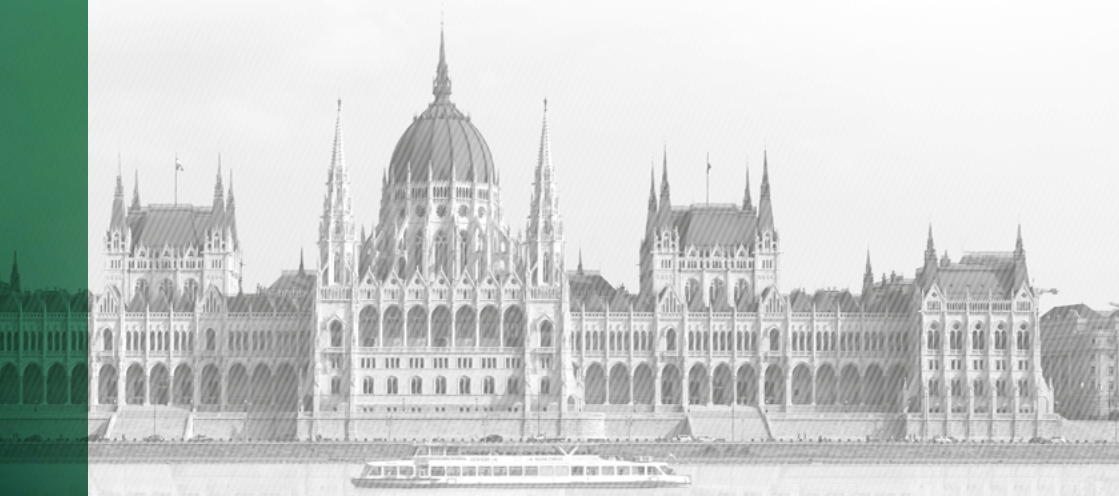
HUNGARIAN COMPETITION AUTHORITY

TWENTY YEARS OF EU COMPETITION LAW IN HUNGARY

EDITED BY MARTIN MILÁN CSIRSZKI



COMPETITION MIRROR

EDITED BY ANDRÁS TÓTH

TWENTY YEARS OF EU COMPETITION LAW IN HUNGARY

Edited by
Martin Milán Csirszki

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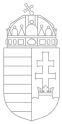

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Foreword

Not so long ago, I attended a panel discussion that revolved around the development of cartel law in Hungary. The panel consisted of renowned Hungarian competition law practitioners and scholars as well. First of the many questions that arised during the discussion was the level of development of Hungarian cartel law in regional comparison. The answers by panelists, of whom some contributed also to this book, were clearly in line with one another. Hungarian competition law, in particular cartel law, performs well compared to other countries in the region. Of course, one could also say that – out of politeness – no other response would have been realistic to such a question at the headquarters of the Hungarian Competition Authority. For those who may have had doubts about the sincerity of the answers, I hope that reading this book will dispel their scepticism.

More than three decades have passed since Hungary became a market economy as a result of the regime change. Furthermore, 2024 marks the 20th anniversary of our accession to the European Union. These are not long periods in the life of a country, but they have been enough that on a dynamic development trajectory the Hungarian professional community of lawyers and economists could raise competition law, as the foundation of a market economy, to a level that we can be proud of. Obviously, being part of the European Union for 20 years, whose original objective was economic integration, played an important role in advancing this legal area. However, in certain aspects, this also holds true in reverse. Hungarian competition enforcement has also been able to add to the fine-tuning of EU competition law.

Csongor István Nagy

Hungarian competition law's contribution to the European discourse on private enforcement

1. Introduction

The private enforcement of EU competition law has a two-decade long history. Agreements on restraint of trade have been pronounced invalid from the outset[1], and actions for damages have always been a theoretical possibility. Nonetheless, concentrated regulatory endeavors to make private enforcement a reality started in the early 2000s. The process was launched by the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules.[2] This was followed by the White Paper of the same title.[3] These generated a very vivid scholarly discourse about the hurdles to private enforcement and the available regulatory means to facilitate actions for damages, and resulted in a growing number of CJEU rulings addressing various aspects of EU competition law's private enforcement.[4] This

1 Article 101(2) TFEU.

2 Green Paper - Damages actions for breach of the EC antitrust rules [2005] COM(2005) 672 final, 19.12.2005.

3 White paper on damages actions for breach of the EC antitrust rules [2008] COM(2008) 165 final, 02.04.2008.

4 Judgment of 20 September 2001, Courage and Crehan, C-453/99, ECLI:EU:C:2001:465; Judgment of 13 July 2006, Manfredi, Joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461; Judgment of 14 June 2011, Pfleiderer, C-360/09, ECLI:EU:C:2011:389; Judgment of 6 November 2012, Otis and Others, C-199/11, ECLI:EU:C:2012:684; Judgment of 6 June 2013, Donau Chemie and Others, C-536/11, ECLI:EU:C:2013:366; Judgment of 5 June 2014, Kone and Others, C-557/12, ECLI:EU:C:2014:1317; Judgment of 28 March 2019, Cogeco Communications, C-637/17, ECLI:EU:C:2019:263.

process culminated in the adoption of the Private Enforcement Directive,[5] which established a detailed European framework. This, of course, does not mark the end of the movement for private enforcement. Although there is a growing number of civil actions concerning competition violations, it seems that private enforcement has still not passed beyond the era when it produced more scholarly publications than court judgments.[6]

This chapter provides an account of the peculiar regulatory concepts and ideas which Hungarian law has developed in the course of the above process, and which contributed to the European discourse on private enforcement. Section 2 presents Hungarian law's presumption of 10 % price increase in cartel matters, which is a unique legal means to facilitate the proof of cartel damages. Section 3 presents how the Hungarian Competition Authority (HCA) has effectively used commitment procedures to further private enforcement. Section 4 presents Hungarian competition law's unique rules on collective redress, which authorize the HCA to launch an opt-out collective procedure to claim a civil remedy.

2. Presumption of a 10% price increase

Article 17(2) of the Private Enforcement Directive, which was transposed into Section 88/D(4) of the Hungarian Competition Act[7] (CA), establishes a rebuttable presumption as to the existence of harm: until the contrary is proved, it has to be presumed that the violation caused harm, provided the claimant proves that the competition violation was a cartel infringement. This presumption is limited to the fact of inquiry (loss) and does not extend to quantum. The CA goes beyond this and, as an idiosyncratic rule on cartel damages, it establishes a presumption that cartels (hori-

5 Directive 2014/104/EU 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 [2014] OJ L 349, 05.12.2014, p. 1–19. For a comprehensive overview of the Directive's national implementation see Nagy Csongor István: Hungary, in Barry Rodger - Miguel Sousa Ferro - Francisco Marcos (eds.): The EU Antitrust Damages Directive: Transposition in the Member States, Oxford University Press, 2018.

6 Nagy Csongor István: What Role for Private Enforcement in EU Competition Law? A Religion in Quest of Founder, in Tóth Tihamér (ed.): The Cambridge Handbook of Competition Law Sanctions, Cambridge University Press, 2022., 218.

7 Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (in Hungarian: "1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról").

zontal naked restrictions) result in a 10% price increase.[8] This rule of the CA predated the Private Enforcement Directive by years[9] and, at the time of adoption, was a pioneer solution in Europe. Since then, it has been followed, for instance, by Romanian law, which, in the implementing national legislation of the Private Enforcement Directive, established a 20% presumption of price increase as to cartels.[10]

According to Section 88/G(6) of the CA,[11]

In the event of a competition law infringement caused by a cartel, it shall be assumed, unless proved otherwise, that the competition law infringement had a ten percent effect on the price applied by the infringer.

The term "cartel" is defined in Section 12 as meaning horizontal hardcore restrictions:

[…] agreements or concerted practices of competitors which have as their object the prevention, restriction or distortion of competition (…) [by] the direct or indirect fixing of purchase or selling prices or other business terms and conditions, the limitation of production or distribution, the allocation of markets including bid-rigging and the restriction of imports or exports.

Accordingly, in any civil action against a member of a horizontal naked price-fixing, market-sharing or quota cartel falling foul of Section 11 of the CA or Article 101 TFEU, it is to be presumed, albeit in a rebuttable manner, that the infringement raised the prices by 10%.

The 10% rule is a useful tool for private enforcement, though it does not address all the challenges of proof concerning competition harm. First, it applies only to restrictive agreements. There is no presumption concerning damages caused by abuses of dominant position. Second, even as to restrictive agreements, its scope of application

8 On Hungarian law's 10% rule see Nagy Csongor István: Kártérítési felelősség kartelljogsértések esetén: gondolatok a Tpvt. új szabályai kapcsán, Magyar Jog, 2009., 56(9), 513-520.; Nagy Csongor István: Schadensersatzklagen im Falle kartellrechtlicher Rechtsverletzungen in Ungarn: neue Schadensersatzvorschriften des ungarischen Kartellgesetzes, Wirtschaft und Wettbewerb, 2010., 60(9), 902.; Nagy Csongor István: New Hungarian rules on damages in competition matters, European Competition Law Review, 2011., 32(2), 63.

9 Act XIV of 2009 on the CA.

10 Ordonanța de urgență nr. 170/2020 privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în materie de concurență, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996, Section 16(2) („Se prezumă că încălcările sub forma unor carteluri provoacă prejudicii constând în creșterea prețului produselor sau serviciilor vizate de cartel cu 20%. Autorul încălcării poate răsturna o astfel de prezumție.").

11 This provision was initially located in Section 88/C of the CA, which provided as follows: "[…] in the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article 101 TFEU, when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent."

is restricted to cartels (horizontal naked price-fixing, market sharing and output limitation, and their functional equivalents) as the most harmful violations.[12] Other restrictive agreements are not covered. According to the decisional practice of the HCA, cartels are "naked" restrictions, whose purpose is to directly fix prices, share markets or limit output. Ancillary restrictions, which may indirectly result in the fixing of prices, the limitation of output or the sharing of market, constitute no cartel.[13] Third, the 10 % presumption applies merely to overcharge matters. It does not apply where the loss is not or not entirely triggered by a price increase; for instance, where a potential competitor suffers damages because of market foreclosure.

It has to be stressed that the above rule embeds no presumption of loss but a presumption of price increase. Given the passing-on defense, the price increase cannot generally be equated with the loss the victims suffer. In the case of a sale to a final consumer, such as public procurement, the price increase may usually equal the quantum of damages. Nonetheless, if the purchaser uses the product as an input, it may be able to pass the price increase partially or fully on to its customers. The input-side cartel may entail a price increase on the output-side market and the purchaser may be able to partially or fully recoup the loss caused by the higher prices it paid through the higher prices it charges.

Although the 10% rule has been regularly applied,[14] its practical impact has remained somewhat underwhelming and has not appreciably increased the number of actions for damages. The judicial practice identified no specific cause that could explain this, and it seems that this can be traced back to various issues. First, it seems that the quantification of the loss is one of the central questions but not the central question of actions for damages. Second, based on the rules in force before the Private Enforcement Directive, Hungarian courts developed a relatively restrictive approach to the limitation period. This generally afforded the injured persons one year after the adoption of the HCA decision to launch an action for damages.[15] This meant that the injured person was expected to launch the action for damages years before the judicial review of the administrative decision concluded. This may have excluded numerous cases from substantive consideration. Third, the 10% presumption may lose most of

12 Initially, the 10 % presumption did not apply to buyer cartels (purchase price fixing). See the original statutory text quoted in footnote 9.

13 See Case Vj-195-11/2001, paragraph 26.

14 See Cases Gf.30046/2023/11 (High Court of Appeal of Szeged), paragraph 96.; Gf.30149/2022/21 (High Court of Appeal of Szeged), paragraph 11.; Gf.30031/2023/13 (High Court of Appeal of Debrecen), paragraph 36.; Gfv.30246/2023/11 (Hungarian Supreme Court), paragraphs 75-76., appealed from Gf.I.30.030/2023/13 (High Court of Appeal of Debrecen) and 4.G.40.125/2022/24/I (Regional Court of Nyíregyháza).

15 Cases Gfv.VII.30.521/2018/8 (Supreme Court); 20.Gf.40.302/2019/5-I (High Court of Appeals of Budapest); 20.Gf.40.050/2020/36-II (High Court of Appeals of Budapest).

its merits if an expert is appointed for the quantification of the harm.[16] In this case, it is up to the court-appointed expert to determine if the cartel caused a loss and how much that loss was. Although the presumption still has a role in case of uncertainty, for procedural reasons, the assessment of the expert determines the outcome. This may sideline the 10% rule.

3. Use of Commitments as Surrogates for Private Enforcement

The HCA's enforcement policy stands out in Europe by systematically using commitment decisions to further private enforcement and secure a civil remedy for the victims of competition law violations.[17]

Section 75 of the CA authorizes the HCA to accept commitments from undertakings to address the identified competition concerns.[18] Section 75(1) of the CA provides that if the party, in respect of the conduct investigated in the competition proceedings, offers commitments to bring his conduct, in a specified manner, in conformity with the applicable provisions of the law and the public interest can be effectively safeguarded in this manner, the HCA may, in a decision, make these commitments binding, without establishing the occurrence or lack of a violation of the law.[19]

> *Where, regarding a conduct investigated in a competition supervision proceeding initiated pursuant to Article 67(2), the party offers commitments to bring its conduct in a specified way in line with the applicable legal provisions and if the efficient protection of the public interest can be ensured in this manner, the competition council proceeding in the case may, in its decision, oblige the party to abide by such commitments without establishing the existence or the absence of an infringement in such decision. If the party has in the meantime ceased the conduct investigated, a commitment may*

16 Cases Gf.30046/2023/11 (High Court of Appeal of Szeged), paragraph 97.; Gf.30149/2022/21 (High Court of Appeal of Szeged), paragraph 112.

17 Nagy Csongor István: Competition Law in Hungary, Kluwer Law International, Hága, 2016., 117-124.

18 This is a functional equivalent of Article 9 of Regulation 1/2003. The currently effective provision of Section 75 was inserted in the CA in 2005 by Act LXVIII of 2005. However, the original text of Section 75 already contained a similar possibility, entitled "suspension of the proceeding". According to the original provision, the proceeding could be suspended if the conduct at stake endangered the freedom and fairness of competition only to a minor extent and the defendant assured that it would refrain from the pursuance of the conduct and take the appropriate measures to prevent the emergence of damages, provided there was such a peril.

19 As to the Hungarian decisional practice on commitments see Nagy Csongor István: Kötelezettségvállalások a GVH gyakorlatában, Gazdaság és Jog, 2011., 19(10), 3.; Nagy Csongor István: Commitments as Surrogates of Civil Redress in Competition Law: The Hungarian Perspective, European Competition Law Review, 2012., 33(11), 531.; Marosi Zoltán - Barnabás Gergely: The Issue of Consumer Compensation Before Antitrust Authorities: Commitments, Cooperation and Competence: The Hungarian Experience, World Competition, 2024., 47(1), 125.

be undertaken to comply with transparent and verifiable rules of conduct which assure that such conduct is not repeated.

Although Section 75(1) of the CA contains no statutory exclusion, there are certain matters where the acceptance of commitments is ruled out due to the nature of the violation. The HCA's decisional practice is consistent in rejecting commitments in matters involving clear violations of competition rules. This principle was confirmed, among others, in Case *Vj-118/2007/21 UniCredit*[20] and in Case *Vj-137/2008/33 Allianz*. If it is obvious that the conduct at stake falls foul of competition law, the HCA will not accept commitments, but it will carry the case through and impose an appropriate penalty. It seems that the exclusion is not based on the size and weight of the detrimental consequences but on the salience of the violation. It would impair the authority of competition law if clear, bad faith and malicious infringements were left without an adequate penalty.[21]

As a corollary, hard-core violations, such as cartels, cannot benefit from commitments. In Case *Vj-18/2008 MIF*, where the HCA condemned Hungarian banks for fixing the domestic multilateral interchange fee and treating, in this regard, the two card companies alike, the HCA made it clear that the restrictive conduct was of such a nature that it was not to be penalized with prospective future commitments but with the declaration of illegality and an appropriate sanction.[22]

This approach is also reflected in the HCA's Notice on Commitments.[23]

12. The GVH does not consider cases to be suitable for commitment stipulated in point 7. a) of this Notice in which the conduct under investigation is considered to be the most serious and most harmful from the point of view of competition law. This includes the conduct under investigation which may constitute an infringement under Article 13(3) [currently Article 12] of the Competition Act – cartel or any other agreement or concerted practice aimed directly or indirectly at fixing purchase or selling prices (…) – except of concerted practices which are novel, in particular if these are committed by small and medium-sized enterprises (SMEs). Namely, in cases falling within the scope of Article 13(3) [currently Article 12] of the Competition Act, a leniency application may be submitted.

Outside of the scope of the above exclusion, the HCA has developed a unique

20 The HCO held that the posterior remedy did not ensure the effective safeguarding of public interest, because the conduct the defendant sought to remedy violated a clear and obvious legal requirement, which was set out in the HCO's decisional practice and confirmed by the courts.

21 Nagy Csongor István: Kötelezettségvállalások a GVH gyakorlatában, Gazdaság és Jog, 2011., 19(10), 3-4.

22 Paragraph 228.

23 Notice No 1/2018 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on commitments pursuant to Article 75 of the Hungarian Competition Act (consolidated version with amendments made by Notice No 1/2021).

decisional practice on the basis of Section 75 of the CA, often using this regulatory tool as a surrogate for private enforcement. In numerous cases it accepted commitments that aimed at providing a civil law remedy or a similar restitutive effect.[24] These commitments remedied the detrimental consequences of competition violations from a civil law perspective and, as far as technically possible, provided compensation for the victims (occasionally, if the individual harms could not be identified properly, in the form of "fluid recovery" or "cy pres"[25]). It is to be noted that the HCA's remit also extends to unfair commercial practices[26] and most commitment decisions have been adopted in this field.

One set of offerings that an undertaking may make to avoid liability is restitutive commitments, i.e. commitments to restore the initial status in a broader sense. According to the HCA's Notice on Commitments, the offered advantage

> *may take the form of, for example: (…) the commitment compensates the harm suffered by consumers and business partners in connection with the conduct subject to the proceeding, as well as the posterior compensation of the competitive disadvantage. In this case, the commitment shall actually be suitable for remedying individual damages available to consumers and business partners without costly and time-consuming procedures (e.g. refund, provision of the right of withdrawal or other benefits).*

The clearest case of restitution is refunding. This occurred, for instance, in Case *Vj-10/2009 Megasztár*[27], in Case *Vj-16/2008 K&H Bank* and in Case *Vj-16/2017 OTP*. In Case *Vj-41/2006/60 OTP*, the competition procedure was instituted because the defendant (a bank) abused its dominant position by increasing pre-redemption fees. The bank refunded the difference to those customers who redeemed their debts in full or in part at the applicable pre-redemption fees, the legality of which was questionable under competition law.

In certain cases, the initial status was restored and the detriment, in essence, lifted by granting the consumers the right of unilateral cancellation or termination. This happened in Case *Vj-118/2007/20 UniCredit*, where the bank was investigated for not

24 On commitment decisions see Bassola Bálint - Kékuti Ákos - Marosi Zoltán: Versenyjogi vádalku? – A kötelezettségvállalás intézménye kritikus szemmel, Magyar Jog, 2011., 58(12), 722.

25 "Fluid recovery" is used in US class action matters where the provision of individual recovery for all class members is impossible or unfeasible, e.g. class members cannot be identified. In such cases the court may order that the recovery awarded shall be devoted to the "next best use". See e.g. State of California v Levi Strauss & Co., 41 Cal.3d 460 (1986); Six Mexican Workers v Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990). As to "cy pres", see Albert A. Foer: Cy pres as a remedy in private antitrust litigation, in Albert A. Foer - Randy M. Stutz (eds.): Private Enforcement of Antitrust Law in the United States, Edward Elgar Publishing, 2012., 349-364.

26 This is based on the Hungarian legislation (Act XLVII of 2008) implementing the Unfair Commercial Practices Directive. The HCO has "the power to proceed against infringements of the prohibition of unfair commercial practices where the commercial practice is capable of materially affecting competition." Section 10(3) UCP Act.

27 Paragraph 20.

disclosing certain important contractual terms to the consumers. As a result of the commitment decision, the consumer was granted the possibility to quit the contract.

In some cases the HCA obliged the undertakings to do what they promised to do. In these matters, the undertakings made certain allegations concerning their products' characteristics, which subsequently turned out to be false. The commitments ensured that the undertaking concerned would "keep its word" and act in compliance with the commercial communication. In Case *Vj-135/2007 T-Kábel Kft.*, the cable-television operator declared that the channels in the undertaking's portfolio were available in digital picture and voice quality, while the set-top-boxes used by the firm could not be connected to digital television devices. After the institution of the procedure, the company undertook to make available the set-top-boxes that were compatible with digital television devices. A similar pattern emerged in Case *Vj-63/2010 Digi Kft.* and in Case *Vj-7-37/2011 Invitel*, which were also terminated with commitment decisions. In Case *Vj-118/2007/20 UniCredit*, the enterprise, among others, agreed to compensate those customers who broke up their fixed deposits. In Case *Vj-75/2012 TEVA*, the undertaking bound itself to reimburse those consumers who paid a price higher than the one advertised and to make up for the difference between the advertised price and the price actually paid.

An interesting question of the policy concerning commitment decisions is whether the restoration of the initial status and a comprehensive civil law remedy are the pre-conditions of accepting commitments. In some matters the HCA suggested that failing this the enterprise cannot bring its conduct in conformity with the law, as required by Section 75 of the CA. And indeed, if interpreting Section 75 literally, the conclusion may be reasonably drawn that the illegal plight ends only when the detrimental consequences are lifted. One of the conditions of accepting the proffered commitments is that the "party offers commitments to bring its conduct in a specified way in line with the applicable legal provisions". The mere fact that the undertaking stops violating the law certainly does not imply that it brings its conduct in conformity with the law, at least not retrospectively, since it is required, by law, to compensate for the losses it caused. According to this interpretation, the undertaking is required to also bring its past conduct in conformity with the law by providing compensation for the detriment caused.

Such a strict and inflexible approach would be very counter-productive in matters where civil law redress cannot be provided simply because the injured persons cannot be identified. The insistence on a civil law remedy would make commitments unavailable in cases where it is impossible or unfeasible for the undertaking to compensate the victims. Fortunately, the decisional practice of the HCA avoided this trap. In Case *Vj-19/2009 OTP*, it was needless to provide for a civil remedy because the bank compensated its complaining customers on a voluntary basis. Nevertheless, in Case *Vj-148/2006/49 Tesco* and in Case *Vj-189/2007 Raiffeisen*, there was no voluntary compensation, and the HCA did not treat this as the pre-condition of accepting commitments.

Before July 1, 2014, if the undertaking failed to execute the commitment decision, the HCA could impose a fine[28] and could launch a procedure to have the commitments enforced. Both tools were used in Case *Vj-157/2007/58 "N&P KEGYELET 2006"*. The currently effective provisions of the CA, however, contain a "fork in the road" rule. If the undertaking fails to do what it promised (commitments), the HCA can either impose a fine for the breach of the commitments or withdraw the commitment decision and re-start the competition procedure against the undertaking (which may, of course, result in the imposition of a fine).[29]

It is an interesting question whether the undertaking's legal obligation (commitment) to compensate implies that the injured persons have a legally enforceable right to claim the promised compensation. Section 6:2(3) of the Hungarian Civil Code[30] provides that a legally enforceable obligation may emerge also from an administrative decision (and from a rule or law or a court decision), if the decision provides so and defines the obligor, the obligee and the service (i.e. the behavior to be performed in the fulfilment of the duties). Commitment decisions arguably meet these requirements, hence, they confer legally enforceable rights on the victims of the competition violation and the injured persons may sue if the undertaking does not execute the commitment. Unfortunately, there is no judicial practice in this regard.

4. Collective Redress

Hungary introduced opt-out class actions in 1996 in the CA and then in 1997 in the Consumer Protection Act.[31] This means that Hungarian legislation was among the few legal systems that pioneered in collective redress and was among the very few that had an opt-out system in place in the 1990s.[32] Besides this, an opt-in joint action scheme was introduced by the new Hungarian Code of Civil Procedure,[33] taking effect on 1 January 2018, as regards certain subject matters (consumer protection, employment matters, and environmental damages). These may not be used in competition matters, as they refer specifically to consumer protection law infringements and not to consumer matters in general (which could, theoretically, also embrace competition

28 See the then-effective provision in Section 76(4)(a) CA.

29 Section 75(6) CA, Section 78(1a) CA.

30 Act V of 2013 on the Civil Code (in Hungarian: "2013. évi V. törvény a Polgári Törvénykönyvről").

31 Act CLV of 1997 on consumer protection (in Hungarian: "1997. évi CLV. törvény a fogyasztóvédelemről").

32 Nagy Csongor István: Collective Actions in Europe: A Comparative, Economic and Transsystemic Analysis, Springer, 2019., 73-85.

33 Act CXXX of 2016 on the Code of Civil Procedure (in Hungarian: "2016. évi CXXX. törvény a polgári perrendtartásról").

violations committed to the detriment of consumers).

The original provisions on collective redress authorized the HCA, the economic chamber, and the organization protecting the interests of consumers to launch civil proceedings on behalf of a group of persons harmed by a competition law violation. The currently effective rules limit standing to the HCA.

This is in line with the general European approach. There is a clear tendency to reserve "hard cases" (which are difficult to manage or raise higher risks of abuse) for public entities and recognized civil organizations. Such cases involve opt-out proceedings and cases where it is difficult to define a group.[34] In Finland, solely the Consumer Ombudsman has the power to institute a collective action.[35] Polish law confers standing on class members and the regional consumer ombudsman (a public body).[36] In Sweden, collective proceedings may be initiated by group members (private group action), civil organizations (NGO action) and administrative agencies (public group action).[37] Portuguese law also defines standing widely: citizens, associations, foundations and municipalities (for the protection of citizens living in their territory) may institute an action. In Spain, standing is conferred on group members, consumer organizations and public entities.[38] In Denmark, the group representative is appointed by the court, who may be a group member, an association, a private institute or other organization or an administrative agency (e.g. the Consumers Ombudsman). Under Danish law, the court has the discretion to decide whether the case should be tried in the opt-in or the opt-out scheme. If the proceeding follows the opt-out pattern, only an administrative agency may be appointed as a group representative (the court decides whether the collective proceeding is managed in the opt-in or the opt-out system).

According to Section 85/A of the CA,[39] the HCA may launch civil proceedings for the protection of consumers' civil claims if an undertaking violates a legal provision that falls within the HCA's competence and that concerns numerous consumers identifiable on the basis of the circumstances of the violation. Accordingly, the pre-conditions of collective action in competition matters may be boiled down to two major substantive requirements: numerosity (the violation concerns numerous consumers) and definability (the victims of the violation are identifiable on the basis of the circumstances of the violation).

The Hungarian Competition Authority may initiate litigation in the public interest to enforce the civil claims of consumers where an infringing practice of an undertaking

34 Nagy (footnote 32) 95-96.

35 Section 4 of the Finnish Act on Class Action.

36 Section 4(2) of the Polish Act on Pursuing Claims in Group Proceedings.

37 Sections 2(3) and 3-6 of the Swedish Group Proceedings Act.

38 Paul Llewellyn: Class actions in the EU, International Comparative Legal Guide, 2005., 21-22.

39 Originally, this provision was located in Section 92 CA.

which falls within the competence of the Hungarian Competition Authority concerns a large group of individuals that can be defined relying on the circumstances of the infringement. Litigation pursuant to this Article shall be conducted in accordance with the provisions of the Act on the Code of Civil Procedure regarding actions in the public interest.[40]

The HCA may start proceedings if it has already launched a competition procedure concerning the violation and, if it requests, the court has to stay the proceedings pending the competition procedure.

The Hungarian Competition Authority is only empowered to initiate such litigation after it has initiated a competition supervision proceeding for the conduct in question. If the competition supervision proceeding is in progress, the court shall suspend its proceeding upon the request of the Hungarian Competition Authority until the conclusion of the competition supervision proceeding.[41]

A collective action may be launched only within three years of the violation being committed; however, this time limit does not apply while the competition procedure is pending.

No litigation may be initiated after three years have elapsed following the date when the infringing conduct was committed. Failure to observe this time limit shall result in forfeiture of the right to initiate litigation. If the conduct is continuous in nature, the time limit shall begin at the time when the conduct is terminated. If the infringing conduct is committed through a failure to terminate a particular situation or state, the time limit shall not begin as long as such situation or state prevails. When counting the time limit set for the initiation of litigation, the duration of the competition supervision proceeding shall not be taken into account.[42]

This procedure is based on the opt-out principle, although the statute does not specifically provide for the right to quit the group.

The court may be requested to judge the common issues as far as possible jointly. If the legal basis (violation) and the amount of the loss (quantum) can be clearly established concerning the consumers injured by the violation, without taking the individual circumstances into account, the HCA may request the court to enjoin the undertaking to satisfy these claims. Otherwise, it may request the court to establish the violation concerning the group members, so individual consumers will be able to rely on this declaratory judgment in their individual actions and will have to prove merely the amount of the loss they suffered and the causal link between the violation and the individual loss.

The court, in its judgment, has to specify those consumers who benefit from the declaration of illegality and who are entitled to monetary relief as well as the data nec-

40 Section 85/A(1) CA.

41 Section 85/A(2) CA.

42 Section 85/A(3) CA.

essary for their identification, and it may authorize the HCA to publish the judgment. If the undertaking fails to honour the judgment and satisfy the consumers' claims, the latter may seek enforcement of the judgment. When launching the enforcement procedure, the court has to examine whether the applicant is covered by the judgment's group definition.

> *Where, with respect to the consumers affected by the infringing conduct, the legal basis of the claim and the amount of damages if a claim is made in this respect, or the content of the claim where other claims are raised, can be clearly established without considering the individual circumstances of the consumers affected, the Hungarian Competition Authority may request the court to oblige in its judgment the undertaking in question to satisfy those claims, or to otherwise establish the infringing nature of the conduct with an effect applying to all of the consumers indicated in the claim. If the court established that the infringing nature affected all of the consumers indicated in the claim, then these consumers shall only prove the amount of the damage, the content of any other claims and the causal link between the infringing conduct and the damage suffered or any other claim if they initiate litigation against the undertaking concerned.*[43]
>
> *If, in addition to establishing the infringing nature of the conduct, the court also obliged in its judgment the undertaking to satisfy a particular claim, the obliged undertaking shall satisfy the claim of consumers belonging to the eligible persons defined in the judgment in accordance with the judgment. In the absence of voluntary compliance, the entitled consumers may request the judicial enforcement of the judgment. The court shall assess the consumers' eligibility on the basis of the conditions specified in the judgment in the course of its proceedings for the issuance of an enforceable document.*[44]

It is not obvious if the judgment's res judicata effect extends to group members. The statutory text does not provide for this specifically. It deals only with the case where the HCA is successful. It does not address the case of plaintiff failure. Nonetheless, group members are not parties to the collective action, hence, absent a specific provision, they should not be covered by the res judicata effect. Last but not least, the collective action does not affect the consumer's right to pursue their claims individually. All these suggest that while group members may "use" the judgment if the group representative prevails, they are not necessarily covered by the res judicata effect. However, this has not been tested before courts.

Although the HCA has made use of this mechanism with the purpose of ensuring

43 Section 85/A(4) CA.

44 Section 85/A(6) CA.

a civil remedy,[45] it has been rarely used to claim monetary relief.[46] This may be due to two circumstances. First, it is a general European experience that administrative authorities are not the keenest initiators of collective actions. The number of cases launched in systems where public authorities have standing has been generally low. Second, until 2010, a one-year long limitation period applied to the collective actions launched by the CA, which proved to be stiflingly short. From 2011, the limitation period was changed to three years.[47]

5. Concluding remarks

Hungarian competition law has come a long way in making competition rules' private enforcement a reality. The legislative and regulatory efforts started way before the Private Enforcement Directive and have resulted in various unique statutory and regulatory constructions, which contributed to the European discourse in the field. The shifting of the burden of proof by means of a presumed 10 % price increase in cartel matters, the use of commitment decisions to ensure civil remedies and the opt-out collective action are all patterns developed in the local "regulatory laboratory" and are worthy of consideration in the search for an effective private enforcement system in Europe.

45 See, for instance, Case Gf.40232/2016/9, where the HCA requested the court to declare the contracts concluded by the enterprise invalid, however, the High Court of Appeal of Budapest established that the HCA cannot enforce invalidity claims by means of the collective mechanism.

46 For the exception, see Case Gf.40336/2008/7 (Budapest High Court of Appeals). See Tóth Tihamér: The Interaction of Public and Private Enforcement of Competition Law Before and After the EU Directive—a Hungarian Perspective, Yearbook of Antitrust and Regulatory Studies, 2016., 9(14), 64–65.

47 Section 134(1) of Act CLVIII of 2010.