibition of Unfair Restrictive Practices, and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

The Fining Notice is available in English under the link:
http://www.gvh.hu/en//data/cms1034901/Kozlemenyek_1_2012_antitroszt_birsag_kozlemeny_egyseges_szoveg_a_20160928.pdf

2 Art. 420 of the Act C of 2012 on the Criminal Code.

3 Fining Notice.

absolutely clear that participation, organisation or maintenance of a cartel is in no way beneficial for the undertakings involved.

> *"The maximum amount of the fine set out in the Competition Act represents the upper limit of the fine. Consequently, the legal maximum is neither a starting point, nor it is a reference point when considering the* ***proportionality*** *of the fine – the fine is not to be imposed in relation to the legal maximum but is to be imposed taking into account its proportionality."*[4]

4. The Administrative Proceedings Act[5] provides the possibility for the GVH to authorise that the fine is paid in instalments. Consequently, as the Fining Notice provides: *"In lack of exceptional and special economic circumstances resulting in fine reduction, there may be grounds to grant that the payment is made in instalments having regard to the difficult justifiable economic situation of the undertaking(s). Authorisation for payment in instalments can be obtained if payment of the amount of the fine in a lump sum would result – having regard to the current paying possibilities of the undertaking(s) – in an extremely* ***disproportionate*** *burden being placed on the undertaking(s) concerned"*[6].

5. Pursuant to the Fining Notice, the GVH determines the amount of the fine in several steps: The first step is to define the basic amount of the fine which is based on the value of the sales of goods or services to which the infringement relates (taking also into account this way the duration of the infringement). In bid rigging cases – as an exception from the general rule – the amount of the relevant turnover is three times the value of the tender (which is typically equal to the value of the winning bid). If there is a lack of credible data, the relevant turnover of the undertaking is estimated by the GVH. The method of the estimation has to be explained in the decision of the GVH.

6. Several factors are taken into account in order to determine the basic amount, which may reach a maximum of 10% of the value of the sales of goods or services to which the infringement relates. This 10% (100 points) threshold will be reached if all the factors evaluated in the assessment are valued at the maximum. These factors are: the gravity of the infringement (threat to competition, impact of the infringement on the market; having each a value of 30 out of the 100 points) and the undertaking's attitude to the infringement (imputability, role in the infringement, active reparation and cooperation, having together a value of 40 points). The basic amount is the sum of the scores received, which is first divided by 1000 and then multiplied by the amount of the relevant turnover. (e.g. 55 points is 5.5 % of the relevant turnover).

Aspect		Points (maximum)	Percentage of the relevant turnover
Gravity of the infringement	Threat to competition	30	3%
	Impact of the infringement on the market	30	3%
Undertaking's attitude to the infringement		40	4%
Total		100	10%

7. In assessing the "threat to competition" of the anti-competitive conduct or agreement in question, the degree to which the conduct or agreement lessens competition, or whether competition has been completely eliminated, is taken into consideration. In the framework of assessing the threat to competition,

4 Art. 41a of the Fining Notice.

5 Art. 74(1) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

6 Art. 46-47 of the Fining Notice.

the GVH assesses whether all of the relevant aspects of competition in the given case (e.g. competition relating to price, quality, or innovation) are affected by the conduct under investigation.

8. The "impact of the anti-competitive behaviour on the market" is closely connected to the position of the undertaking on the market and depends on its market share, and in case of practices falling under Article 11 or 21 of the Competition Act or Article 101 or 102 of the TFEU, on the joint market shares of the undertakings concerned. The bigger the market share, the more severe the sanction imposed by the GVH will be. It seems more like a correction factor, but this aspect is taken into account in the course of calculating the basic amount, focusing on the gravity of the infringement and on the impact of the infringement on the market. As a result of this, it is not regarded as an adjustment of the basic amount and as an aggravating factor.

9. When assessing the "undertaking's attitude to the infringement", factors such as whether it has taken the leading role in the offence, whether it has refused to cooperate with the investigation and whether it has obstructed the investigation are analysed.

10. In the case of restrictive agreements, the GVH places special emphasis on the evaluation of the role of the undertaking in the infringement. If the undertaking is found to have taken on a leading role, this may result in an increase in the amount of the fine. Participants in the agreements, especially in the case of hard-core cartels, often play different roles; they may be organisers or leaders in the agreement, actively contributing with their conduct to the operation and maintenance of the agreements. On the other hand, other undertakings may be in a vulnerable position and participate in, or remain in, the restrictive arrangements due to the threats of the leader(s) to take retaliatory measures.

11. A refusal to co-operate hinders the work of the GVH and causes difficulties during the proceeding and in such cases the Competition Council has the power to increase the fine.

12. As in the case of a refusal to co-operate, in cases of obstruction the GVH may increase the amount of the fine. However, in comparison to a refusal to co-operate, an obstruction of an investigation results in an even bigger increase in the fine as in this case the undertaking has the direct intention of impeding the proceeding of the GVH. Nevertheless, in case of obstruction it is more likely that procedural fines will be imposed.

13. Admission might be accepted as a mitigating factor if in parallel the undertaking takes steps to repair the negative effects of its infringements.

14. When calculating the actual points to be given, both the aggravating and the mitigating circumstances are taken into account. As regards to possible "mitigating" circumstances, the following are taken into account: the immediate termination of the infringement, the state action defence and the effective cooperation of the undertaking with the authority during the procedure. In the case of an immediate termination of the infringement, the GVH recompenses the quick cooperation of the undertaking and reduces the fine. Lower fines can be imposed if the state had, for example by improper regulation, influenced the company to commit an infringement. The Competition Act provides that, in setting the amount of the fine, the "effective cooperation" of the respondent "during the proceedings" is to be taken into consideration as a factor supporting the reduction of the fine. In the case of a restrictive agreement, the GVH takes into account the role of the undertaking in the infringement, although it is not strictly considered as a mitigating factor. In the case of a minor role in the offence the GVH does not further increase the fine (it simply means that the behaviour was not aggravated due to the undertaking playing an active role in the cartel).

2. Adjustments of the basic fine

15. The next step after calculating the basic amount of the fine is the adjustment of the basic amount, taking into account the following factors:

- whether the infringement constitutes a repeated infringement,
- the gains derived from the infringement,
- the deterrent effect of the fine to be imposed,
- the legal maximum amount of the fine,
- the application of the result of the leniency policy or the negotiated settlement, and
- the financial difficulties faced by the undertaking.

16. The first three factors qualify as aggravating circumstances. As regards to recidivism, the GVH imposes more severe sanctions on repeated infringements. In particular, it will consider practices to be repeated infringements where the object or effect of the conduct is essentially identical to that of a previous unlawful conduct even if the existing facts of the case are different from those previously existing. An example of such a repeated infringement may be a situation in which a dominant undertaking attempts to restrict competition by preventing entry to its market, and to this end first it engages in restrictive tying, then in discriminative business practices with the same object or effect. The GVH will also consider infringements committed by undertakings, other than those previously committing the same infringement, which are members of the same group of undertakings identified in the decision, to be repeated infringements. Repeated infringements may result in (depending on the number of repetitions) a significant increase in, and even a doubling of, the amount of the fine.

17. Gains derived from the infringement can rarely be quantified with a sufficient degree of reliance. However, where this is possible, the fine imposed by the GVH is increased to three times the quantified gain, except if it would have exceeded that amount in the first place.

18. The GVH places a special emphasis on the deterrent effect of the fines it imposes; to this end, the basic amount of the fine – established in line with the principles laid down by the "Fining Notice" – can be increased in relation to those undertakings which have a particularly significant turnover above the relevant turnover, with the result that the fine imposed on the basis of the relevant turnover would not place a significant burden on their shoulders. When issuing its decision, the GVH may also take into consideration how much financial power the concerned undertaking has as a member of a group of undertakings.

19. The legal maximum amount of the fine is 10% of the net turnover of the undertaking concerned in the preceding business year, i.e. the maximum amount of the fine shall not exceed 10% of the net turnover of the undertaking, achieved in the business year preceding that in which the decision establishing the infringement is reached.

20. Further steps of the calculation are the application of the leniency policy and the negotiated settlement (if at all) and the decision on the applicability of fine reduction or payment in instalments.

21. Leniency and settlement are taken into account as correction factors. The Competition Act contains the leniency policy of the GVH supplemented by the "Explanatory notes on the applicability of the leniency policy" issued by the President of the GVH and the Chair of the Competition Council of the GVH in order to give practical guidance about the applicability of the statutory norms[7].

22. In the case of leniency the fine may be reduced in the case of undertakings which due to their active collaboration, contribute substantially to the detection of the cartel and the finding of an infringement. The degree of reduction reflects the contribution of the party to the detection of the infringement, in terms of content and timing. Full leniency is awarded to the first undertaking that provides the GVH with relevant information about the alleged infringing practice and which fully cooperates with the GVH throughout the whole competition supervision proceedings.

23. Except in the case of the full leniency, the level of the reduction in the amount of the fine will be, as compared to the fine set in accordance with the GVH's Fining Notice, as follows. For the:

1. first undertaking (which provides the GVH with evidence which represents clearly added value with respect to the evidence already in the GVH's possession) a reduction of 30-50%;

2. second undertaking which meets the above mentioned requirement: a reduction of 20-30%;

3. subsequent undertakings: a reduction of up to 20%.

24. As regards settlement, according to the Competition Act and the Fining Notice, the amount of the fine to be imposed under the fine calculation may be reduced by ten per cent, with respect to an undertaking that has made a settlement submission.

25. If the undertaking makes use of both leniency and settlement, the fine reduction obtained via settlement is added to the fine reduction gained through leniency. Concerning the financial difficulties faced by the fined undertaking, payment by instalments may be possible (for more detail see above in Section 1).

3. Compliance and parental liability

26. The competition authorities of different jurisdictions take differing views as to whether an undertaking's well-prepared compliance programme is taken into account as a mitigating factor, or in the case of an undertaking operating a programme which is found to be a sham or false, whether it is taken into account as an aggravating factor. The GVH launched a comprehensive compliance communication in 2012 in order to effectively secure the compliance of undertakings, disseminate competition law compliance and promote a culture of competition. In order to facilitate the above-mentioned aims, the GVH cooperates with several professional organisations and associations representing different business interests and elaborated a website about competition law compliance (http://gvh.hu/en/compliance/compliance_main). The Hungarian approach is rather neutral both on the GVH and on the court level. It appears in several decisions that a failed programme should not result in a reduction in the amount of the fine, as compliance

[7] See http://www.gvh.hu/en/for_professional_users/leniency_policy/5863_en_explanatory_notes_of_the_president_of_the_hungarian_competition_authority_on_the_application_of_the_rules_concerning_leniency_pursuant_to_articles_78a_and_78b_of_the_pura_2009.html

with the law and the enforcement of this compliance is the duty of the undertakings under investigation under the applicable law, regardless of any compliance programmes operated by the undertakings[8].

27. Concerning the parental liability issue it should be emphasised that if the parent company has not taken part in the infringement, then no direct fine will be imposed on it and generally the parent company will not be involved in the procedure. The parent company is only involved to the extent that its net sale revenue can be taken into account when defining the maximum level of the fine which can be imposed on the group of undertakings if its secondary liability can be established according to the Hungarian Competition Act, which says *"where the association of undertakings fails to voluntarily pay the fine and the enforcement procedure does not result in the collection of the total amount of the fine, the competition council proceeding in the case shall by a separate injunction oblige those members of the association of undertakings which participated in reaching the infringing decision and which have been identified as such in the decision, jointly and severally to pay the fine".*[9]

28. However, it is to be noted that pursuant to the Competition Act joint and several liability does not apply to leniency applicants. This relevant Section[10] of the Competition Act confers the right on the immunity applicant to refuse to provide compensation for any damage caused by the applicant insofar as it may be collected from the other infringer(s) which has/have not received lenient treatment. It must be added that by the implementation of the Damages Directive 2014/104/EU into the Hungarian Law this rule will be changed.

4. Judicial issues concerning the sanctions imposed by the GVH

29. The decision of the GVH can be challenged before the court, which may overrule the decision or change the amount of the fine.

30. If a party (undertaking found to have infringed antitrust regulation) challenges the resolution of the Competition Council, such challenge –if it does not include a request for suspension – shall not have an automatic suspensory effect on the sanction.

31. Suspension is only provided if the party who expressly requests it files a (1) reasoned, (2) justified claim before the competent court, which claim (3) must contain all relevant evidence justifying why the suspension should be granted. According to the practice of the competent courts, suspension is deemed to be an exceptional benefit for the undertaking on which the sanction is imposed and it is also clear from the practice that while deciding upon the request for suspension the court weighs the public interest related to the enforcement of the sanction and the private interest of the party who claims the suspension based on its individual business interests. The Civil Procedure Code provides guidance on the assessment of such claims, while the practical experiences of courts are summed up in the 'Integrative Administrative Decision No 2/2006 of the Curia'. The Competition Act and the Civil Procedure Code[11] prescribe that judicial review of the resolutions issued by the Competition Council may be requested before

8 Vj/29/2011., Betonpartner, Paragraph 539, reserved by the court: Metropolitan Administrative and Labour Court of Budapest: 2.K.34.125/2014/69.

9 Art. 78 (6) of the Competition Act.

10 Art. 88/D of the Competition Act ruling that "... Any lawsuit initiated to enforce the liability of the person causing the damage to whom immunity from fines has been granted shall be suspended until the administrative lawsuit for the review of the decision of the Hungarian Competition Authority establishing an infringement is closed with a final, non-appealable effect."

11 Act III of 1952 on the Civil Procedure

the competent court(s)[12]. There is also a possibility of filing for so-called "constitutional review" before the Constitutional Court.

32. The number of court decisions made in review procedures altering the amount of the fine imposed by the GVH is very low. Such decisions occur very rarely, in only 1 or 2 judgments per year – usually the main reason for the courts altering the fine is that they decide differently either on the period of the conduct in relation to one or more undertakings or regarding the scope of the agreement or concerted practice (different range of products, or different type of restriction of competition – e.g. instead of price fixing and market sharing they only find price fixing applicable). To summarise, when courts alter the amount of the fine, they usually do this because they find that certain parts of the decision were not correct regarding the assessment of the evidence or because they do not consider that the conduct in question has infringed the law. There is very little precedent that the court would change the amount of the fine without finding at least part of the GVH's decision unsubstantiated (e.g. by finding different time-frame for the violation, narrower market definition, etc.) simply substituting its own calculation of the fine for that of the Authority's.

33. As regards the effectiveness of the collection of the fines imposed, the GVH provides the following figures: between 2005 and 2015 the GVH failed to collect 37% of the fines it had imposed. If a company fails to pay the fine imposed on it within a set deadline, the GVH initiates fine recovery proceedings. It is important to note that the fine imposed by the GVH is considered to be a claim enforced as taxes and is consequently executed by the National Tax Authority. The National Tax Authority expects fine recovery proceedings to be initiated in a timely manner. In its report the Court of Auditors emphasised that the effective recovery of fines is a public interest.

34. One of the main reasons for such a high percentage of unclaimed fines is that approximately 5-6 percent of the undertakings involved in competition proceedings are foreign based companies (Germany, Austria, Slovakia and Seychelles), with the number of cross border cartel cases growing in the enforcement practice of the GVH. Consequently, it is very difficult to recover the fines imposed on them, since 50 percent of the undertakings concerned do not voluntarily pay the fines.

35. While it is a rare occurrence that private enforcement is preferred over public enforcement, this seems to be the case in relation to the execution of the competition law related decisions aimed at recovering fines. This may be due to the fact that the recognition and enforcement of judgments in civil and commercial matters are regulated in the Brussels I Regulation; however there is no European legislation on the recognition and enforcement of administrative resolutions. In Case C-102/15 Gazdasági Versenyhivatal versus Siemens Aktiengesellschaft Österreich[13] the Court of Justice of the European Union ruled that the competition authority is not entitled to bring a private action to enforce its claims in connection with a fine imposed in connection with a competition law infringement. Therefore recovering a fine imposed in competition law proceedings and related claims do not fall within 'civil and commercial matters' within the meaning of Article 1 of the Brussels I Regulation. Thus the GVH faces a severe problem because there is no legal background for requesting assistance for the recovery of fines and related claims, when an undertaking based in a different member state (like in cross border cartels) refuses to voluntarily pay the fine.

12 1st instance is the Metropolitan Administrative and Labour Court of Budapest, 2nd instance is the Metropolitan Court of Budapest, while extraordinary judicial review in an even more narrow scope is also available before the highest court, the Curia.

13 ECLI:EU:C:2016:607.

36. A further reason for the high percentage of unclaimed fines is that companies are sometimes unable to pay the fines imposed on them due to their economic situations.

37. In the past 3 years the GVH secured the imposition of fines by adopting interim measures prior to its final decisions in 9 instances.

38. The GVH adopts interim measures during its investigation if any of the following factors occur:

- the undertaking cannot be found at its seat, the GVH cannot contact the party;
- detrimental change of ownership (e.g. unknown foreign or offshore owner);
- reduction/lowering equity;
- on-going restructuring procedures (liquidation, winding-up procedures) during the GVH's proceedings.

39. The GVH initiates liquidation proceedings at the Court if the execution of the fine was ineffective and an economic activity is actively being pursued, with the result that is there a chance of recovering the fine. In 2015 and 2016 there were 29 ongoing cases in which the GVH initiated liquidation proceedings.

5. Leniency, the GVH's approach

40. According to the GVH's practice, the operation of a leniency programme is only one method among many that is used by the GVH in its fight against cartels. Ex officio detection is equally important: the GVH has introduced the so called "Cartel Chat", which is an internet-based system that enables persons (individuals and undertakings) who/which have information about secret cartels to share their knowledge about a potential infringement with the employees of the Cartel Detection Section of the GVH by a simple, anonymous registration, in full anonymity and without fear of negative consequences.

41. Concerning the correlation between higher fines, illegal gains and the infringing undertakings' willingness to submit a leniency application, the following facts can be established. Overreliance on the leniency policy in cartel enforcement can be dangerous because it may lower the threat of detection since the competition authority tends to devote its capacity to solely handling leniency applications and leniency application based cartels. It is a worldwide phenomenon that many competition agencies consider that leniency applications currently cover old and dying or declining cartels rather than sophisticated or profitable ones. Therefore it must be noted that-even higher fines do not encourage companies to apply for leniency. The number of leniency applications received by the GVH over the years has been very low – only 2-4 each year – which is significantly lower than the number of applications in countries in Western Europe. Blowing the whistle in a cartel case may result in the termination of many business relationships for the undertaking providing information. Fear of exclusion from the business community might therefore prevent companies from denouncing cartels, and unfortunately this cannot be offset by the benefits of granting leniency.

6. Alternative sanctioning "tools"

42. The GVH can only impose administrative fines.

43. Applying the provisions of the Criminal Code[14], the criminal courts may impose a jail term, criminal fine, community service, or a combination of these sanctions. Since 2005 agreements restricting competition in public procurement and concession procedures have been qualified as crimes in the Criminal Code. A term of imprisonment of up to five years can be imposed[15] by the **criminal court**. In the last few years there have been at least 3 cases where the Prosecutor has filed charges against individuals in bid rigging cases. It should be noted that the GVH is obliged to report public procurement cartel cases to the Hungarian Police. According to the GVH's knowledge there are two such ongoing cases, but no final jail sentence has been imposed so far. It must also be mentioned that the Hungarian Police also has the competence to initiate a public procurement procedure according to the Criminal Code, however, it is not required to inform the GVH if it chooses to do so.

44. As a consequence of committing the above-mentioned infringement, according to a Public Procurement Act[16] provision, a bidder can be excluded by the Public Procurement Authority if two conditions are met. Firstly, if the bidder has infringed Article 11 of the Hungarian Competition Act (or the equivalent provision of the European Union competition law) in a bidding process and this has been established by a definitive and executable decision of the GVH (i.e. a decision which has either been accepted by the parties, or challenged, but approved by the court(s)). Secondly, the court or the GVH has imposed a fine on the particular firm.[17]

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14 Act C of 2012 on the Criminal Code

15 Art 420 (1) of Act C of 2012 on 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 a felony punishable by imprisonment of between one to five years."*

16 Act CXLIII of 2015 on Public Procurement

17 Art. 62 (1) of the Public Procurement Act says *"any economic operator may be excluded from participation in a contract as a tenderer, candidate tenderer, subcontractor, or from the attestation of competence:* ***n)*** *where the economic operator has been found guilty and sanctioned within the previous three years of a legal offence committed in a public award procedure by a final and executable decision of the competition authority under Section 11 of the Competition Act or under Article 101 of the TFEU, or by a final and executable court ruling passed in conclusion of the judicial review of the said decision of the competition authority; or if the tenderer has been condemned, and fined, for a similar offence by another competition authority or court within the previous three years"*

But also see Subsection **(5a)** Paragraph n) of Subsection (1) *shall not apply in the procurement procedure if the Government adopted an individual decision on a recommendation by the minister in charge of public contracts made upon the contracting authority's request to grant exemption in order to ensure an adequate level of competition. The contracting authority may request the exemption exclusively before the commencement of the award procedure, if the grounds for exclusion under Paragraph n) of Subsection (1) apply to the majority of the economic operators of the market to which the award procedure pertains, excluding those economic operators that may not be excluded from the procurement procedure based on the self-clarification provided for in Section 64. In the call for competition the contracting authority shall indicate that the grounds for exclusion under Paragraph n) of Subsection (1) are not applied in the procurement procedure relying on the Government decision."*

45. If in the actual case it is detected by the contracting authority that the bidder has committed the infringement under Art. 11 of the Competition Act or under Art 101 of the TFEU, it must also be excluded from the procedure. The exclusion is not compulsory and is merely an option that is available to public procurement agencies and which can be used by them depending on their considerations. However, if the bidder has received full immunity from the GVH, it is exempted from this disqualification.[18]

46. Individuals can also be concerned by the disqualification in case of committing the infringement regulated by the Art. 420 of the Criminal Code, as it is regulated by the Public Procurement Act[19].

47. As regards the use of a disqualification order as a sanctioning tool by the GVH, it does not exist in our competition regime and there is no plan for its introduction. In June 2008 draft legislation was discussed and passed by the Hungarian Parliament. However, before the Act entered into force the President of Hungary – who promulgates all bills – vetoed the act by sending it to the Hungarian Constitutional Court which found the Act to be contrary to the Hungarian Constitution. The President raised the concern that CEOs' right to a fair procedure and public trial would have been violated and the presumption of innocence would have been breached if, according to the amendment, CEOs would have to prove that they were not involved in making the illegal decision, or that they opposed it. Consequently, the Act was declared unconstitutional and disqualification as a sanction was not introduced into the Hungarian Competition Act.

48. With regard to the public procurement sanctions (the exclusion of the cartel member from the tender procedure) the possibility of self-cleaning[20] has to be mentioned which is an instrument for the undertakings which might undermine the effectiveness of the exclusion sanction. Pursuant to the Public Procurement Act the potential tenderer may not be excluded from a public procurement procedure if, according to the final ruling of the Procurement Authority, the tenderer can sufficiently demonstrate its reliability despite the existence of the relevant ground [cartel infringement] for exclusion.

49. Concerning the cooperation between the Hungarian Police and the GVH, it must be mentioned that in those cartel cases where there are ongoing parallel criminal cases, the GVH may obtain several pieces of direct evidence from the police. However the admissibility of such evidence – which is often collected in the course of secret data surveillance – has not been clarified in our proceedings; consequently, the use of such evidence is more risky than beneficial. A future court judgment on this issue would shed light on the usefulness of such evidence.

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18 Art. 62 (1) o.) of the Public Procurement Act *if the contracting authority is able to prove that the economic operator has committed the infringement under Section 11 of the Competition Act or under Article 101 of the TFEU, except if the economic operator admits to the Competition Authority commission of the infringement under Section 11 of the Competition Act or under Article 101 of the TFEU before submitting the tender, or the final tender in competitive procedures with negotiation and in competitive dialogues, and the Competition Authority verified the conditions provided for in Subsection (2) of Section 78/A of the Competition Act for exemption from the fine in its ruling adopted according to Subsection (2) of Section 78/C of the Competition Act.*"

19 Art. 62 (2) *Furthermore, an economic operator may be excluded from participation in a contract as a tenderer, candidate tenderer, subcontractor, or from the attestation of competence: a) if any executive officer or supervisory board member, or director of the economic operator, or the sole member in the case of a business association, or a member of management or supervisory body, or any person vested with decision-making powers under national law in a position similar to those aforementioned* where such person was found guilty of either of the criminal offenses defined in *Art (1) a) by final court verdict in the past five years, and has not been exonerated from the detrimental consequences of having a criminal record".*

20 Art. 64 of the Public Procurement Act.

50. While no sanctions may be imposed on specific individuals for their participation in an infringement, a procedural fine may be imposed in the case of an obstruction of the procedure. The Competition Act provides the possibility that *"a fine may be imposed on those who engage in an act or express a conduct which has the object or result of protracting the proceeding or preventing the establishment of the facts of the case"*[21].

51. A recently introduced new special provision of the Competition Act aimed at ensuring greater compliance of small and medium sized enterprises provides that when an SME commits an infringement for the first time – with the exception of some certain more severe infringements – it is possible to only give a warning instead of imposing a fine. The amendment explicitly lists those serious infringements that cannot be terminated by a warning.

52. The private enforcement of competition law in Hungary is provided for by both Regulation 1/2003/EC and the Competition Act. The implementation of the provisions of the Damages Directive is also in its final stage. The Competition Act will be amended to transpose the provisions of the Damages Directive into the Hungarian system. While private enforcement exists in our jurisdiction, there is little case law and experience on it in Hungary.

[21] See also in Section 1 of the contribution, listed among the factors contained by the "*the undertakings attitude to the infringement"*.