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Question A: Competition Law

Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?

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1. Legal framework

1.1 What is the legal framework in the national competition act applicable to vertical agreements, i.e. are these agreements in generally permissible or in part impermissible. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?

It is to be noted at the outset that the competition law assessment of vertical agreements in Hungary is substantially similar to the relevant rules contained in European law; the main reason for this is that the Hungarian legislator expressly intended to take into consideration the EC competition law during the legislation process.[2]

Consequently, as an overview, one may state that the general cartel prohibition is also applicable to vertical agreements, this type of agreements may also enjoy be block exempted or fulfil the requirements for individual exemption. In addition, Hungarian competition law also regulates *de minimis* agreements on a statutory level.

It is also important to note that in Hungary – in accordance with the relevant rules of EC Regulation 1/2003 – the regulation of vertical agreements includes not only Hungarian competition law, but also EU competition law. EU law is directly applicable, if the agreement in question affects trade between Member States in accordance with Article 101 of the Treaty on the Functioning of the European Union (***TFEU***). In case, however, the agreement in question does not affect trade between member states only Hungarian competition rules are applicable. With respect to the scope of the research below only the Hungarian national rules and their application we be dealt with in detail (with occasional references to EU law, for example, in case of any deviations from EU law).

The general prohibition of anti-competitive agreements

Article 11 of Act LVII of 1996 on the Unfair and Restrictive Market Practices (the ***Hungarian Competition Act*** or the ***HCA***) generally prohibits agreements which have as their object or effect (or potential effect) the prevention, restriction or distortion of competition. Based on the wording of the above statutory rule and the practice of the Hungarian Competition Office (***HCO***) – also taking into account the EC law background – it is clear that the general cartel prohibition is also applicable for vertical agreements.[3] Thus, in accordance with Hungarian law, all vertical agreements are prohibited which have as their object or effect (or potential effect) the prevention, restriction or distortion of competition.

It is to be noted that certain types of anti-competitive agreements – including vertical agreements – are specified in Article 11 (2) of the HCA (see our detailed answer for question 1.2 below).

Individual exemption

[2] See Articles 67-68 of Act I of 1994 on the promulgation of the European Treaty, which expressly mentions community competition rules as an area which is concerned by the obligation of legal harmonization. See also the stand point of the HCO concerning the intrepretation of Hungarian antitrust law in case Vj-73/2001 (Holcim/Duna-Dráva): „*the development of a substantially different interpretation of the EC norms and Hungarian norms (which are essentially identical) is also contrary to the interests of the undertakings under invetigation." (para 147)*

[3] See cases Vj-30/1997 (Opel) and Vj-52/1992 (Borsodi Sörgyár) (in the latter case the HCO brought its decision based on the former Competition Act (being in forca before 1997, which expressly specified anti-competitive agreements concerning vertical resale).

In accordance with Article 17 of the HCA an agreement is exempted from cartel prohibition if it fulfils the following four cumulative conditions:

(i) it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness;

(ii) a fair part of the benefits arising from the agreement is conveyed to the consumer or the business partner;

(iii) the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals; and

(iv) it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

Thus, the basis of the Hungarian rules is the general prohibition of restrictive agreements, while exemption is granted for any agreement that fulfil the criteria laid down in the HCA – very similarly to EU law. Thus the *rule of reason* principle known in US Law is unknown to Hungarian law.

Individual exemption is automatic, agreements are *ex lege* exempted, and no measure is required from any (competition) authorities (the possibility for requiring individual exemption ceased in 2005 in Hungarian law in accordance with the similar rules contained in Regulation 1/2003/EC).

Block exemption

In addition to individual exemption, Hungarian law contains, similarly to EC law, vertical block exemption regulations as well. First, such rules are included in the Hungarian vertical block exemption regulation ("***umbrella regulation***" or the "***HBER***")[4], second, in sector specific regulations such as the block exemption regulation for the automotive sector,[5] or the regulation on agreements on technology transfer.[6]

The structure of the HBER is similar to the Council Regulation 2790/1999/EC (and, consequently, the new Regulation 330/2010). Thus, the HBER exempts vertical agreements on the basis of the market share of the undertakings concerned provided such agreements contain no black-listed clauses. The black list is composed of two parts: the first part includes those provisions that exclude the application of the HBER with respect to the whole agreement (e.g. determination of resale price), the second part recites those obligations that can not be exempted based on the block exemption, which, however, do not affect the possible exemption of the remaining provisions of the agreement (e.g. exclusivity clauses exceeding a five year period).

It is important to note that the current HBER does have some deviations from the EU regime. First, the HBER for example contains specific definitions for "active sales" and "passive sales": although this may entail more legal certainty in this respect for undertakings, this can also imply a certain rigidity in the application of the HBER (especially with the development of new technogies, like the Internet). Second, the HBER has not yet been aligned to the new rules contained in Regulation 330/2010 as

[4] Government Decree 55/2002. (III. 26.) on the exemption from cartel prohibition of certain groups of vertical agreements.
[5] Government Decree 19/2004. (II. 13.) on the exemption from cartel prohibition of certain groups of vertical agreements in the automotive sector.
[6] Government Decree 86/1999. (VI. 11.) on the exemption from cartel prohibition of certain groups of vertical agreements concerning technological transfer.

adopted in April 2010: for example, the HBER still takes into account the market share of the supplier when establishing the exemption (regardless of the market share of the buyer on the purchasing market as required by Article 3 of Regulation 330/2010). Until these discrepancies are remedied by the Hungarian legislator, agreements that do not have an effect on trade between Member States (ie those that do not fall under the scope of Article 101 TFEU) will be adjudicated somewhat differently than they would be on an EU level.

Agreements of minor importance (de minimis agreements)

In accordance with Article 13 of the HCA, the cartel prohibition is *ex lege* not applicable for agreements of minor importance (see our detailed answer for question 1.4 below).

Agreements concluded by and between undertakings belonging to the same group of undertakings

The HCA expressly specifies as an exception those agreements that are concluded by and between undertakings belonging to the same group of undertakings: in accordance with this provision a vertical agreement is not considered anti-competitive if it is concluded by and between undertakings that are not unrelated to each other (e.g. parent company – subsidiary) (Article 11 (1) of the HCA).

Abuse of dominance in vertical relationships

It is to be noted that vertical agreements may not fall only under the scope of cartel prohibition, but may at the same time constitute an abuse of a dominant position as well.[7]

1.2 Do these principles vary depending on the type of vertical practice considered?

The different types of vertical practices are assessed by the HCA based on the principles presented above in Section 1.1, namely the legality of them is assessed based on the prohibition of anti-competitive agreements (Article 11 of the HCA) and their exemption (Article 17 of the HCA). However, there are implicitly some differences between the legal assessment of vertical practices: these differences are presented in detail in Section 1.3 and 2.1-2.2 below, with special regard to practices concerning pricing (object-type infringements, effect-based infringements etc.).

1.3 Is there a specific prohibition in the national competition act on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

HCA

The HCA generally prohibits anti-competitive agreements. Article 11 (2) a) of the HCA (which is a list of the most typical restrictive agreements) expressly lists the direct or indirect determination of purchase or sales prices as a typical restraint.

It is important to note that the HCA prohibits *agreements* the object or effect of which is the determination of purchase or sale prices.[8] This implies a concurrence of wills between two parties: thus, based on the general rule, the unilateral practice of the supplier concerning pricing does not fall

[7] Vj-30/1997. (Opel); Position statement of the Competition Council of the HCO, No. 11.25.
[8] Similarly to EC law beyond agreements between undertakings (in a narrower sense), concerted practice, the decision by association of undertakings [social organistaion, public corporation and professional associations] are also considered as „agreement".

under the scope of the prohibition of anti-competitive agreements [9] (see in more detail in Section 2.4 below). It is also relevant to highlight that resale price maintenance in case of agreements of minor importance – contrary to EC law – is not prohibited (Article 13 (1)-(4), see more detailed in Section 1.4 below).

HBER.

In order to complete the system in the HCA, the HBER contains different provisions for pricing practices. The fixing of resale price (including the fixing of minimum price) is prohibited; it is considered as a black-listed provision in the HBER, thus agreements containing such a clause can not be exempted at all. However, maximum resale prices or recommended prices can be established by a producer / seller (i.e. these can fall under the scope of the HBER), provided that such a price determination does not lead to fixed or minimum sale prices as a result of the application of pressure or incitement (carried out) by any of the parties.[10]

The practice of the HCO

Based on the above rules (taking into consideration the relevant experience of the EU) the practice of the HCO concerning prices generally regards the determination of resale prices, i.e. RPM (including minimum resale prices) as anti-competitive. For example, the HCO stated as a principle that:

> *„In accordance with competition law practice, the determination of resale prices or stipulating minimum resale prices are considered as obviously anti-competitive practices."*[11]

And:

> *„the listing of these [the direct or indirect determination of sale prices] in the HCA entails that [in case of the application of such clauses] the HCA presumes the possibility of the occurrence of negative effects on competition. Thus, in case of such practices, the possible anti-competitive effect does not need to be proven as their anti-competitive effect results directly from their listing in the HCA."* [12]

In its case-law, therefore the HCO has confirmed[13] that "*fixing minimum prices or prices applied towards end-users/customers in vertical relationships is a practice having an anti-competitive object*"[14] as such a practice is – without any further effect-based analysis – "*capable of restricting competition and thus per se anti-competitive*".[15] The HCO noted in several cases concerning the competition law assessment of such clauses that "*it is indifferent whether the agreement contained any express sanction [or the infringement of the pricing clause], whether it was actually observed by the parties, whether it was stipulated by chance or after long negotiations*" [16]

It is apparent from the above quotes that there is no consistent terminology in this respect in Hungarian law. Although no Hungarian decision uses the term "per se" infringement (a notion based

[9] Vj-179/1996 (Magyar Suzuki).
[10] Government Decree 2002/55, Article 3. a)
[11] Vj-171/2002. (MOL)
[12] Vj-7/2008 (Castrol), para 45
[13] Vj-133/1996 (Budapest Sör); Vj-64/2000 (Délhús Et al.); Vj-161/2004 (Kemira GrowHow); Vj-57/2008 (Hungaropharma)
[14] Vj-7/2008 (Castrol)
[15] Vj-12/2003 (Bobájka)
[16] Vj-26/2006 (Navi-Gate et al.); Vj-7/2008 (Castrol) ; Vj-64/2000 (Délhús et al.).

on US antitrust law), the decisions regard RPM as being "obviously anti-competitive", where negative effects are "presumed" by law and also which have "as their object" the restriction of competition. We consider the latter to be the most convincing terminology, especially since this would correspond to the European law background of Hungarian competition law (taking into account the origin, wording and structure of Article 11-17 of the HCA). This notion essentially creates a favourable situation for the competition authority as in such cases it does not have to fully prove the effects of the agreement in question on the relevant market; the conclusion of certain type/object agreement is unlawful in itself.

A slightly different approach appears to materialize in the HCO's practice in a case decided in 2008 under No. Vj-164/2006 (Büki). Here the HCO examined certain clauses in exclusive distribution agreements of energy drinks, which included RPM. Quite uniquely, the resale price was not set uniformly for each distributor by the producer, rather the producers and the distributors individually agreed in different levels of prices, depending on the market circumstances of the various distributors. Although the HCO established that the case concerned vertical RPM, the HCO stated that as opposed to horizontal price-fixing (which is regarded as a hard-core infringement), the assessment and evaluation of vertical RPM "*is a more complex task due to the potential efficiency reasons*". Noting the differentiation in the resale prices, the HCO found that the producer "did not intend to establish/influence a uniform resale price on the market". Although the HCO stated that even such differentiated RPM may be anti-competitive (as it could have the effect of excluding competitors), in the actual case, the HCO did not found any such effects and thus terminated its proceedings. The HCO did not even reach step two (the assessment of the conditions for exemption), and merely found a lack of infringement of Article 11 of the HCA. Thus, it appears that in this specific case, the HCO did not exclude that in special circumstances, RPM may also be subjected to a limited effects based analysis (as opposed to an object-based assessment) and may altogether fall outside the scope of Article 11 of the HCA.[17]

It can thus be concluded that there has not been any significant changes in the approach of the HCO in the last years towards RPM: the anti-competitive nature / object of RPM clauses was not called into question, with the exception of one single recent case (Vj-164/2006 (Büki).

Conclusion

Based on the above detailed Hungarian rules and HCO practice, the following conclusions can be made:

(i) in case of agreements of minor importance, suppliers have a wide range of possibilities to determine prices applied towards end-users / resale prices (including the application of RPM);

(ii) in case of agreements that fall under the scope of the block exemption regulation only maximum prices and recommended prices are allowed (RPM is generally prohibited, except the highly unlikely case when an undertaking would be able to show that the given RPM actually fulfils the requirements for individual exemption);

(iii) in case of agreements that fall outside the scope of the block exemption regulation, the object and effect of a given price-related arrangement shall be assessed on a case by

[17] We also refer to the former practice of the HCO in relation to the former HCA that was in force between 1990 and 1996. This former HCA did not prohibit vertical cartels, only resale price maintenance was expressly prohibited, provided such RPM could have had the effect of prevention or restriction of competition. See Article 14 (3) of Act LXXXVI of 1990 on the prohibition of unfair market practices.

case basis (but in any case, RPM is highly unlikely to be exemptable and other pricing practices (e.g. recommended or maximum prices) also need to be individually justified).

1.4 What is the de minimis / appreciability threshold, if any, applicable to vertical arrangements and practices?

In accordance with Article 13 of the HCA those (anti-competitive) agreements do not fall under the scope of cartel prohibition that are of minor importance (*de minimis* agreements). An agreement is considered to be of minor importance if the aggregate market share of the parties to the agreement and undertakings not unrelated to these undertakings does not exceed 10 % on the relevant market. It is important that the criteria concerning the market share (not exceeding 10 %) shall be fulfilled during the entire term of the agreement, in case of agreements concluded for a term exceeding one year, the criteria shall be fulfilled in each calendar year.

Despite the simple and clear wording of the above provision of the HCA, the calculation of the "aggregate" market share in case of vertical agreements is not entirely clear from the practice of the HCO. Based on the case law, there are at least three different methodologies for the calculation: [18]

- In accordance with the first methodology, the numerator of the quotient representing the total aggregate market share of the two parties to the agreement is the total turnover of that relevant geographic market (see Article 14 (3) a) of the HCA), where the distributor carries out its business activities; the denominator of the quotient is the total turnover of the supplier on the relevant geographic market calculated based on resale prices, increased with the turnover of substitutable goods purchased by the distributor from other suppliers.[19]

- In accordance with the second methodology only one market share shall be taken into account regarding the 10% threshold, which is the market share of the supplier or the customer realized on that market where the anti-competitive effects arise.[20]

- Finally, in accordance with the third methodology, again, only one market share shall be taken into account, namely the highest one among the possible market shares.[21]

It can be argued that the above inconsistencies can be avoided by a legislative change in the HCA, whereby the word "aggregate" is deleted from the HCA and the relevant *de minimis* rules are adjusted to those in the EU law.

It is to be noted that the *de minimis* provision of the HCA – contrary to EU law[22] – draws the scope of the relevant agreements rather widely: the relevant Article of the HCA, most prominently, allows the benefit of this provision even for vertical pricing practices (as opposed to horizontal price-fixing and market sharing arrangements, which may not fall under the scope of this rule in any case). Thus, vertical agreements containing hard-core anti-competitive clauses (e.g. RPM) do not fall within the

[18] See: PAPP, Álmos: *De Minimis Anomalies: Searching for a Regulatory Solution* (International Law Office, December 17 2009).
[19] Vj-57/1998. (Henkel); Position statement of the Competition council of the HCO No. 14.1.
[20] Vj-31/2000 (Interusz) and Vj-12/2003 (Bobájka).
[21] Vj–81/2003. (MB-Auto). In the same case the HCO noted with respect to the nature of the market that in case of vertical agreements concerning the distribution of the entire range of products having the same nature (e.g. automobiles) regarding minor importance the average share of the undertaking of each range is of importance, irrespectivly of whether the ranges belong to the same product market with respect to the end-user or not.
[22] Article 11 of Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community (de minimis) (OJ C 368 2001)

general cartel prohibition, provided they fall below the 10 % market share threshold.[23] For example in case Vj-81/2003 (Mercedes) the HCO examined the agreements of the Hungarian Mercedes car importers and 24 Mercedes car distributors. Even though the agreement contained an RPM clause (Mercedes distributors were only entitled to give discounts that were higher than a certain level if they received the permission of the importer), the HCO terminated its proceedings based on the *de minimis* provision, referring to the fact that the market share of the undertakings under investigation were below 10%.

It is nevertheless to be noted that a further exceptional rule where an agreement falls under the scope of cartel prohibition, if - as a parallel effect of the agreement and parallel agreements on the relevant market - competition is restricted, distorted or prevented at a significant level (Article 13 (4) of the HCA) is still applicable to vertical agreements. The HCO may establish in competition proceedings that the given agreement still falls under the scope of cartel prohibition, however, in such a case the HCA does not allow the HCO to impose a fine.

1.5 Has the competition authority in your jurisdiction issued guidelines regarding exchanges of information and/or vertical price agreements?

As opposed to the situation at the European Commission,[24] the HCO has not issued general guidelines for vertical agreements. However, the guidelines of the European Commission – taking into consideration the similarity of the Hungarian and the EC competition law – serve as a basis for the Hungarian practice as well. This has been mentioned in the legal literature,[25] and the HCO has also referred to the guidelines of the European Commission when interpreting Hungarian competition law in specific cases. [26]

The HCO publishes its position statements year by year. The position statements consist of the statements of fundamental importance of the HCO established in individual cases, including cases relating to vertical price arrangements. Below, we refer separately to the relevant position statements.

2. Criteria applicable to price related vertical agreements

2.1 Is the national competition act declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?

As it was mentioned in Section 1.2-1.3 above, Article 11 (2) of the HCA lists in an exemplificative manner certain groups of concerted practices and anti-competitive agreements, including agreements which concern directly or indirectly purchase or sale prices. Based on the consistent case law of the HCO,[27] those anti-competitive agreements that are listed in Article 11 (2) of the HCA shall be prohibited based on their object, thus irrespective of the prospective effects of the examined agreement. Consequently, agreements concerning the direct or indirect determination of resale prices

[23] In accordance with Article 13 (2) a)-b) de minimis provisions are not applicable for agreements a) which directly or indirectly fix purchase or sale prices by competitors or b) which concern the share of the market by competitors. Both exceptions are applicable exclusively for agreements concluded by competitors, thus it is not applicable for most of the vertical agreements (in case of which the seller and the buyer are not competitors).

[24] Commission Notice: Guidelines on vertical restraints (2000/C 291/01).

[25] The former president of the Competition Council of the HCO stated in a publication that the HCO presumably would instructions contained in such publications/handbooks, and the HCO does not intend to represent an approach which significantly deviates from the approach of the European Commission. See: TÓTH, TIHAMÉR: The actual questions of vertical restraints – with special regard to reslae price fixing, in: VÖRÖS, IMRE (editor) The development tendencies of EC and Hungarian competition Law, MTA Jogtudományi Intézet, Budapest, 2008, pages 36 and 48.

[26] Vj-60/2004 (Aréna/Multimédia/Ticketpro), para 171: *"Article 25 of the Guidelines of the European Commission on vertical restraints No. 2000/C/291/01. – hereinafter: Guidelines – provides further explanation for the provisions cited above of the Government Decree."* (highlighted by the author)

[27] Position statements of the Competition Council of the HCO No. 11.12.

in vertical relationships considered in Hungarian competition law as prohibited based on their object (similarly, but not equally to a *per se* prohibition – the most importance difference being that even object based infringements may be exempted as stated below).

The HCO also established that – as opposed to RPM – no similar negative effects can be established as a general rule, if in vertical relationships the parties stipulate maximum resale price (including the maximum level of retailer's margin).[28] Thus, agreements belonging to the latter group are not prohibited outright in Hungarian law (similarly to the EC law).

It is also to be highlighted that in Hungarian competition law (also in accordance with the EC competition law) RPM agreements can not enjoy the benefit of block exemption based on Article 3 a) of the HBER.[29] However, they may still fulfil the conditions for individual exemption based on Article 17 of the HCA. It is to be noted within the application of Article 17 of the HCA that in Hungarian case-law such *per se* infringements may only fulfil the conditions for individual exemption only in the most exceptional cases. One of these exceptional cases was an early decision of the HCO brought in case Vj-150/1995 (Kontavill), where the HCO found a vertical agreement deserving for exemption, which prohibited the distributor to sell the electronic products of the producer under a price 12% lower than the purchase price, and by this determined a minimum resale price in practice. In this case, the HCO pointed out that although the agreement in question was considered as anti-competitive in its object, the stipulation of a very low level of minimum margin (compared to which the average margin applied in the same sector was higher), in the given difficult overall economic situation in Hungary could be regarded as proportional and necessary in order to reach the economic aim of the maintenance of the standard of after-sales services.[30]

We finally emphasise that with the exception of the above cited case, we are not aware of any other cases where the HCO would have exempted an RPM arrangement. We are of the view that the reasons concerning the critical overall economic situation prevailing in those years in Hungary was definitive to the exceptional assessment of the HCO.

2.2 Are only agreements pertaining to prices considered illegal? Which conditions have to be fulfilled in order to render "agreements" to be considered illegal?

The HCO has brought several decisions in its 20-year practice, where it established competition law infringement not only in case of RPM arrangements, but also in case of other anti-competitive vertical provisions concerning prices. Below, we present based on the case-law of the HCO in a comprehensive manner those typical provisions and practices concerning resale prices which are not considered as direct RPM, but still fall under the *per se* prohibition in the practice of the HCO.

Ad i) First, we note the requirement for previous consent of the manufacturer for resale price changes in vertical agreements. In a typical case distributors undertake not to change the resale price without the previous consent of the manufacturer/the supplier. Based on the consistent practice of the HCO this kind of provision restricts distributors in the determination of their pricing policy independently at

[28] Vj-150/1995 (Kontavill)
[29] The text of which provision is identical with Article 4 a) of the EC block exemption regulation (Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336 1999).
[30] It is clear from the reasoning of the decision that mostly the exceptionally uncertain Hungarian economical environment indicated the exemption of the agreement (in the year affected by the agreement the rate of inflation was 24% (!), compared to which the 12% minimum margin stipluated in the agreement was reletively low indeed.)

such a level that the competition law assessment of such an agreement can not differ from the competition law assessment of RPM provisions.[31]

Ad ii) Second, we refer to provisions setting the margin of retailers. In this respect, the HCO found that "*the determination of resale price in any case shall be assessed in a similar way*" and provisions setting the reseller's margin shall be considered as per se anti-competitive.[32] The HCO considers the prohibition of the application of resale price under the purchase price as a special way of determining of the margin of the retailers, a kind of minimum price and thus anti-competitive due to its object.[33]

Ad iii) Third, based on the consequent practice of the HCO, provisions which prohibit ad hoc discounts shall be considered as anti-competitive vertical provisions on prices.[34] In one case, the HCO considered the prohibition by the supplier of the application of the expression "*discounted price*" for the retailer as a special provision essentially prohibiting a form of discounting. The HCO noted that the retailer is obviously less motivated in giving a price discount to its customers if it can not promote its products by the well-known "*discount price*" slogan.[35]

Ad iv) Concerning the practice related to recommended resale prices, see Section 2.3 below.

2.3 What about the situations which are in-between, such as recommendations / suggestions and exchange of information?

Ad i) Hungarian competition law practice (correspondingly to the EC law) is of the view that in vertical business relationships the stipulation of recommended price itself, without any supplementary elements, can not be regarded as an infringement of competition law, provided the supplier does not enjoy significant market power.

The HCO pointed out in a decision in brought 1999 that the supplier "*may recommend resale prices to the retailer legally if the retailer may decide independently whether or not he takes such recommendation into account"*.[36] However, if in the business practice the manufacturer/supplier applies "compelling tactics" in order to enforce the given recommended resale prices included in the agreement, then such practice share the same legal fate as vertical price fixing.[37] These kinds of compelling tactics include, for example, the sending of a letter to the distributor, in which the supplier threatens the termination of the agreement or denying the delivery of goods;[38] or - without expressly promising any such sanction – the application of frequent (harassment-like) notices by the supplier in order to achieve that the distributor follows the recommended prices.[39]

As an example for the latter tactic, the HCO established concerning the distribution of automotive navigation (GPS) devicies that even though the given distribution agreements contained "recommended prices", the Hungarian importer and the wholesalers applied them as fixed prices in practice. Although the manufacturer/importer allowed minimal differences (a few %) from the prices specified in the "recommended" price lists, in cases where higher discounts were provided by the distributor to its customers, the importer warned the distributor and threatened the distributor with denying deliveries or by applying even higher delivery prices towards that distributor. There was a

[31] Vj- 57/2008 (Hungaropharma); Vj-26/2006 (Navi-Gate et al.); Vj-81/2003 (MB-Autó)
[32] Vj-150/1995 (Kontavill)
[33] Vj-147/1999 (Euro-Elzett)
[34] Vj-47/2004 (Magyar Könyvkiadók Egyesülete); Vj-161/2004 (Kemira GrowHow); Vj-57/2008 (Hungaropharma)
[35] Vj-161/2004 (Kemira GrowHow)
[36] Vj-147/1999 (EURO-Elzett)
[37] Vj-30/1997 (Opel)
[38] Vj- 197/1996 (Magyar Suzuki)
[39] Vj-166/2006 (MITAC et al.); Vj-161/2004 (Kemira GrowHow)

similar agreement in force between the foreign manufacturer of the product and the importer itself: the manufacturer also threatened the importer with the loss of bonuses if the importer did not follow the "recommended" prices.

Also, the HCO found the franchise-contracts concluded by MOL (one of the biggest Hungarian companies and one of the leading oil and natural gas enterprises in Eastern-Central-Europe) on the operation of gas stations, which fixed the resale price, to be restrictive of competition (Vj-171/2002 (MOL)). The HCO did not accept MOL's defence that it was not mandatory to apply the restrictive clauses, there was no sanction for enforcing the fixing of the price, or that the sending of the price lists to the franchisees was merely informative. The HCO stated that despite these facts, the RPM (and the fixed nature of the prices) can still be established.

Ad ii) As to vertical information exchange, it is to be highlighted that in vertical relations a certain level of information exchange serves the legal interest of the undertakings operating at different levels of the distribution chain. However, in cases where "*the object or the effect of the information exchange system is to reduce risks being inherent in the behaviour of competitors*" the information exchange is deemed to be prohibited – as the HCO stated in one important case.[40]

The HCO had the possibility to examine information exchange systems in vertical relationships only in a few cases. One case in 2008 concerned agreements between a pharmaceutical company and its distributors where the pharmaceutical company maintained a database on the distribution of medicines to pharmacies. The HCO - taking into consideration the anonymous nature of the information collected by the pharmaceutical company – found that the maintenance of a database did not infringe Article 11 of the HCA. We are, however, not aware of any cases where the HCO would have established competition law infringement concerning information exchange carried out by undertakings being exclusively in a vertical relationship. We are of the view that the HCO would need to assess the effects of such an information exchange on competition on a case-by-case basis. Most probably, inferences may be drawn from the general criteria applicable for horizontal information exchange agreements. Thus, the HCO could take the following factors into account (i) the nature and details of the exchanged information; (ii) the "age" of the data (past, present, future data); (iii) the frequency of the data exchange; (iv) the structure of the market (e.g. number of market players).[41]

2.4 What is the assessment of vertical unilateral practices in relation to prices?

In accordance with the consistent practice of the HCO, the price-related clauses dealt with above were stipulated in agreements which were accepted by the parties with common will, thus the concurrence of wills between the parties was easy to establish (and, as a result, a conduct falling under the scope of Article 11 of the HCA). The legal situation is, however, somewhat different in case of (i) agreements not recorded in writing and (ii) conduct that only formally appears to be a unilateral pricing decision.

Ad i) As to agreements not recorded in writing, Hungarian case law does not make any difference, beyond certain obvious difficulties in evidencing, between the different types of prohibited forms of consent. Thus it is legally indifferent whether the RPM agreement can be established on the basis of a written contract, an oral agreement or by an exchange of letters. For example, the HCO established in several cases – after a detailed investigation of the continuous communications between the manufacturer and the distributor as well as based on personal hearings of witnesses and on different e-

[40] Position Statement of the Competition Council of the HCO No. 11.16.
[41] Vj-73/2001 (Holcim)

mails – that the parties concluded anti-competitive agreements orally as the distributors accepted and in practice followed the resale price levels required by the manufacturer.[42]

Ad ii) As a matter of principle, unilateral conduct clearly does not fall under the scope of Article 11 of the HCA, unless further elements evidencing a concurrence of wills are present.[43] In the practice of the HCO there are some border-line cases when the competition authority found – taking into consideration the circumstances of the given case – that the formally unilateral behaviour of the manufacturer resulted in an actual agreement (concurrence of wills) with respect to which the prohibition laid down in Article 11 of the HCA was applicable. For example, in one of the early cases initiated against Magyar Suzuki (the car manufacturer),[44] the HCO pointed out that the supplier restricted in an anti-competitive manner the freedom of distributors to determine their own pricing policy by promising a sanction for the distributors in a circular (the unilateral termination of the distribution agreement) in case they deviate from the recommended prices set by Magyar Suzuki. In this case the economical force/threat was the further element, which raised the formally unilateral behaviour to the level of agreement (concurrence of wills) between the parties. In a later case, the HCO established that the act of following the recommended prices of the supplier by distributors (which were sent by e-mail to the distributor) in practice was an element which established the application of Article 11 of the HCA.[45]

2.5 Are some of these practices not considered illegal merely as a result of a de minimis/appreciability rule?

As we stated in detail in Section 1.4 above, contrary to EC law, Hungarian competition law does not consider price agreements in vertical relationships to be automatically outside of the scope of the *de minimis* rule. The HCO confirmed in several cases that the market share of the undertakings concerned need to be examined in case of RPM agreement and it has to be verified if such marke share is below 10% on the relevant market; in the affirmative, no infringement can be established.[46]

3. Anti-competitive effects

3.1. Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

In the system of the HCA – as we stated in Section 1. above – the prohibition of anti-competitive agreements exists within a unified/standardized framework, similarly to EC law; both the scope of the cartel prohibition and the system of exemption do not differentiate in general between the different types of behaviours.

However there are some behaviour which are considered to be anti-competitive in their object (so-called "hard-core" cartels, e.g. vertical price fixing): in accordance with the practice of the HCO these are considered as "*per se*" infringing without the examination of the effects of the agreements.

3.2. To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

[42] Vj-26/2006 (Navi-Gate.); Vj-161/2004 (Kemira GrowHow).
[43] Vj-164/2006 (Büki Ásványvíz); Vj-21/2005 (Albacomp, Synergon).
[44] Vj-179/1996 (Magyar Suzuki).
[45] Vj-147/1999 (EURO-Elzett).
[46] Vj-164/2006 (Büki Ásványvíz); Vj-81/2003 (MB-Autó); Vj-57/2008 (Hungaropharma)

We hereby refer to our answer to question 3.1 above, as Hungarian competition law does not make a distinction between the different types of anti-competitive effects.

In the practice of the HCO, the distinction between inter-brand and intra-brand effects can be clearly detected. E.g. in case Vj-9/2008 the HCO examined an exclusive distribution agreement of wedding dresses. The HCO found that there was strong competition between wedding dress brands (inter-brand competition), the HCO also examined any potential intra-brand effects and found that no appreciable effects on competition can be found, especially due to the geographic separation of retailers.[47] Also, in its decision in case Vj-7/2008 (Castrol Hungária) the HCO examined that the vertical agreements of Castrol Hungária for the distribution of lubricants, which contained minimum price and exclusivity clauses for a term exceeding 5 years. Even though the HCO established the infringement, it did not impose any fine on Castrol Hungária stating that although the relevant clauses could have been capable of restricting inter-brand competition, they in fact did not have such anti-competitive effect on the relevant market to an extent that would necessitate the imposition of fines.

The HCO also took into consideration that fixing resale prices may have significant effect on intra-brand competition, especially where the product price is an important factor for customers when choosing among merchants (the statement was made in relation to determining the amount of fine in a case initiated for the examination of an RPM agreement on the market of navigation devicees).[48] Regarding another RPM agreement on the market of navigation devices, the HCO took into account the continuous and significant changes on the relevant market – being typical in technology-related markets – may be capable of alleviating the effects of the RPM thereby also showing that that inter-brand competition is capable of easing any restrictions of intra-brand competition.[49]

3.3 Is also the anti-competitive intent of the vertical agreement considered?

Under Article 11 of the HCA, the prohibition of anti-competitive agreements extends to agreements having as their object or effect the restriction of competition. This object to restrict competition however, similarly to EU law, does not refer to the parties' state of mind, but rather to the issue whether the conduct is anticompetitive by its content and nature. A conduct is considered as having its object the restriction of competition if it carries the possibility of restricting competition by its very nature. The object of the conduct can be derived from the text of the agreement, its objective aims, the legal and economic framework of the agreement, the parties' conduct and the way of execution.

The intent the parties had at the time of concluding the agreement - albeit its analysis may assist in revealing the object of restriction of competition - cannot by itself entail an existence of a restriction by object within the meaning of Article 11 of the HCA.

In the system of Hungarian competition law, the subjective element appears rather as the "imputability" of the conduct, which is a circumstance to be assessed when deciding on the extent of the sanction (fine) based on Article 78 of the HCA. In terms of imputability, the HCO assesses the undertaking's subjective view on the infringement, such as whether it was aware that the conduct was anti-competitive (or if whether the undertaking could be expected to be aware of the anti-competitive nature of the agreement) or what role it played in the agreement (e.g., whether it acted as a motivator or it was rather in a subjected position).

[47] Vj-9/2008, paras 18 and 34
[48] Vj-26/2006, para 300
[49] Vj-166/2006, para 173

3.4 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practice encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case law and/or legal doctrine.

Article 3 a) of the HBER, similar to the relevan EU law rule, states that those agreements including a maximum or recommended sales price, which factually result in the application of fixed or minimum prices because of pressure or incentives from any party, shall not have the advantage of block exemption. Therefore, in the HCO's practice, as we detailed in Sections 2.3 and 2.4 above, the tactics enforcing the price recommended by the seller, agreements not recorded in writing and conduct appearing to be formally unilateral may also fall under the scope of Article 11 of the HCA.

4. Pro-competitive effects

4.1 Does the national competition act recognize justifications in relation to these vertical practices regarding prices? Has the relevant case law taken into account practical justifications for the need of price agreements and/or pro-competitive aspects in relation to the exchange of information regarding price?

As described in Section 1.1 above, Hungarian law, basically similarly to EU law, is based on the prohibition of anti-competitive agreements and also provide for the possibility of exemption provided the relevant four cumulative conditions are fulfilled (while there is also the possibility of block exemption). These conditions apply to vertical agreements concerning prices, as well.

The HCO's case law has accepted numerous practical justifications and pro-competitive aspects in the last few years regarding vertical restraints, especially when assessing various forms of RPM. Part of the case law concerns individual exemptions; despite this legal institution has been abolished in June 2005 (see Section 1.1), the previous practice developed by the HCO in these cases continues to be persuasive in respect of later decisions as well, especially because the previous reasons for individual exemptions and the current reasons for exemption practically overlap.

4.2 What are the types of pro-competitive effects recognised in relation to vertical practices on prices?

Article 17 of the HCA determines those pro-competitive effects that are recognized by the legislator, which could be referred to even in case of RPM agreements (the agreement *"contribute[s] to a more reasonable organisation of production or distribution, the promotion of technical or economic progress, or the improvement of competitiveness or of the protection of the environment"*). These possibilities are alternative, thus it suffices if the agreement complies with only one of the in order to be exempted; nevertheless, it is not sufficient if the effects emerge only subjectively for the participants, the pro-competitive effects have to be appreciable also on the market.

It is noteworthy that the earlier HCA of 1990[50] gave a detailed enumeration about the benefits attached to restrictive agreements that can be taken into account in the context of exemption, which, as regards

[50] 1990. évi LXXXVI. törvény a tisztességtelen piaci magatartás tilalmáról, 17. § (2) bek. szerint a tilalom alóli mentesülés szempontjából előnynek minősül különösen:
a) az árak kedvező alakulása, vagy
b) az áru minőségének javulása vagy az elért jó minőség állandóságának biztosítása, vagy
c) a teljesítési feltételek javulása (pl. a szállítási határidő rövidülése), vagy
d) a forgalmazás útjának rövidülése, a beszerzés, az értékesítés szervezetének ésszerűbb kialakítása, az adott áru kínálatának javulása, vagy

content, partially overlaps the current conditions of exemption. The earlier HCA is not in force today, and language of the current regulation is more general, nevertheless, the concrete economic effects identified in these earlier decisions could be useful, irrespective of the amendment of the law.

As regards the decisional practice of the HCO on the earlier and the currently effective HCA, see in detail Section 4.3 below.

4.3 Are the following types of justifications taken into consideration and, if yes, in relation to witch sort of practices and to which extent?
Please give examples from case law and/or legal doctrine.

Competitive oversight inside the distribution network

The HCO did not accept as a legitimate purpose the exclusive control over the production, distribution and the whole resale level of the brand in a case where the contractual relations between Magyar Suzuki and its 110 resellers were scrutinized. The HCO thus considered the contractual clause, which provided that the distributor can charge only the prices determined by the producer, to be restrictive of competition (Vj-176/1996 (Magyar Suzuki)).

Price-level positioning of the products by a supplier

In the Vj-176/1996 (SUZUKI) case the HCO held that the determination of the price level in the resale network by the producer is in general restrictive of competition. On the other hand, in the case on OPEL's distribution network (Vj-3/1997 (Opel)), where the price communicated by the importer was only labelled as a recommended retail (resale) price, the HCO did not regard the agreement as restrictive. Accordng to the reasoning of the HCO, firstly, such a price is not "determined price", because it does not restrict the reseller in determining the price according to its own business considerations. Secondly, the importer's counter-interest hinders that the traders charge unilaterally excessive mark-ups and thus increase the price of the motor vehicles (spare parts, repair), thus decreasing the quantity sold.

The HCO did not accept the defence of the defendant in case Vj-47/2004 (MKKE), where the HCO examined the internal rules of the Hungarian Association of Publishers and Book Distributors, which restricted the sales under the minimum resale price determined by the publishers. The Association argued that the system of fixed price ensures that the literature is multi-coloured, the current density of the book-shops, preserved workplaces, ensures price stability and prevents the coming into existence of a high market concentration. The HCO, however, opted for the system of free prices because this is the only way that makes price competition, the reduction of prices possible and gives an incentive for market participants for efficiency.

Consumers' benefits in relation to resale price cap

In case Vj-52/1992 (Borsodi Sörgyár) the HCO established that prohibiting sales above the wholesale price (maximum price) serves the interest of consumers and do not have appreciable restrictive effects. This was the first case where the HCO established that maximum resale prices are not to be regarded as restrictive of competition. The HCO even contented that such agreements may be even beneficial from the point of view of public interest. Since then, this can be regarded as the competition authority's settled practice (cf. answer given in Section 4.7)

e) a műszaki-technológiai fejlődés előzmozdítása, a környezetvédelmi helyzet vagy a külpiaci versenyképesség javulása.

Consumers' interest in general (please specify)

In the very early and exceptional case Vj-150/1995 (Kontavill Kontakta), in connection with the resale agreements for the sale of electricity spare parts, the HCO established that economic competition is not an aim but merely a tool for enforcing efficient economic activities serving the public interest and the final interests of the consumers. In this context, the HCO regarded price competition between market operators as desirable only such price competition does not force market operators to deteriorate the conditions of marketing (or those of the product's quality) to such an extent that is in turn harmful for the consumers. In case of luxury products, technically complex and widely diversified products, and in case of products that need a big inventory, the producer is interested in the distributor selling its products under appropriate conditions and proper standards. The HCO argued that in order to ensure this, RPM - that is in accordance with the costs necessary for complying with the necessary standards - can in fact serve the interests of consumers as in this case RPM makes the financing of the higher level marketing service possible. RPM was thus in that specific case not regarded as restrictive of competition. The HCO thus argued that the agreement in fact enables wholesalers not to cut on important expenses (full range of products, conditions of serving the customers, storage, advertisements, related services) that would deteriorate the quality of the service to the detriment of the consumers.

The case Vj-133/1996 (Budapest Sör), which related to the fixing of the resale price of bier, had a different commercial context than the above case and the HCO also reached a different conclusion. In this case, the HCO regarded the RPM agreement to be restrictive of competition. The parties argued that the level of the fixed resale price ensures that the trader stay on the market: the HCO, however, did not accept this defence. The HCO's starting point was that if all wholesalers were to apply the same resale prices, the incentive to the increase in efficiency would deteriorate, there would be no chance to reduce prices and costs due to efficient operation. The HCO considered that on those markets (such as the beer market), where the chances for non-price competition are restricted – as opposed to the market for electronic devices as in Vj-150/1995 (Kontavill Kontakta) – RPM may be particularly harmful.

Launching of a new product

We are not aware of any cases in the Hungarian legal practice, where this pro-competitive effect would have been invoked.

Market positioning of a product

In Case Vj-26/2006 (Navi-Gate) the HCO considered as anti-competitive various distribution agreements for navigation devices and software due to RPM clauses contained in those agreements. The HCO did not accept the arguments raised by the parties that the fixing of the resale price was aimed at finding and locating illegal software, which usually appear on the market at a significantly lower price. The parties also argued that the RPM was intended to secure an appropriate margin for the distributor in order to allow a proper service to customers. The HCO did not examine these allegedly positive effects as it found that there was no proper evidence behind these contentions.

In Case Vj-7/2008 (Castrol), Castrol Hungária also referred to the market positioning of its lubricant products (being branded premium products of a world-wide well-known producer) in an investigation by the HCO into alleged RPM clauses in Castrol Hungária's distribuition agreements. The HCO, however, again did not accept these arguments, stating that market positioning could have been achieved via less restrictive / other means.

Finally, in the early exceptional case of Vj-150/1995 (Kontavill Kontakta) the HCO did find that the desire to sell the products at the appropriate level was a reason to provide individual exemption to the given agreement despite the application of an RPM.

Promotional organisation

In Case Vj-52/1992 (Borsodi Sörgyár) the HCO expreesly took into account that the given agreement promoted "the supply of the given products" in general.

After-sale services

In the special early case of Vj-150/1995 (Kontavill Kontakta) the HCO specifically referred to the high costs of after-sales services, when it provided an individual exemption to the RPM agreement.

Coordination with consumers' information

We are not aware of any relevant case law in this regard in the Hungarian practice.

Short term promotional campaigns

In Case Vj-57/2008 (Hungaropharma), the HCO examined the nation-wide distribution agreements concluded by Hungaropharma (one of the largest wholesalers of medicines in Hungary) and 490 pharmacies. The agreements included express RPM provisions and Hungaropharma required its prior approval for any individual promotion / discount by the pharmacies. When examining whether the given agreement may be exempted, the HCO stated that the latter clause is clearly restrictive of competition. At the same time, the HCO noted that such a restriction can be regarded as proportionate, provided that it does not relate to promotions / discounts in general, but rather to the period of the promotions organized by Hungaropharma itself.

4.4 Does the national competition act and case law take into consideration other justifications?

In case Vj-52/1992 (Borsodi Sörgyár) the HCO took into account that the agreement promoted the shortening of the deadlines of delivery. The earlier HCA of 1990 enumerated the shortening of the deadlines of delivery as a specific benefit justifying an exemption.

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

On the basis of Article 20 of the HCA, in the procedure before the HCO the burden of proof as regards the conditions of exemption rests on the party who refers to the exemption: in principle, the burden of proof is therefore not on the competition authority but rather on the given party. Accordingly, the HCO does not take the possible pro-competitive advantages automatically into account, it is the obligation of the parties to refer to these benefits.

Nonetheless, it is to be emphasized that in the decisional practice of the HCO, even though the HCO does not legally bear any obligation of proof regarding the conditions of exemption, in practice the the HCO raises the attention of the parties already in the investigation phase to the possibility of exemption and it may address particular questions to the parties in this regard. The HCO's duty to inform the parties can be deduced from the general requirement of cooperation with the party, which obviously pertains to the HCO as an administrative authority.

In case of a civil procedure affecting the prohibition of anti-competitive agreements, Article 88/B(7) of the HCA provides, mirroring the procedure of the HCO, that in the court proceedings it is the party referring to the breach of Article 11 of the HCA that has to prove the facts underlying the violation. One the other hand, the fact that the agreement comes under the scope of one of the block exemption regulations, as well as that the conditions of Article 17 of the HCA are met are to be proved by the party referring to these. According to Article 3 (3) of the Hungarian Civil Procedural Act (***HCPA***), the court is expressly obliged to inform the parties about the facts to be proven and the burden of proof beforehand: as a consequence of this, the court can apply the above rule of the burden of proof to the illegality of the agreements restrictive of competition only after adequately informing the parties

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case law?

Yes, although there is no statutory reference in the HCA to the fact that the justifications - that can otherwise be referred to - could have anti-competitive effects in a given case. From the cases before the HCO, see Section 4.3. It can be seen that for instance the competitive oversight inside the distribution network, price-level positioning of the products by a supplier, consumers' interest in general or a market positioning of a product were taken into account by the HCO as potentially anti-competitive effects of the justifications referred to in the context of the exemption.

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

Yes, as stated in Sections 1.1-1.3 above, the legal characterizazion of vertical agreements occurs in two steps. The first (a) is establishing whether the agreement is restrictive of competition - that is if the agreement comes under the scope of Article 11 of the HCA, and (b) if the first question is answered in the affirmative, the second step is the examination of the justifications, that is the conditions for exemption under Article 17 of the HCA. Accordingly, the HCO examined the justifications stated under Section 4.3 mainly in the framewprk of the conditions of exemption, and especially in the framework of the RPM it mainy took the position that such RPM practices do not merit exemption.

4.8 In your opinion, do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

In our opinion, the HCO gives basically a proper answer to the vertical pricing practices, and balanced in its individual decisions as described above that considerations related to the agreements, including the circumstances pointing to an exemption (see point 4.3)

5. Sanctions

5.1 -5.2 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?
Are the above practices subject to sanctions as well?

If the HCO establishes a competition law infringement, i.e. the HCO finds that the given anti-competitive agreement falls under the scope of Article 11 of the HCA (and the conditions of block exemption or individual exemption are not fulfilled, and also the agreement question is not of minor importance), the HCO may impose a fine on the undertakings concerned in accordance with Article 78 of the HCA. It is to be noted that based on the provisions laid down in the HCA in case of establishing competition law infringement, the HCO is not obliged to impose a fine on the undertakings under investigation (based on the wording of the HCA, the Competition Council „may impose a fine"): thus

the HCO is entitled to decide even not to impose any fines on the parties even if an infringement was found.

In accordance with the provisions with the HCA the maximum amount of fine is 10% of the net turnover of the undertaking concerned in the preceding business year (in extraordinary cases the HCO may identify an entire group of undertakings when the maximum amount of fine is 10% of the net turnover of the group of undertakings in the preceding business year).

Based on Article 78 (3) the amount of fine shall be determined by taking into consideration all the relevant circumstances of the case. The HCA provides the following examples as relevant circumstances: the gravity of the infringement, the period of the infringement, the advantage realized by the infringement, the market position of the undertakings concerned, whether the behaviour is attributable or not, cooperation during the competition proceedings, the repeated nature of the infringing behaviour. The gravity of the infringement shall be determined on the basis of degree of the restriction of competition and the scope and extent of the infringement of the interests of consumers and business partners.

Earlier, the principles followed by the HCO when imposing the fine in anti-trust cases were published in the notice of the HCO No.2/2003 („***Former HCO Notice on Fines***"***)*** which was subsequiently withdrawn by the HCO in 2009; thus at present it is only the above provision of HCA that serves as a basis for the HCO concerning fining.[51] However - as the individual cases below also confirm - sanctions imposed on parties engaged in vertical practices are generally lower than in cases of hard-core (horizontal) cartels. The most likely reason for this is that vertical restraints (which mostly imply agreements concluded by undertakings who are not competitors of each other) clearly present a less obvious danger to competition than classic horizontal cartel arrangements.

With respect to vertical anti-competitive agreements, Hungarian law does not apply any further sanctions under e.g. criminal law or other fields of law.

It is to be noted that in accordance with Article 75 of the HCA there is a possibility to close competition proceedings by offering commitments: if the undertaking under investigation undertakes to bring its market behaviour in compliance with the provisions of the HCA and the protection of public interest can be assured this way, the HCO does not establish competition law infringement and thus does not impose any fine. The HCO applies this possibility for agreements being less dangerous for competition e.g. vertical agreements, however, in case of RPM clauses no proceedings have been closed based on Article 75 of HCA.

5.3. Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the application of sanctions?

In this respect refer to Section 5.2 above, where we confirmed that the HCO takes into consideration the gravity/the less severe nature of the infringement. The Former HCO Notice on Fines applied lower scores concerning the degree of restricting competition for vertical restraints. However, the Former HCO Notice on Fines considered RPM as a more serious restriction within the realm of vertical restraints, and considered them as serious infringements similarly to less severe horizontal cartels.

[51] Meanwhile the Court of Appeal Budapest (the forum which is entitled to carrry out the judicial review of the decisions of the HCO at second degree) in February 2009 in an individual case detailed those aggravating and mitigating factors that are acceptable for the courts with respect to the determination of the amount of fines (case number before the HCO: Vj-45/2006 – case number before the Court of Appeal Budapest: 2. Kf.27.057/2008/15.).

5.4. What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

Based on the latest decisional practice of the HCO it can be established that the HCO followed a relatively flexible sanctioning policy concerning vertical price agreements. Thus, if the evidence suggested that the given RPM did not function in practice and the producer was open to a cooperation with the HCO (eg to amend the relevant agreements and to remove any potentially restrictive clauses either by way of a commitment or as part of an obligation set out in the final decision), generally no fine was imposed. In contrast, where it could be proven that the RPM agreement was effectively enforced and sanctioned and if the parties decided not to cooperate with the HCO then higher amounts of fines were also imposed by the HCO. It is also important that the HCO generally imposed the fines on the parties that were active on the upstream market (typically the manufacturer or the importer) as RPM clauses typically served their interests. The merchants / distributors who were "merely" obliged to follow the RPM were thus only sanctioned if they actively contributed the operation of the system (e.g. they also obliged their business partners in a similar way, and they controlled / reported whether the RPM clause was followed or not).

Below we will focus on the decisions the HCO of the last 5 years as we are of the view that from these cases more certain consequences can be made concerning the future practice of the HCO than from older decisions. First we will present some cases which were closed without imposing a fine, and then those where the HCO established competition law infringement and impose a fine.

Cases closed without the imposition of a fine

In case Vj-7/2008 (Castrol Hungária) the HCO established that in the lubricant sales contracts of Castrol Hungária as manufacturer/importer contained RPM closes, which were anti-competitive in their object. The HCO, however, did not impose any fine on the undertaking under investigation. The reason for this was that the HCO found out that the RPM clause existed only in the contract and not in practice, and based on the evidence available to the HCO the manufacturer/importer did not intend to enforce such RPM provisions. In this respect it is important that Castrol Hungária itself undertook towards the HCO to amend its contested agreements and to immediately remove the contested clauses.

In case Vj- 57/2008 (Hungaropharma) the HCO examined clauses in medicine wholesale contracts in which - among others –the price discounts towards customers (pharmacies) depended on the permission of the wholesaler. In this case, due to the cooperative behaviour of the undertaking under investigation the HCO did not impose any fine. It is to be noted that in this decision of the HCO it was also relevant that the given contractual provision concerning discounted prices was not clear and it was interpreted by the parties in several different ways (the undertaking under investigation considered it as maximum price fixing, while the HCO disagreed).

In case Vj- 161/2004 (Kemira) no fine was imposed on the parties. The specialty of this case was that the HCO had already imposed fine on the manufacturer (Kemira) in another cartel case before and the RPM agreement in question was a part of the execution of this other cartel agreement. In the reasoning of the decision the HCO highlighted that it did not intend to impose a sanction on the merchants involved in the agreements as the RPM clause was contrary to their interests and they even deviated from the RPMs in practice.

In case Vj-74/2004 (Magyar Könyvkiadók és Könyvterjesztők) the HCO did not impose any fine despite the horizontal nature of the collectively fixed prices regarding the (non-agent) distribution of

books. The HCO took into account that the infringement did not have appreciably effects as it affected only 2% of the market.

Cases closed with the imposition of a fine

In case Vj-26/2006 (Navi-Gate) the HCO imposed a fine of HUF 43 million (approx. 160 000 EUR) on an importer (Navi-Gate) applying RPMs in the distribution of navigation devices.[52] When determining the amount of fine the HCO took into consideration the relevant aggravating and mitigating factors based on the turnover realized on the market affected by the infringement, in accordance with the Former HCO Notice on Fines and its scoring system (it is to be noted that when the HCO brought its decision the Former HCO Notice on Fines was still in force). The HCO was of the view that the stipulation of resale prices may significantly affect intra-brand competition especially if the products in question (Garmin PNA-k and I-go softwares) are chosen by consumers based on the product price. The HCO also took into account that due to the individual purchase system Navi-Gate was not only the supplier of its contracting parties but their competitor as well both on the wholesale and the retail markets. The HCO considered the effect of the agreement on the market as low and accepted those statements which established that the RPM clauses were not enforced in practice. The HCO also took into consideration that Navi-Gate must have been aware of the relevant prohibition when it concluded the given agreements and the HCO did not accept the explanation according to which Navi-Gate merely applied those template contracts that the executive officer brought from its former employer. The HCO took into account as a mitigating factor that Navi-Gate amended the contested agreements during the competition proceedings. In accordance with the former HCO Notice on Fines the HCO determined the amount of fine by multiplying the scores given for the above factors the thousandth of the turnover realized during the infringement concerning the affected product. The HCO did not impose any fine on the other undertakings involved in the RPM taking into account the main function of the sanctioning (deterrent nature) and established that the RPM system was established by Navi-Gate and it was Navi-Gate who intended to put it in operation in practice.

Two years after the above decision the HCO brought another decision concerning the same market with respect to an RPM clause in which case the HCO imposed altogether fines amounting to HUF 103 million (approx. 400 000 EUR). In this case (Vj-166/2006 (Mitac/LCP)) Mitac (as the manufacturer) LCP (as the Hungarian importer and wholesaler) were fined by the HCO as well as certain distributors. When the HCO brought its decision the Former HCO Notice on Fines was not in force, however the HCO took into account as an aggravating factor that RPM clause belong to more severe vertical restrains and that the agreement in question was followed in practice (however its effects mitigated by parallel import and inter-brand competition). The HCO took into account as aggravating factors when determining the amount of fine imposed on Mitac and LCP that the following of the recommended prices were controlled through a monitoring system. The specialty of the decision is that the HCO did not only sanction the manufacturers/importers but two active distributors as well: it was established that one of the undertakings contributed actively to the control of the execution of the fixed prices applied towards end-users.

Base on the above and in accordance with the reasoning of the decisions of the HCO the following steps and factors can be identified regarding the fining method of the HCO, which are taken into account differently in each case:

(i) The nature of the anti-competitive conduct;

(ii) The consequences, market effects of the anti-competitive conduct;

[52] The judicial revision of the decision is in process.

(iii) Whether the infringement is attributable or not, the role of the undertaking in the infringement (it is not clear whether the repeated nature of the infringement is an individual factor or it is involved in the definition of attributability), cooperation of regretting nature during the competition proceedings;

(iv) Whether the amount of fine is proportionate to the size of the group of undertakings (whether it serves appropriately the deterrent function or not).[53]

6. Assessment

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

The HCA – similarly to EU law – takes a rather unified approach to anti-competitive agreements and does not contain specific rules or categories that would only concern vertical agreements. Nevertheless, the existing additional legal instruments (namely the supplementary block exemptions and the HBER) generally take into account sufficiently the specificity of price-related vertical agreements and include a number of specific related rules. Nevertheless, it is to be noted that certain adjustments would still be needed on a legislative level in the following aspects:

- the HBER would need to be adjusted to comply with the new rules contained in Regulation 330/2010;

- the market share threshold of the *de minimis* exception in Article 13 of the HCA should be reformulated in order to comply with the relevant EU rules and to contain a workable test;

6.2 Is the case law evolving? Towards which tendency? On which points are an evolution of the situation advisable?

The HCO's case-law on RPM (and other price-related vertical restraints) has been fairly consistent in the recent years. Specifically, in relation to RPM, the case-law appears to present a clear picture as to the application of the competition rules, however, the exact terminology that is used to describe RPM arrangements ("object", "presumption of effects", "obvious effects") could be more consistent in order to provide more legal certainty to market participants. The recent special case of Vj-164/2006 (Büki) may signal a departure from this line of case law as a clear RPM practice was found to fall outside the scope of the prohibition of anti-competitive agreements based on a special "effects-based" analysis. At this stage it is unclear, however, if the HCO will consider this case as an "odd one out", or if it will try to accommodate this decision with its earlier case-law and will be able to distinguish this decision from its other RPM decisions.

In any case, with a "more effects based approach" taking a more and more important position in EU competition law (see e.g. the Commission's new guidelines on vertical restraints)[54], it is expected that this will also have repercussions in the HCO's further cases. The importance of economics is further underpinned by the fact that the HCO already has its own chief economist, who may play a pivotal role in the assessment of cases involving price-related vertical restrains. This economics based

[53] In case Vj-26/2006 the amount of fine (HUF 43 million) was 3 % of the undertaking under investigation realized in the preceding business year. In case Vj-166/2006 LCP had to pay 0,5 % of its net turnover realized in the preceding business year, whereas Hamex was obliged to pay much lower fine which was 1,6 % of its net turnover. There are no further information concerning the turnover of Mitac in the decision, if we take into account its turnover arising from Hungary, it would represent even a lower proportion than the above ones.
[54] Commission Guidelines on Vertical Restraints, 20 April 2010.

approach may also entail a consideration of wider aspects of competition when assessing price-related vertical restraints. A competition authority may therefore very well evaluate any restraints on price in a wider context, taking into account not only price-based competition, but also the importance of the quality of products, any supplementary (eg. after sales) services, product support, etc. for the consumer.

Finally, it is expected that companies facing HCO investigations in relation to vertical restraints will opt more and more to use the possibility of offering commitments to the HCO in order to avoid a finding of an infringement. This could place an increased responsibility on the HCO and will also provide the HCO with increased potential to influence the market behavior of companies in specific cases. First, these commitment decisions are hardly subject to judicial review (the Hungarian civil procedural rules make it especially difficult for third parties to challenge such commitment decisions[55]), which provide the HCO with more leverage and room for negotiation in such proceedings. Second, this possibility may also allow the HCO to include and accept commitments which go beyond providing an actual and specific remedy for the given competition problem (typically the amendment of the restrictive contractual clauses for the future) and thus enable to HCO to engage in a special form of "market engineering" (e.g. a commitment whereby allegedly harmed consumers should be compensated, etc). The scope of commitments thus should be defined in a very careful and elaborate manner, taking into account all relevant legal aspects.

[55] See Article 327 (1) of the Hungarian Code of Civil Procedure, which only makes it possible to initiate a judicial review for the following parties: (i) the undertaking concerned and (ii) third parties in respect of those parts of the decision, which specifically relate to them