

**Pál SZILÁGYI, Ph.D., Competition Law Research Centre (Pázmány Péter Catholic University)**

Phone: +36-20-366-6290; E-mail: pal.szilagyi@versenyjog.com

**Some aspects of liability in Hungarian competition law enforcement**

**Abstract:** After a short introduction on the role of the GVH, the first part of the article deals with the liability of public officers at the Hungarian competition authority, the Gazdasági Versenyhivatal (GVH), for omission of turning to the law enforcement institutions in case there is a suspicion that the offence of consumer deception or bid rigging was committed. The second part of the article deals with institutional and state liability for the non-application of EU competition rules after a recent amendment of the Hungarian laws on agricultural interest representation. The third part will deal with the social liability of the GVH for the promotion of competition culture in Hungary.

**Key words:** competition law, Hungary, human rights, competition culture

## **1. Introduction**

In this article I will discuss several aspects of liability in Hungarian competition law enforcement. The article is based on my presentation of early 2013 in Poland.<sup>1</sup> The topics are loosely connected by the idea of liability based on law or social expectations. We will elaborate both personal, institutional and state liability.

After a short introduction on the role of the GVH, the first part of the article deals with the liability of public officers at the Hungarian competition authority, the Gazdasági Versenyhivatal (GVH), for omission of turning to the law enforcement institutions in case there is a suspicion that the offence of consumer deception or bid rigging was committed. The second part of the article deals with institutional and state liability for the non-application of EU competition rules after a recent amendment of the Hungarian laws on agricultural interest

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<sup>1</sup> P. Szilágyi, Some aspects of liability of the officers of the Gazdasági Versenyhivatal (International Scientific Conference "Liability of Public Officers"). (Paweł Włodkowiec University College in Płock, Płock, 2013). This article was published in the framework of TÁMOP No. 4.2.1.B-11/2/KMR-2011-0002. project (furthering scientific research at the PPKE) of the Pázmány Péter Catholic University.

representation. The third part will deal with the social liability of the GVH for the promotion of competition culture in Hungary.

## **2. The role of the GVH**

The responsibilities of the GVH are twofold: it has to safeguard competition and it has to promote competition.

Safeguarding competition means basically the enforcement of the competition rules entrusted to it. The GVH is entrusted to enforce the Hungarian Competition Act (HCA)<sup>2</sup>, the Trade Act<sup>3</sup>, the Unfair Commercial Practices Act (UCPA)<sup>4</sup>, the Business Advertising Act<sup>5</sup>, some other sectoral acts and some of EU competition rules<sup>6</sup>.

The role of the GVH regarding promotion of competition is that it acts as *amicus curiae* in court proceedings<sup>7</sup>, consults and advises the different institutions of the state and it also promotes the benefits of competition to citizens<sup>8</sup>.

In order to carry out its activities the GVH was entrusted with very strong powers as an administrative body, both regarding investigation and regarding the available remedies. For example the GVH may request information and compel undertakings to provide information, can carry out dawn raids, take witness statements, can use protected witnesses and informants.

## **3. Offences in Hungarian competition law**

The Hungarian Criminal Code<sup>9</sup> prohibits two offences which are related to competition law. Article 296/A prohibits consumer deception, while Article 296/B prohibits anticompetitive bid

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<sup>2</sup> Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (HCA).

<sup>3</sup> Act CLXIV of 2005 on Trade.

<sup>4</sup> Act XLVII of 2008 on unfair commercial practices to consumers.

<sup>5</sup> Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising Activity.

<sup>6</sup> Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

<sup>7</sup> HCA Article 88/B.

<sup>8</sup> See later in this article.

<sup>9</sup> Act IV of 1978 on the Criminal Code.

rigging<sup>10</sup>. The UCPA also contains articles prohibiting on consumer deception.<sup>11</sup> While the Criminal Code is enforced by criminal law enforcement (public prosecutors and police), the UCPA is partly enforced by the GVH.<sup>12</sup>

In 2011<sup>13</sup> the GVH had 71 decisions on unfair commercial practices, but received altogether 1694 complaints. Out of 1694 it investigated 553 and initiated 71 proceedings. It is easy to see based on these statistics that one of the most frequent competition law infringements in Hungary is consumer deception. This is straightforward when we look at the enforcement activity of the GVH, but as we will see not so much when we look at the court register.

According to Article 171 paragraph (2) of the Criminal Procedural Code<sup>14</sup>, any official has to report an offence to the public prosecutors or the other law enforcement authorities if there is a well-founded suspicion of a crime. The obligation to report is a *lex imperfecta* in case of public officials, since there are no sanctions if a public official doesn't comply with the provisions of the Criminal Procedural Code.

According to the public register of the Hungarian courts<sup>15</sup>, up to date no cases were brought in the last few years based on Article 296/A of the Criminal Code. This is very surprising, since the GVH adopted more than 500 decisions in the last few years and between 2007 and 2011 it imposed fines of around 5,2 billion HUF (around 18 million EUR). Many undertakings which are fined by the GVH are repeat offenders and the misleading of consumers is carried out knowingly by many of them.

The lack of any judgement by the courts may have several reasons, but one of them might be that there is no reporting by the GVH to law enforcement. There is no information in the public

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<sup>10</sup> We will only deal with consumer deception, since bid rigging cases are much more clear-cut cases and usually the GVH informs law enforcement of such activities. For bid-rigging cases see T. Tóth and Á. Hargita, "God Forbid Bid-Riggers: Developments under the Hungarian Competition Act" (2005) *World Comp.* 205. For the assessment of the offence on bid-rigging see: B. Csépai and Á. Ujvári, "A versenyt korlátozó megállapodás közbeszerzési és koncessziós eljárásban való büntethetőségének kérdésköre" (2006) *Jogtudományi Közlöny* 221.

<sup>11</sup> See articles 3., 6 and 7 of Act XLVII of 2008 on unfair commercial practices to consumers.

<sup>12</sup> An other institution enforcing the same provisions for individual consumer harm is the National Consumer Protection Authority.

<sup>13</sup> The last official statistics are available only for 2011 in the Report to the Parliament on the activities of the GVH – 2011.

<sup>14</sup> Act XIX of 1998 on Criminal Procedure.

<sup>15</sup> Available here: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>.

domain that reporting is carried out frequently by the GVH, or that there was any reporting recently at all. Even though there is no legal liability in case there is an omission to report a case to the criminal law enforcement, the social responsibility is great. The deterrent effect of criminal law is much higher than that of competition law and therefore the enforcement of the laws in force would increase consumer welfare.

#### **4. Protection of human rights in competition supervision proceedings**

Since the beginning of the 21<sup>st</sup> century fines in competition law became ever higher. Recently in the TV and computer monitor tubes case the European Commission imposed a fine of almost 1,5 billion EUR. The same trend is true for fines imposed by the Hungarian competition authority, although in recent years there was a backdrop in the number of cartel cases.

In the recent Menarini judgement<sup>16</sup> of the European Court of Human Rights (ECtHR) the court basically categorized competition law enforcement as a quasi-criminal proceeding according to the European Convention on Human Rights (ECHR). Ever since the judgement there is a wide-ranging debate how to deal with the consequences of such a decision.<sup>17</sup> The European Court of Justice and the General Court both started to adapt and recently they carry out more thorough reviews in recent cases.

Taking into account the Menarini judgement, it is most likely that Hungarian competition law is also a quasi-criminal procedure in the light of the ECHR. The consequence of the fact that a procedure is quasi-criminal according to the ECHR is that either the authority which investigates a competition case has to safeguard the protection provided by the ECHR (e.g. requirements on fair trial) and the first body which reviews the decision of an administrative authority has to be a full review court, or the first body deciding on the case shall be a court within the meaning of the Convention. If this is not the case, the decision might be annulled as a consequence.

The GVH in Hungary is a typical administrative body. Even though the procedure of the authority is very special, it is nevertheless primarily based on the Act on administrative

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<sup>16</sup> AFFAIRE A. MENARINI DIAGNOSTICS S.R.L. c. ITALIE, (Requête no 43509/08), 27 September 2011.

<sup>17</sup> See e.g. N. Petit: *The Future of the Court of Justice in EU Competition Law - New Role and Responsibilities*. (2012) <http://ssrn.com/abstract=2060831>. or M. Bronckers and A. Vallery, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini" (2012) *European Competition Journal* 283.

procedures<sup>18</sup>. Court review is also carried out accordingly and the general rules of the Code of Civil Procedure<sup>19</sup> on the review of administrative decisions.<sup>20</sup> The rules applicable are that of a typical administrative review procedure, so the Code of Civil Procedure in Article 339/B states that: “An administrative decision rendered on a discretionary basis shall be construed lawful if the administrative body has appropriately ascertained the relevant facts of the case, complied with the relevant rules of procedure, the points of discretion can be identified, and the justification of the decision demonstrates causal relations as to the weighing of evidence.”

It is quite clear that the courts do not carry out full review as understood according to the ECHR, at least according to the rules in the relevant acts. Neither is the GVH a court according to the ECHR. A court must be at the minimum independent from all other state organs and the GVH it is not an independent body, even though the Competition Council within the GVH is often called a quasi-court due to the independence in decision making.<sup>21</sup> Nevertheless the conditions required by the ECtHR in order to treat a body as a court are not met in the case of the GVH.

Currently there is not solution to the problems discussed above, but in line with the developments at EU level, I suppose we will see amendments of the enforcement system and court practice in Hungary too.

## **5. The Watermelon incident<sup>22</sup>**

In July 2012 the Hungarian Ministry of Rural Development summoned the larger retailers (Aldi, Auchan, TESCO, Spar, etc.) and got them to agree that they would not charge less than 99 Hungarian forints for a kilogram of watermelon. After the agreement was concluded—with the support of the Ministry—the Ministry went public and announced that this common understanding was a “fair deal for producers and consumers.” This was instantly followed by great media attention and the State Secretary for Parliamentary Affairs of Rural Development even consulted the GVH. After a month the GVH initiated a formal investigation against the undertakings involved, but not against the Ministry.

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<sup>18</sup> Act CXL of 2004 on the General Rules of Administrative Proceedings and Services

<sup>19</sup> Act III of 1952 on the Code of Civil Procedure.

<sup>20</sup> Ibid. Chapter XX.

<sup>21</sup> The Competition Council is part of the GVH and is the decision making body within the GVH.

<sup>22</sup> Some of the paragraphs below are cited from my article: P. Szilágyi, "Hungarian Competition Law & Policy: The Watermelon Omen" (2012) Competition Policy International - Antitrust Chronicle 2.

What followed seemed to be on the right track, since there was an official investigation and the supposed cartel agreement was busted instantly, thanks to the media attention and probably also due to the intervention of the authority.

However, on October 8, 2012 an MP of the governing party handed in a bill which included the following: The Act excludes the application of Article 11 of the Hungarian competition act (prohibition of anticompetitive agreements) to all agreements concerning agricultural products if the restriction of competition due to the agreement does not exceed an economically justified and legitimate income. The Minister for Rural Development will determine whether these conditions apply, and the outcome of the consideration is binding on the national competition authority. Finally, the draft also includes that the GVH shall not adopt fines for any infringements of Article 11 of the Hungarian competition act or Article 101 of the Treaty on the Functioning of the European Union (“TFEU”), if the infringement concerns agricultural products.

Apart from the obvious problems with the bill, one very interesting issue is that one of the official justifications of the bill stated that if all the members of a market are involved in an agreement, than that group cannot be classified as a traditional cartel, since none of the undertakings have an economic advantage due to the agreement and the agreement affects only undertakings or consumers on different levels of the vertical chain.

One would have thought that the bill would be squashed by the Committee for Agriculture at the Parliament, but the Committee supported the bill and accepted only one amendment, namely that the exclusion of the application of competition rules shall only be possible if Article 101 TFEU is not applicable. One should note that the provision that fines cannot be imposed for infringements of Article 101 TFEU was still in the bill.

It is really difficult to see how one could have an agreement in the sector where most of the undertakings are involved (cf. official explanation of the bill) but Article 101 TFEU is not applicable. That is, however, the smallest problem with the bill. After the support of the Committee of Agriculture, the bill was adopted by the plenary session for adoption. I have to note that the European Commission faces the same problem, since the European Parliament wants to exclude to a large extent the application of Article 101 for the agricultural sector.

Actually, I do not think it is necessary to comment further on the content of the bill. It was obviously wrong and mistaken. The act which was finally adopted is worded as follows:

Article 18/A. § (1) Regarding an agricultural product a violation of Article 11 of the Competition Act cannot be established if the distortion, restriction or prevention of competition resulting from an agreement according to Article 11 of the Competition Act does not exceed the limit necessary for an economically justified, appreciable income and the competitors on the relevant market concerned by the agreement are not prevented from obtaining such income.

(2) The fulfilment of the conditions of exemption provided for in paragraph (1) are defined by the Secretary of State.

(3) During the inspection of an infringement based on Article 11 of the Competition Act, in case a violation concerns an agricultural product, the Gazdasági Versenyhivatal must obtain the resolution of the Secretary of State according to paragraph (2) and it must act accordingly. The Secretary of State must deliver the resolution within 60 days of receipt of the request by the Gazdasági Versenyhivatal. The Gazdasági Versenyhivatal suspends the procedure for this period.

(4) The acting Competition Council suspends the imposition of fines in case of an agreement according to Article 11 of the Competition Act or an agreement or concerted practice between competitors according to Article 101 TFEU if those have been committed regarding agricultural products. In this case the acting Competition Council sets a time limit for the parties involved in the agreement or concerted practice to reconcile their behaviour with the provisions of the acts. After the deadline elapsed unsuccessfully the acting competition council imposes a fine.

This amendment can have wide ranging effects to the enforcement of competition law in Hungary, going well beyond the agricultural sector. By adopting this amendment the Hungarian legislator basically allowed cartels in the agricultural sector. Although Articles 101 and 102 TFEU are directed at undertakings, the European Court of Justice has held several times that the Member States are not allowed to undermine or endanger the effectiveness of EU policies (principle of sincere cooperation). This duty of sincere cooperation is currently also incorporated in Article 4 (3) TEU: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the

Union's objectives.” Regarding competition policy this principle was confirmed in several cases.<sup>23</sup>

It is easy to see how the aims of EU competition policy are undermined if the GVH does not impose sanctions for infringements of Article 101 TFEU in the agricultural sector. This case might be an easy one for the European Commission for an infringement procedure.<sup>24</sup> On a theoretical basis I think the approach of the state to exempt a certain sector from the prohibition of cartel agreements and thereby directly harm consumers is a very dangerous approach and it not only harms consumer welfare, but also undermines the belief that in general a competitive market will provide better results as compared to a cartelised or regulated market.

## **6. Promoting competition culture**

The GVH is entrusted by law to promote competition culture. The HCA states the followings. In Article 36 (1) point f) it provides that the President of the Hungarian Competition Authority “directs the activities of the Hungarian Competition Authority, the objective of which is to develop competition culture and the culture of informed decision-making by consumers in order to promote public awareness of competition, compliance with the law and the creation of a competitive regulatory environment ensuring informed decision making by consumers, furthermore, to improve the consciousness of consumers. In the scope of his duties, he is responsible, in particular, for

fa) the improvement of public awareness of competition policy, the decision-making by consumers and its protection, as well as

fb) the contribution of the Hungarian Competition Authority to the development of competition-related legal and economic activities of public interest.”

Paragraph (7) states that “the President of the Hungarian Competition Authority may vest, by the decision on foundation, separate legal personality in the unit of the Hungarian Competition Authority created for the purposes of the development of competition culture in Hungary and

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<sup>23</sup> See K. Lenaerts, P. V. Nuffel, R. Bray, N. Cambien and K. C. I. o. t. E. U. Lenaerts, *European Union law*, 3rd ed. / editors Robert Bray, Nathan Cambien. (London: Sweet & Maxwell, 2011) 359 – 360 and cases cited therein.

<sup>24</sup> One has to note that victims of the cartel can still claim damages for the infringement of Article 101 TFEU, which would lead to the strange situation that the GVH cannot impose a fine on those who participate in such a cartel, but the victims might sue for damages.



the European Community and of the promotion of the development of the institutional system of competition law enforcement in the region.”

The organisation set up by the GVH is the Competition Culture Centre which finances several projects each year in order to promote the culture of competition.

However, as I described elsewhere<sup>25</sup> currently the public opinion is favouring protectionist measures. The adoption of the amendment detailed in the previous chapter was applauded by many. Basically all measures which are protecting the Hungarian market are welcomed by the public. At the Competition Law Research Centre in Hungary we carried out a research<sup>26</sup> to measure the approach of citizens to competition. One of the results was that when asked whether the state should provide protection against import in order to protect Hungarian products, the majority of respondents (over 85 %) was clearly in favour of such a solution. The HCA also conducts a survey every 2-3 years.<sup>27</sup> The last survey which surveyed consumers was carried out in 2010. The result was that the consumers are more in favour of state regulation than in favour of competition, although the majority of consumers thought that a balanced approach is the one which shall prevail. One of the most surprising results of the survey in 2012 is that the directors of the undertakings were on the opinion that the aim of the HCA is to protect the Hungarian economy from foreign undertakings. 47 % of the respondents thought this is the case. 56 % thought that the HCA is protecting the undertakings from competitors and 45 % thought that the aim is to support small- and medium sized enterprises.<sup>28</sup> The results are somewhat similar if we look at respondents from interest representation organisations.<sup>29</sup> One notable difference is that 66 % percent of respondents were on the opinion that the aim of the HCA is to protect an undertaking from the competitors.

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<sup>25</sup> P. Szilágyi, "Hungarian Competition Law & Policy: The Watermelon Omen" (2012) Competition Policy International - Antitrust Chronicle 2.

<sup>26</sup> The Hungarian Scientific Research Fund financed the research on 'The role and appreciation of competition in Hungary' (HSRF nr.: 78683). This research investigated in theory and empirically and how competition as an institution is accepted.

<sup>27</sup> The results of the surveys are available here:  
[http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=54&m5\\_doc=6365&m90\\_act=21](http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=54&m5_doc=6365&m90_act=21).

<sup>28</sup> The results of the survey are available here:  
<http://www.gvh.hu/domain2/files/modules/module25/222379D4185EAD11C.pdf>.

<sup>29</sup> The results of this survey are available here:  
<http://www.gvh.hu/domain2/files/modules/module25/2223913549A78376E.pdf>.

One can state that currently the values of competition are very much undervalued and sometimes not understood. In theory the consumers are aware that competition is beneficial, but if we look at empirical evidence, we can state that a large part of consumers and undertakings either do not understand the aims of competition regulation or is not in favour of competition. The paradox result of this is that consumers are often welcoming and supporting national cartels (e.g. Watermelon cartel) and that consumers often think that competition is bad and shall be limited by the state in order to protect Hungarian undertakings and the national economy. In order to overcome many of the misunderstandings the GVH has great responsibility. The authority is equipped with several tools and the Competition Culture Centre is well suited to carry out information campaigns. But of course this is only one part of the story, the GVH shall be very active to influence or consult the government during the drafting of bills and shall try to intervene in every case by showing how a particular regulation might harm Hungarian consumers.

## **7. Conclusions**

In this article I have showed some areas of Hungarian competition regulation where there is either an individual liability of the public officers or there is an institutional or state liability. Most probably many of these problems will be solved in the next few years either due to the intervention of external actors (e.g. the European Commission) or by the realisation of the inappropriateness of the current regulation. The most difficult task most probably is the promotion of the idea of competition among consumers.