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INTERNATIONAL LEAGUE OF COMPETITION LAW  
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

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**Question A:**

**The consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties**

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*References and abbreviations:*

APA	Act CXL of 2004 on the General Rules of Administrative Procedures and Services
Competition Act	Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
CCP	Act III of 1952 on the Code of Civil Procedure
HCA	Hungarian Competition Authority ( <i>Gazdasági Versenyhivatal</i> )
TFEU	Treaty on the Functioning of the European Union
ECHR	European Court of Human Rights
Rome Convention	Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)
New Criminal Code	Act C of 2012 on the Criminal Code
Old Criminal Code	Act IV of 1978 on the Criminal Code
Notice on Conditions and Obligations in Merger Cases	Notice of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority no. 1/2008 on the conditions and obligations attached to the decisions authorizing concentrations
Leniency Guidelines	The Guidelines of the President of the Hungarian Competition Authority on the application of leniency rules set forth in Sections 78/a and 78/B of the Competition Act
Guidelines on the Hearing	HCA's Guidelines on the hearings held by the Competition Council
Guidelines on the Preparation of Non-Confidential Versions of Documents	HCA's Guidelines on the requests regarding the limitation of the access to the file due to business secrets and the submission of non-confidential versions of documents
Pre-notification Guidance	HCA's Guidance on the pre-notification contacts relating to the control of concentrations
Notice on Considerations in Differentiating Between Concentrations Subject to Authorisation in Simplified or Full Procedure	Notice of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority no. 1/2013 on Considerations in Differentiating Between Concentrations Subject to Authorisation in Simplified or Full Procedure
Notice on Setting Fines	Notice no 1/2012 of the President of the HCA and the Chair of the

	Competition Council of the HCA on the method of setting fines in case of market practices infringing Sections 11 and 21 of the Competition Act and Articles 101 and 102 of TFEU
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## 1. Introduction

Transactional resolutions in Hungary are not limited to competition law proceedings, but they are, although in another form, present in administrative and criminal proceedings.

The APA is the general code of procedures for administrative acts and decisions in Hungary; however, specific regulations like the Competition Act supplement it with rules specific to that legal area. These specific regulations may make use of public authority contracts substituting an official decision.<sup>1</sup> The ministerial reasoning of APA emphasized that in many cases public authorities and clients are partners and by this means the private interests can be better tailored not to conflict with the public interest.

We have no information about how public contracts or commitments function in other areas of public administrative law (there are no such rules e.g. in the environmental protection, media, energy and bank supervision fields). Act No CLV of 1997 on consumer protection established a Conciliation Board whose procedure may end with a commitment. On the other hand, consumer protection agencies themselves do not adopt commitment decisions, but conclude public contracts with parties in respect of the commitments undertaken by the parties.

Also, the New Criminal Code regulates a mediation procedure whereby the investigation may end with an agreement between the person hurt and the suspect. There is also a sort of plea bargaining institution whereby the inductee waives its right to have a trial. This plea bargaining process is, however, not often used, since inductees cannot achieve a significantly less severe sentence and public attorneys are also cautious about relying on this mechanism.<sup>2</sup>

For competition law cases, also involving comparative and misleading advertising and other unfair commercial practices, the HCA may apply transactional procedures as set out in the Competition Act.

The Competition Act regulates three types of transactional procedures in respect of cases relating to restrictive agreements and / or abuse of dominance:

- (i) leniency introduced as of 2003;<sup>3</sup>
- (ii) commitment introduced as of 1 November 2005;<sup>4</sup> and
- (iii) settlement introduced as of 1 July 2014.<sup>5</sup>

As for mergers, the HCA may attach conditions or obligations to the clearance.<sup>6</sup>

All of these mechanisms have their root in the EU legislation and are very similar to their EU counterparts. For details, please see below under Section 2.1 and under Section 3.

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<sup>1</sup> Section 76 of the APA

<sup>2</sup> [http://www.jogiforum.hu/files/publikaciok/orosz\\_judit\\_a\\_vadalkuljogi\\_forum\].pdf](http://www.jogiforum.hu/files/publikaciok/orosz_judit_a_vadalkuljogi_forum].pdf)

<sup>3</sup> Leniency was first introduced into the Hungarian competition law by the notice of the HCA and then as of 1 June 2009 it is incorporated into Sections 78/A-78/D of the Competition Act

<sup>4</sup> Section 75 of the Competition Act

<sup>5</sup> Section 73/A of the Competition Act

<sup>6</sup> Section 30 (3) of the Competition Act

It must be noted that the HCA has established a unique and flourishing practice unmatched by other administrative agencies in Hungary. This also reflects that 'transactional institutions' are not embedded in the Hungarian administrative law system.

Although transactional procedures may reduce the duration of the investigative procedures, this is not what they are aimed at in the first place.

Rather, the HCA believes that transactional procedures contribute to the more efficient use of resources. Not only is the administrative procedure less lengthy, but there are less court review procedures either (e.g., in case of settlement, there is no court review due to the waiver made by the parties). The HCA believes that this is an effective method of changing the behaviour of undertakings that also gives an orientation point to other market players.<sup>7</sup>

Companies prefer leniency and commitments in cases where they have a case that is hard to defend and they hope that they will avoid (get reduced) fines and in case of commitments, also avoid bad publicity. The new rules on settlements took effect in the summer of 2014; consequently, there are no experiences yet.

## **2. Transactional resolution of agreements and the abuse of dominance**

### **2.1. Overview of transactional procedures**

The Competition Act regulates three types of transactional procedures:

- (i) leniency available for certain types of agreements;
- (ii) commitment available both for agreements and abuse of dominance cases; and
- (iii) settlement available both for agreements and abuse of dominance cases.

#### *Leniency*

In the case of leniency applications, the Competition Act requires the applicant to describe the conduct which qualifies for leniency, which is an agreement or concerted practice among competitors aimed at the fixing of sale or purchase prices, market sharing or the setting of production or sales quotas, which infringe either upon Section 11 of the Competition Act or Art. 101 TFEU.<sup>8</sup> The Competition Act only requires the applicant to acknowledge the above behaviour and its participation in the behaviour; however, it does not expressly require the applicant to acknowledge its liability. Whether acknowledgment of the liability is a precondition of leniency is an open question, which has not yet been decided by Hungarian courts.

As a general rule, the leniency applicant has to cease its involvement in the infringement. In addition, it is a precondition of leniency (for both immunity from and a reduction of fines) that the undertaking fully and continuously cooperates with the HCA.<sup>9</sup> The leniency applicant has to submit all the available evidence to the HCA.<sup>10</sup>

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<sup>7</sup> See point 9 of the Guidelines No. 3/2012 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on commitments in procedures relating to unfair commercial practices.

<sup>8</sup> Section 78/B(1)(b) of the Competition Act.

<sup>9</sup> Section 78/A(7)(b) of the Competition Act.

<sup>10</sup> Sections 78/B(2)-(3) of the Competition Act.

Leniency is available before the proceedings are commenced. In this case, full immunity may be granted to the first undertaking which provides evidence to the HCA which enables the HCA to acquire judicial authorization for a dawn raid.<sup>11</sup> Once a dawn raid has been carried out and the proceedings commenced, the applicant may only qualify for full immunity if it is the first undertaking to provide evidence which enables the HCA to prove the infringement.<sup>12</sup> A leniency application may be filed later, in the course of the proceedings, however once the statement of objection or the investigator's report has been sent to the undertaking, or the HCA has given access to the file of the case for inspection (whichever is earlier), it is more difficult to obtain a fine reduction. After this date fines may be reduced based on leniency only if the applicant provides clear evidence which was previously unknown to the HCA and which relates to a fact which substantially influences the decision about the infringement.<sup>13</sup>

Leniency applicants seek to get full or partial immunity from fines, the reduction of fines or disregarding an aggravating fact in determining the amount of the fines. The range of the reduction is set out in the Competition Act (30-50%; 20-30%; -20%).<sup>14</sup> It is for the HCA to determine the exact amount of the reduction within the applicable statutory range. There is no legal basis for conducting a negotiation of the amount of the fines with the undertaking.

It is not a precondition of a successful leniency application that the applicant undertakes to indemnify third parties or undertakes to do this. To the contrary, the Competition Act enables the applicant which received immunity from fines to reject the payment of damages as long as such damages may be recovered from the other participants in the infringement.<sup>15</sup>

Since a successful leniency application means that the applicant provided information and evidence to the HCA which facilitated the proving of an infringement, victims of the infringement generally benefit from leniency applications. However, the undertaking receiving full immunity may reject the payment of damages as long as such damages may be recovered from the other participants of the infringement, which may put such leniency applicant in a more favourable position than the other undertakings participating in the infringement, while the victims' rights to damages is not detrimentally affected.

### *Commitments*

Undertakings proposing commitments want to avoid a negative decision by complying with the competition rules as interpreted by the HCA. Thus, one of the main purposes of the commitment is to close the proceedings of the HCA without any declaration of the infringement.<sup>16</sup>

Commitments become binding upon the HCA's decision to accept the undertaking's commitment proposal.

This means that the undertaking which proposes commitments is not obliged to acknowledge

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<sup>11</sup> Section 78/A(2)(a) of the Competition Act.

<sup>12</sup> Section 78/A(2)(b) of the Competition Act.

<sup>13</sup> Section 78/A(4) of the Competition Act.

<sup>14</sup> Section 78/A(5) of the Competition Act.

<sup>15</sup> Section 88/D of the Competition Act.

<sup>16</sup> Section 75(1) of the Competition Act.

its liability,<sup>17</sup> or to assist the HCA in investigating its own or other parties' misconduct beyond the obligation to act in good faith in the course of the procedure and not to mislead the HCA.

A proposal for commitment may be filed at any time before the proceedings terminate. However, if the proposal is filed at an early stage of the proceedings (in the investigation phase) and therefore the HCA's procedural costs are substantially decreased, then the HCA may consider this as a reason in favour of accepting the commitment.<sup>18</sup>

If the HCA accepts the undertaking's commitments, the HCA does not impose fines and does not even declare the undertaking's conduct illegal. If the HCA rejects the commitments, it may impose fines; however, there is no legal basis for conducting a negotiation of the amount of the fines with the undertaking.

The statutory preconditions of commitment do not include damages to third parties. However, undertakings may (and often do) include in their commitment proposal that they provide some sort of indemnification to third parties. If the HCA accepts such a proposal, this will be binding on the undertaking.

Commitments decisions make private enforcement more difficult than in the case that the HCA establishes the infringement. However, the undertaking may offer, in the framework of its commitment proposal, to indemnify the victims of the infringement to a certain extent (for the avoidance of doubt, this is not a legal requirement for a successful commitment and this does not prevent damages claimant to claim damages suffered beyond the indemnification received).

### *Settlement*

Settlement is aimed at the swift termination of the competition proceedings. The settlement declaration has to contain an acknowledgement of the undertaking's participation in the infringement.<sup>19</sup> As a reward, the HCA will grant the undertaking a reduction of 10% on the fine that would otherwise be imposed. This means that successful settlement does not involve more far-reaching conduct requirements being imposed on the undertaking in addition to what the HCA may otherwise impose. In other words, it is not a precondition of a successful settlement that the applicant undertakes to indemnify third parties or undertakes to do this.

It is the competition council (the decision-making body of the HCA) which may propose to the undertaking to file a settlement declaration. The competition council may do this once the investigation report is prepared but the statement of objections is not finalized,<sup>20</sup> which also means that the undertaking which makes a settlement declaration is not obliged to assist the HCA in investigating its own or other parties' misconduct. If the competition council makes such a proposal, the undertaking has to answer within the deadline set by the competition council, which cannot be more than 15 days.<sup>21</sup>

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<sup>17</sup> Section 23 of Guidelines No. 3/2012 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on commitments in procedures relating to unfair commercial practices.

<sup>18</sup> Section 29 of Notice no. 3/2012 of the President of the HCA and the President of the HCA's Competition Council.

<sup>19</sup> Section 73/A(3)(a) of the Competition Act.

<sup>20</sup> Section 73/A(1) of the Competition Act.

<sup>21</sup> Section 73/A(2) of the Competition Act.

If the undertaking makes a settlement declaration, it has to indicate to the HCA what it considers as the acceptable maximum amount of fines. If the HCA imposes fines in excess of this amount or if the statement of objections or the final decision significantly differs from the settlement declaration, the settlement declaration may be withdrawn. In such case, the undertaking's previous acknowledgement of the infringement cannot be used as evidence.<sup>22</sup>

A successful settlement procedure may mean that victims of the infringement will be compensated sooner, since the HCA's procedure terminates in a shorter time and there will not be any lengthy subsequent judicial review procedure. However, the undertaking's acknowledgement of the infringement may put other undertakings, which still dispute the infringement, in a more difficult situation.

As for the combination of the mechanisms, we have to note that leniency and settlement may be combined and the rewards may be cumulated, while the combination of leniency and commitments or settlement and commitments is highly improbable due to the different nature of such mechanisms.

Also, it must be noted that there is no legal basis for the HCA to bargain about infringements not subject to the leniency / commitment / settlement.

As for the risk of hijacking of the procedure by interests of other parties, we have to note that this is not a real risk in case of settlements and leniency, since third parties are not involved in such procedures. In case of commitments, however, this may pose a real risk since third parties may be consulted in respect of the commitments offered and they may use this opportunity to overdimension the problem to be remedied in order to create more advantageous market conditions for themselves.

### **2.1.1. Discretion of competition authorities and/or judges during proceedings**

As discussed above, the parties (i.e. undertakings subject to the HCA procedure) have great discretion over the transactional resolution of competition law cases. Commitments can only be proposed by them and cooperation under the leniency policy is also derived from their own decision. Though settlements of cartel cases can only be offered by the HCA, it is not likely that it would not do so should the parties advocate for this swifter resolution. In a sense, the parties may cause more trouble to each other. This is because certain forms of transactional resolution require the participation of all or at least most parties. In a cartel case or a restrictive agreement case it may not be feasible to transact with only one party.

The procedure of the HCA is divided into two parts. First, the investigators conduct a fact finding exercise and summarise the results and their legal assessment in a report (phase of the investigation). Second, on the basis of the report and the complete file, the competition council (which is the HCA's decision making body) prepares a statement of objections, holds a hearing and brings a decision (phase of the decision).

The procedural division of the HCA's procedure complicates the application of transactional resolutions in the sense that no formal objections are addressed to the parties in the phase of the investigation. At this stage, it is therefore difficult to formulate commitments or to express a willingness for settlement or commitments as the HCA's investigator is not entitled

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<sup>22</sup> Section 78/B(5) of the Competition Act.

to make a decision on the issue and cannot use a shortcut to speed up to procedure. The investigation has to be completed in any case. Nevertheless, it is still useful to indicate an inclination towards a transaction and even to submit specific commitments, as the investigators' report could then include their assessment. Due to this complexity, in practice the parties also tend to apply a mixed approach. Some are only willing to negotiate with the competition council while others start consulting already in the phase of the investigation. (Leniency of course supposes a thorough cooperation during the whole investigation.) The former approach involves inefficiencies as the parties basically withhold information until the beginning of the phase of the decision which otherwise would allow a swifter understanding and conclusion of the case. The latter approach on the other hand may be disadvantageous, revealing the company's weak points: its own perception on the illegality of its behaviour or its negative effects on the market.

Ultimately therefore it is the competition council that determines the feasibility of a transactional outcome. In this assessment it seems to follow a practical approach and favours such outcomes if beneficial for the markets and for the procedure in general. The discussion itself is to be started by the competition council when it communicates its objections to the parties. This communication may be a formal written statement or, especially in the case of settlements, a less formal, even verbal one. It is for the parties to address the objections with appropriate commitments or with a written acknowledgement of the infringement in a settlement submission. Discussions and negotiations between the communication of the objections and the written submission of the party may be held with the competition council.

It is up to the competition council to accept commitments or to go along with settlements. The refusal of commitments or non-settling cannot be made the subject of judicial review, either separately or as part of the judicial review of the final decision. This means that the parties have no right to a transactional outcome. The refusal may even be external to the company and its efforts. The competition council may decide for instance not to pursue a hybrid cartel case with settling and non-settling parties, or may find it more appropriate to establish an infringement instead of engaging into the negotiation of commitments, in order to set an example on the market. In this decision however, it has to have due regard to the principles of proportionality and the adequacy of competition law intervention. In the case of a commitment, this means that the competition council may choose to refuse the commitments and establish the infringement for the sake of general prevention if that is the more adequate solution for the protection of the public interest.

### **2.1.2. Nature of the legal act concluding, approving, and/or making binding the settlement**

A leniency is a formal decision of the competition council of the HCA. The competition council rules on whether to grant leniency only upon the request of the party applying for leniency by a separate interim decision (prior to its final decision).

A commitment is included in the final decision of the competition council against the party of an *ex officio* competition control proceeding.

The settlement is concluded by and between the competition council of the HCA and the parties subject to the proceedings opened *ex officio* pursuant to the Hungarian cartel prohibition or the prohibition of the abuse of a dominant position, or their equivalent under EU competition law (Article 101 or 102 of TFEU).

This means that the transactional decisions do not take the form of an actual agreement between the HCA and the parties to a competition supervisory proceeding. As it can be seen, the investigative body is not party to an agreement, and is not entitled to issue a decision incorporating the transactional resolution. It is the decision-making body of the authority, the competition council, which is formally involved in the decision related to settlement, leniency or commitment. Such decision of the competition council does not need to be approved by a judge.

As the provisions of the Competition Act concerning settlement will only enter into force with effect on 1 July 2014, there is no Hungarian precedent on settlement available at this stage. We assume that the fact that the undertaking has submitted a settlement statement will be included in the motivation of the decision.

The application of the leniency policy is included only in the motivation part of the final decision, but the decision on the granting of the leniency is included in the order of the competition council passed during the procedure. The operative part of the final decision contains a list of the parties who committed an infringement and the extent of the fines imposed on each party who committed an infringement. Therefore, it may be revealed from the operative part that an infringer is exempted from the fine or that it has received a reduced fine. However, the reasons (i.e. successful leniency applicant) are elaborated in the motivation of the decision.

The commitment, on the other hand, is included in the operative part of the decision and the circumstances of the commitment are included in the motivation of the decision.

### **2.1.3. Legal consequences for the parties**

The final decision on the merits involving leniency and the settlement decision declares the finding of infringement, while the decision containing a commitment does not state the finding (or non-finding) of an infringement.

It can be stated that the decision on commitment is *per se* a modification or regulation of future conduct in a sense that it describes commitments for the client, and does not contain reference to a fine or to other sanctions. However, this is not the case with leniency and settlement decisions, although a pre-requisite of a successful leniency application is that the party who applies for leniency, as a main rule, terminates its involvement in the infringement, which has a *de facto* effect on the party's future conduct. The final decision (containing a reference to settlement and/or to leniency) includes a ruling on the amount of the fine, or in case of full immunity, the fact that the successful leniency applicant is exempted from the fine.

However, the interim decision on leniency cannot be challenged and in case of settlement procedures, the party must waive the right to challenge the decision, which is also contained in the final decision. Commitments decisions may be challenged before court. For further details in respect of the legal remedy, please see Sections 2.2.6 and 2.3.2.

The legal sanctions in the case of non-compliance with the transactional resolution are different depending on the type of such resolution.

After receiving the interim decision on the granting of leniency, the undertaking has to comply with some conditions:

- (i) to terminate any involvement in the infringement;
- (ii) to cooperate with the HCA in good faith, covering all aspects throughout the competition control proceedings;
- (iii) not to disclose in any way or form without the express consent of the HCA that it has submitted a request for exemption from, or for the reduction of, the fine.

In the case of a breach of the above conditions, the undertaking risks losing its immunity or a reduction in the amount of the fine.

In the case of a commitment decision, the HCA conducts a follow-up investigation to verify compliance with the decision with regards to the fulfilment of the commitment. If the commitment has not been fulfilled, the HCA may impose a fine on the client or withdraw its decision. In addition, under certain circumstances, the HCA may also amend its transactional decisions (as for withdrawal and amendment, see under Section 2.2.7 below).

The transactional agreement takes the form of a formal decision of the HCA. As such, the same applies to these agreements and their review by a court as to other formal decisions of the HCA, please see under Section 2.2.6 and 2.3.2 below.

Court cases may also take the form of private actions, whereby it is possible to initiate stand-alone, as well as follow-up actions under Hungarian law based on the infringement of the Competition Act.

Under the rules applicable prior to 1 July 2014, the court is bound by the HCA's final and binding decision on determining the (lack of) breach of competition law (the part of the decision which establishes that competition law was infringed). As of 1 July 2014, the court will only be bound by the HCA's decision which established the infringement (and not by a decision on the lack of infringement). An interesting aspect is that the binding nature of the HCA's decision was interpreted in a 2012 Hungarian lawsuit by the highest Hungarian court - the Curia - to be limited only to HCA decisions as a result of HCA proceedings which were initiated as a result of the court informing the HCA about the initiation of a lawsuit.

The qualification of facts, e.g. the definition of the relevant market, is not binding on a court e.g. the court may come to the conclusion that the HCA's definition of the market was not correct.

Since 2009 there is a special statutory – rebuttable - presumption in the Competition Act: In lawsuits initiated on the basis of any civil law claim against any person alleged to be a party to a hard-core cartel (any agreements and concerted practices between companies in violation of the Hungarian or EU cartel prohibition aiming directly or indirectly, to fix prices, to share the market, or to fix production or sales quotas), the presumption is that the infringement increased the price by 10% (for the purpose of determining the impact of the infringement on the price charged by the infringer), until proven otherwise. This presumption also applies to the infringement of the EU cartel prohibition, not only to the infringement of its Hungarian equivalent.

There are, however, limits to this presumption under general Hungarian civil law principles: The plaintiff still has to prove causation between the conduct of the infringer and the damage, as well as the actual amount of the damage; moreover, the plaintiff has to prove that it was affected by the infringement (e.g. it was a customer).

Along with a support for private actions, the Competition Act also contains provisions to protect successful leniency applicants with the following rules:

- (i) the leniency applicant who has received a *full immunity* from the fine pursuant to the *Competition Act* may refuse to provide compensation for any damage caused by his conduct in violation of the (HU or EU) cartel prohibition insofar as it may be recovered from the other infringer who was party to the same cartel.
- (ii) Any civil lawsuit filed against the *fully exempted* infringer (i.e. successful leniency applicant) must be suspended until the final and binding decision of the administrative lawsuit instituted for the review of the HCA's decision.

However, both protective measures for leniency applicants refer only to full immunity, not to the reduction of the fine; moreover, they only contain reference to the full immunity pursuant to the Competition Act (not to full immunity based on a cartel decision rendered by the European Commission).

## 2.2 Fundamental and procedural rights of the parties

Main risks for parties' rights during transactional procedures are connected with the extent of the right to withdraw their declarations and the use of the withdrawn declarations by the HCA, the rules relating to the disclosure of documents produced for the purpose of such procedures to third parties and in case of settlement, the waiver of their right to challenge the HCA's decision before court.

### *Right to withdraw declarations and the use of such declarations by the HCA*

According to the Competition Act,<sup>23</sup> applications to grant immunity from fines, so that information and evidence is submitted which enables the HCA to carry out a targeted inspection in connection with the alleged cartel, can be withdrawn before immunity is conditionally granted or if the application is rejected, within 8 days after the delivery of the decision on the rejection.

Leniency applications to grant immunity by way of providing information which enables the HCA to find an infringement in connection with the alleged cartel and leniency applications to reduce fines may not be withdrawn. In this respect, it is important to note that a leniency application requesting a grant of immunity from fines must be considered to be an application requesting the reduction of fines if the application for immunity is rejected (and the applicant did not withdraw the application). This means that once these applications have been made, the information provided may be used by the HCA irrespective of the fact of whether the leniency is granted.

### *Disclosure of documents to third parties*

Under the Competition Act in force as of 1 July 2014, corporate statements and settlement submissions may not be disclosed to third parties. Such statements may only be disclosed to other parties to the same procedure if this seems to be necessary for those parties to exercise their statutory rights in the procedure, e.g. their right to defence. In addition to this, there are strict rules which control the use of such documents by the other parties to the procedure.

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<sup>23</sup> Section 78/B (7) of the Competition Act.

According to such rules, as per the applicant's request, the HCA may restrict the access to corporate statements and settlements submissions so that such documents cannot be photocopied or photographed and only notes may be taken. Furthermore, the parties are allowed to use such documents only for the purpose of that particular procedure and the related judicial review procedure (review of the decision of the HCA on the merits of the case).

As for the evidence submitted under the leniency programme, no special rules apply. Depending on their contents, upon the applicant's justified request, the HCA may decide to treat such documents or a part thereof as a business secret. If this is the case, special rules apply to the access of such evidence, which are set forth in detail in Section 2.2.3.

#### *Waiver of the right to challenge the HCA's decision in case of a settlement procedure*

While in the case of leniency or commitment decisions, there is no surrendering or waiving of constitutional and other procedural rights, in settlement procedures, the parties must waive their right to challenge the settlement decision before court when providing the settlement submission. However, if the parties consider the statement of objections or the decision on the merits prepared on the basis of the settlement submission to be different than the settlement submission itself, they may withdraw the settlement submission. In such case, the HCA must prepare a new statement of objections without building on the settlement submissions.

These waivers, however, are balanced by the right of the parties to access the file prior to making the settlement submission and the right to withdraw the settlement submission if there is a difference between it and the statement of objections or the final decision. However, it may be also argued that it goes too far and limits the right to access to courts in a way which raises constitutional concerns.<sup>24</sup>

As for the conditions, circumstances, and conduct that may indirectly or directly increase pressure on companies, including the HCA's discretion in respect of pleas that may be raised against companies with full proof, we note that the HCA's discretion in respect of pleas that may be raised against companies without full proof is limited. Both in the case of procedures involving leniency applications and in the case of settlement procedures, the factual background must be explored in detail and supported by evidence. The preliminary views of the HCA are formulated in the statement of objections. The parties receive the statement of objections and may reply to it. In the case of settlement procedures, the parties may withdraw their settlement submission if they consider the statement of objections or the final decision to be substantially different to the settlement submission.

As for the fine setting, the HCA must impose fines pursuant to the rules set forth in the Competition Act. According to the provisions in force, the amount of the fine must be set by taking into account all circumstances of the case. Nevertheless, the legislator explicitly indicated certain aspects which the HCA must in particular take into consideration in the course of calculating the competition supervision fine:

- the gravity of the infringement (the degree to which economic competition is endangered, the scope and extent of harm to consumers' interests);
- the duration of the infringement;

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<sup>24</sup> Decision of the Constitutional Court 5/1992 (I.30.)

- the gain achieved by the infringement;
- the position of the participants of the infringement on the market;
- the culpability for the conduct;
- the cooperation facilitating the proceedings;
- the repeated violation of the law (recidivism).

In addition to this, the Notice on Setting Fines includes the rules relating to the aspects of setting fines. According to the court practice, the HCA may deviate from the rules set forth in this notice; however, it must state the reasons for the deviation.

Apart from the obligation of the HCA to take into consideration the above aspects, the HCA has wide discretionary powers in setting the amount of the fine. Thus, it falls under the discretion of the HCA, for example, whether to apply the sanction of a competition supervision fine at all or to impose other sanctions (as well).

According to the amendment of the Competition Act, which entered into force on 1 November 2005, contrary to previous rules the maximum amount of the fine is not 10% of the net turnover of the undertaking achieved in the preceding business year, but the same percentage of the turnover of the group of undertakings to which the concerned undertaking belongs. The same logic applies to the fines imposed on the professional association of undertakings; there the maximum amount of the fine is also 10% of the net turnover of the member undertakings achieved in the preceding business year.<sup>25</sup>

Also, we do not think that there would be conditions, circumstances or conduct which would constitute unjustifiable pressure on companies.

In our view, incentives to accept the benefits of a transaction resolution may be the transparent, predictable application of relevant rules of the Competition Act confirmed by court practice, the availability of notices and guidance as to the details of the procedure and the availability of the HCA for informal discussions.

### **2.2.1. Right against self-incrimination and presumption of innocence**

Neither the APA, nor the Competition Act provide expressly for a right against self-incrimination or the presumption of innocence. The general principles of the APA include a more general obligation that administrative procedures should be conducted fairly.<sup>26</sup> Despite this, parties routinely refer to both of these principles in the course of the procedures.

The Competition Act codified the principles established under EU law: the authority may not force undertakings to answer questions that would mean an admission of wrongdoing.<sup>27</sup> Yet, they cannot refuse to hand over documents that may prove the infringement. They must also answer factual questions.

This right also applies in procedures that are terminated with commitments (to put it differently, there are no special rules for procedures that are closed due to a commitment).

The other due process requirement, the presumption of innocence, is not formally recognized

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<sup>25</sup> Based on the LIDC Hungarian National Report of 2011

<sup>26</sup> Section 4(1) of the APA.

<sup>27</sup> Section 64/B(1) of the Competition Act.

in administrative procedures either. Yet, it is basically respected, since the HCA is obliged to prove the charges against the undertakings according to the applicable standard of proof. The undertakings investigated are not treated as wrongdoers before the competition council has established the infringement. Press releases heralding dawn-raids routinely explain that the search of corporate premises does not mean that the companies would have infringed the law.

There is no formal or informal obligation for parties to submit spontaneously and actively all kinds of documents or evidence material that would prove their participation in a competition law infringement (compared with the more active role of a leniency applicant due to its co-operation obligation).

There is no formal or informal obligation for parties to acknowledge liability or that an infringement of competition has occurred to benefit from a commitment order. The essence of commitment orders is that the existence of an infringement of competition rules is not decided.

That is obviously not true for settlements where undertakings must admit their wrongdoing and even waive their rights to seek court review<sup>28</sup>.

One feature of the Hungarian rules is that there is no special procedural framework for commitment procedures (or any other transactional procedures). This also means that the general procedural principles and safeguards apply to these cases as well. Unlike with phase one and phase two merger review procedures, there is no intermediate decision by the HCA to choose a transactional phase. Parties prepared to offer a commitment do not get sufficient feedback from the case handlers about the likelihood of the acceptance of their offer. The competition council gives orientation on this issue only in its statement of objections (SO) in the last phase of the procedure.

Neither in the Competition Act, nor in the guidelines on commitments, are there any provisions about the exclusion of documents provided before, should the authority or the company decide not to continue with a transactional resolution. This weakness has not led to litigation so far.

Given the two-stage nature of the HCA procedure, parties submit their commitments only after they have received the statement of objections of the acting competition council. By this phase, the HCA has collected almost all the facts and arguments required to prove an infringement. That is especially true for misleading advertising cases which usually do not involve such a sophisticated process as an abuse of dominance issue would call for. Even if companies are prepared to offer commitments, they nevertheless may challenge both the facts and the arguments of the HCA on the substance.

It is hard to predict how the practice of settlements will evolve. It can be expected that undertakings settling a case will not challenge the position of the HCA, since they have to admit the wrongdoing to benefit from the fine reduction.

### **2.2.2. Right of the parties to know the case against them (statement of objections)**

In the decision opening an investigation, the HCA briefly informs the parties about the alleged infringement. At the end of the investigation phase the case handlers prepare an

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<sup>28</sup> This waiver applies if the decision is in line with the content of the settlement agreement.

investigation report for the competition council which includes an indication of the subject of the investigation, the facts, supporting evidence and the proposal of the case handlers concerning further action.<sup>29</sup> According to the general practice, the parties have no access to the investigation report until the competition council issues its statement of objections, but the competition council may decide to deliver it to the parties and invite their comments thereon.<sup>30</sup>

Before holding a hearing and making a final decision, the competition council sends to the parties the statement of objections<sup>31</sup> which is similar to the Statement of Objections issued by the European Commission. This document contains the facts, legal conclusions and proposed remedies. However, it does not specify the exact amount of the fine which the competition council intends to impose on the parties. The statement of objections is always issued after any negotiation in relation to leniency or settlement, however a commitment offer can be made by the parties even after receiving the statement of objections. The statement of objections makes reference to the contemplated leniency or the settlement statement made by the party.

If a commitment offer was made before the statement of objections is issued, the competition council will either propose a commitment decision in the statement of objections in accordance with the commitment offer of the party or should give reasons why the commitment offer is not acceptable.

A party may not waive its right to receive the statement of objections from the competition council.

In some cases, parties make a commitment offer during the investigation phase of the procedure, i.e. before receiving the statement of objections, in which cases it can easily happen that they offer concessions that exceed what is necessary to remedy the existing competition problems. If the competition council asks for the improvement of the commitment offer, which exceeds what is necessary to eliminate the anticompetitive conduct specified in the statement of objections, the party may decide not to offer such an improved commitment, but in most cases the parties are willing to consider and accept the request of the competition council in order to avoid a negative decision and fine.

In the case of leniency, the Competition Act sets out the conditions for immunity or the reduction of fines.<sup>32</sup> When making a leniency application, the parties cannot be sure that their application would meet such conditions. The competition council makes an interim decision during the investigation on whether the application meets the statutory requirement for granting immunity or a reduction of fine. It gives certainty to the parties that they will receive leniency in the final decision of the competition council, provided that they fully cooperate with the authority during the procedure and that the investigation does not reveal that they coerced others to participate in the cartel.<sup>33</sup>

During settlement discussions, the competition council informs the party about the expected decision, including the range of fine.<sup>34</sup> Therefore, the party makes its settlement statement on

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<sup>29</sup> Section 71 of the Competition Act

<sup>30</sup> Section 55(5) of the Competition Act

<sup>31</sup> Section 73 of the Competition Act

<sup>32</sup> Sections 78/A-78/C of the Competition Act

<sup>33</sup> Section 78/C (2) of the Competition Act

<sup>34</sup> Section 73/A (2) of the Competition Act

the basis of such information and can expect that the statement of objections and the final decision of the competition council will reflect the same. If the statement of objections of the competition council substantially differs from the content of the settlement statement, the party may withdraw its settlement within 15 days from the date of receiving the statement of objections.<sup>35</sup> Also, if the final decision of the competition council deviates from the content of the settlement statement, the party may withdraw its statement.<sup>36</sup> In the case of a commitment offer made before receiving the statement of objections, the party can receive certainty about the possible positive outcome only when it receives the statement of objections providing for a proposed commitment decision.

The statement of objections also makes it clear if the competition council does not find the commitment offer acceptable. In the case of a commitment offer made after receiving a statement of objections, the party cannot be certain about the possible outcome until receiving the final decision of the competition council. However, they may receive some informal indication during the hearing of whether the competition council has a positive attitude towards the commitment offered.

On the one hand, there is a certainty about the possible maximum of the fine because of the statutory limit in the Competition Act. On the other hand, although there is a Notice on Setting Fines which contains information about the calculation of fines in antitrust cases, the parties can never make an exact calculation or prediction of the expected fines. [However, the party can make a rough estimation of the expected fine on the basis of the Notice after receiving the statement of objections which contains detailed information about the infringement, including relevant product and territorial markets, relevant period of time, and the aggravating and mitigating factors of the case.] Therefore, when the party submits an application for leniency it cannot calculate the expected amount of the fine for the given infringement. In the case of leniency, once the party receives the interim decision of the competition council providing for immunity, it has a great degree of certainty that it will not receive any fine. In the case of an interim decision of the competition council on the reduction of a fine, the Competition Act provides for the level of discount but the party will have no certainty about the exact amount of the fine.<sup>37</sup>

In the case of settlement, the competition council tells the party the range of expected fines during the negotiations, which provides certainty to the party about the level of fine before they make a settlement statement containing the acknowledgement of liability.

In the case of a commitment offer, the party is not required to acknowledge liability and a commitment decision does not establish the infringement and does not impose any fine.

### **2.2.3 Right to be heard and access to file**

As a general rule, under the Competition Act the parties have full access to the file, which takes place when the investigation is closed and the competition council communicates its objections.<sup>38</sup> As parties usually offer commitments or propose settlements after this moment, their access to the file is not restricted in any sense, with the exception of documents treated confidentially (see below). Generally, the parties do not receive the investigator's report

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<sup>35</sup> Section 73 (A) (4) of the Competition Act

<sup>36</sup> Section 73/A (5) of the Competition Act

<sup>37</sup> Sections 78/A (2) and (5) of the Competition Act

<sup>38</sup> Section 55 (5) of the Competition Act

separately but can access it during their access to the file. In some cases, especially when the parties would be ready for commitments, the competition council may send the report to the parties for comments and prepare its statement of objections on the basis of those comments. In such cases, the access to the file opens with the sending of the investigator's report.

As an exception, parties may access relevant documents in the file prior to the communication of the statement of objections, if this is indispensable in order to exercise their right to legal remedy against the decisions of the HCA passed during the procedure, which may be challenged by way of an appeal.<sup>39</sup> In addition, as per the party's request, the competition council may allow access to certain documents in the file for another reason if this does not jeopardize the success of the procedure.<sup>40</sup>

Special rules apply to the access to documents which are treated as confidential under specific legal titles.<sup>41</sup>

In the case of business secrets, the party must request the HCA to treat the document including such a secret confidentially by giving a detailed justification, and must prepare a non-confidential version of the document. It is important to note that the HCA may later change its decision on confidentiality if the relevant criteria for confidentiality are no longer fulfilled.

The decisions of the HCA on the rejection of the request on confidential treatment and on the termination of confidential treatment may be challenged by the relevant party before court.<sup>42</sup>

In procedures involving leniency or commitments, the waiver to the right to be heard or the waiver to the right of access to the file is not a precondition to the proceedings or the conclusion of a transactional resolution.

The only limitation on the access to the file as a whole is when a settlement procedure is initiated. When submitting their settlement submissions, the parties must waive their right to further access to the file.<sup>43</sup> This, however, does not constitute a real limitation, as by the time the parties make their submissions they have already had full access to the file via the normal rules. In any case, they may ask for further access to the file before completing their submissions.

In settlements, in their submission the parties have to waive their right to a hearing, but more importantly, the right to judicial review as well.<sup>44</sup> The submission (and the waivers) can nevertheless be revoked if the statement of objections or the final decision of the competition council differs from the content of the settlement submission to a meaningful level.<sup>45</sup> As to what constitutes a meaningful level, is not further described in the Competition Act and as the settlement procedure was introduced in the Hungarian competition law as of 1 July 2014, there is no relevant practice in this respect yet.

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<sup>39</sup> Section 55 (5) of the Competition Act

<sup>40</sup> Section 55 (6) of the Competition Act

<sup>41</sup> Section 55/A of the Competition Act

<sup>42</sup> Sections 55/A and 55/B of the Competition Act

<sup>43</sup> Section 73/A (3) of the Competition Act

<sup>44</sup> Section 73/A (3) of the Competition Act

<sup>45</sup> Section 73/A (5) of the Competition Act

#### **2.2.4 Right to an equal treatment**

One example can be given for the possible unequal treatment of companies in substantially equivalent situations: the different liability for the damage claims of leniency applicants. The leniency applicant under Hungarian competition law bears a “secondary” liability for the damages caused by the cartel.<sup>46</sup> any undertaking which received full immunity from the fines under the leniency rules may refuse indemnity claims as long as they can be collected from other undertakings in the same cartel. This refusal possibility bears special significance in light of another distinctive rule according to which it is presumed under Hungarian competition law that horizontal price fixing and/or market sharing arrangements are deemed to result in a 10% increase in the contract prices.<sup>47</sup> This way, the injured parties in civil lawsuits seem to be released from the necessity of affirmatively proving the amount of the damages they have suffered by virtue of the cartel, although the presumption is not about the amount of damages, but rather about the level of the price increase.

The rules summarized above uniformly entered into effect as from 1 June 2009. However, the same effective date does not mean a uniform application method. According to the amendment, the 10% price increase presumption can be invoked in all lawsuits initiated after 1 June 2009, regardless of when the underlying cartel was committed; while the possibility for the leniency applicant to conditionally refuse indemnity claims only applies to damage claims originating from cartel activities committed after 1 June 2009.

The difference could pose the risk of the unequal treatment of leniency applicants. If the HCA concludes in a decision, along with the evidence supplied by a leniency applicant, that a cartel was operated before 1 June 2009, the leniency applicant will need to consider filing a petition with the court to overturn the HCA decision (providing that all other infringers challenged the HCA decision before the court). Otherwise the HCA decision becomes final and enforceable against the leniency applicant and it will be liable for indemnifying the damaged parties alone. In that case, the leniency applicant will not be able to take advantage of the “secondary liability” and refuse indemnity claims because the cartel was operating before 1 June 2009. On the other hand, since the “follow-on” damage claims are asserted after 1 June 2009, unless the leniency applicant proves otherwise, it remains “automatically” liable for indemnifying the injured parties to a value equalling to at least 10% of the contract prices affected by the alleged cartel. (Nevertheless, the leniency applicant may claim indemnity from the members of the same cartel in proportion to their involvement in the cartel – but only after the legal review of the cartel decision is over.)

This illustrates that the entry into force of regulations resulted in a fairly unequal position for the leniency applicants compared to that of other infringers and/or leniency applicants submitting evidence on infringements committed after 1 June 2009.

#### **2.2.5 Right to an impartial judge**

The HCA passes its transactional resolutions similarly to its regular resolutions - there is no difference in the involved bodies or authorities. The function of investigation and decision-making is separated within the organization of the HCA; for details please see Section 2.1.1. However, the body negotiating and finalizing the transactional solution is usually the decision-making body, i.e. the competition council acting in the case.

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<sup>46</sup> Section 88/D of the Competition Act

<sup>47</sup> Section 88/C of the Competition Act

## 2.2.6 Right to trial

Decisions on granting leniency (immunity from or reduction of fine) are passed by the HCA in the form of an order<sup>48</sup> against which no appeal or judicial review is possible.

Until 30 June 2014 the transactional decisions of the HCA took the form of an order in the case of commitments.<sup>49</sup> The order could be reviewed by a court and the request for review must have been submitted to the competition council within 8 days of the receipt of the order. The request for review could be submitted by the parties or anybody in respect of whom the order contains provisions or who had to be notified of the order according to the Competition Act.<sup>50</sup>

As of 1 July 2014, both settlement decisions and commitments decisions take the form of a resolution (decision on the merits of the case).<sup>51</sup>

Resolutions may be challenged before court by the parties to the procedure, with the exception of the resolution passed as a result of a settlement procedure. In the latter case, the parties must waive their right to request the judicial review of the settlement decision.<sup>52</sup> Instead of the right to judicial review, in the case of settlement procedures the parties may withdraw their settlement submissions if the statement of objections issued by the competition council or the decision on the merits significantly differs from the contents of the settlement submission.<sup>53</sup> This right of withdrawal seems to constitute an acceptable guarantee for the parties in principle, although no practice could be developed in this respect to date. However, it may be argued that it goes too far and limits the right to access to courts in a way which raises constitutional concerns.<sup>54</sup>

The resolution of the HCA may be challenged before the court within 30 days after delivery of the same.<sup>55</sup> The review may be initiated by the parties and also by other participants of the procedure in connection with provisions concerning other such participants.<sup>56</sup>

The court is entitled both to annul the decision and to order the authority to adopt a new decision and to alter the HCA's decision.<sup>57</sup>

Commitments decisions taken in the form of an order, as set out by the version of the Competition Act in effect until 30 June 2014, cannot be altered by the court.<sup>58</sup> However, based on the new rules effective as of 1 July 2014, commitments will be accepted in the form of a resolution, where the reviewing Courts will have, at least theoretically, the right to amend such resolutions of the HCA.

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<sup>48</sup> Section 78/C (2) of the Competition Act

<sup>49</sup> Section 75 (1) of the Competition Act in force until 30 June 2014

<sup>50</sup> Section 82 of the Competition Act

<sup>51</sup> Section 75 (1) of the Competition Act in force as of 1 July 2014

<sup>52</sup> Section 73/A (3) of the Competition Act

<sup>53</sup> Section 73/A (5) of the Competition Act

<sup>54</sup> Decision of the Constitutional Court 5/1992 (I.30.)

<sup>55</sup> Section 330 (2) of the CCP

<sup>56</sup> Section 327 (1) of the CCP

<sup>57</sup> Section 83 (4) of the Competition Act

<sup>58</sup> Section 83 (4) of the Competition Act and Section 339 of the CCP

A review is only admissible if the parties base their claim on the infringement of a legal provision. Administrative decisions which involve a margin of discretion are regarded as lawful if the competition authority has satisfactorily constituted the facts of the case and followed the procedural rules, if the principles of its considerations can be determined and if the causality is established in the reasoning.<sup>59</sup> Only substantial procedural flaws will lead to the annulment of the decisions.

Based on the Menarini judgement of the ECHR (*A. Menarini Diagnostics S.r.l. v. Italy*, App. No. 43509/08), some authors argue that even if there is no legal possibility of a full review by the courts, if they carry out a full review in fact, this is compatible with the ECHR. Many authors view the Hungarian system similar to that of the Italian as in the Menarini judgment.

### **2.2.7 Ne bis in idem**

First, it is important to note that the Competition Act does not contain any express provision that could be interpreted as a ‘ne bis in idem’ principle in competition law proceedings. An express ‘ne bis in idem’ prohibition is contained in the new Constitution, which entered into force in 2012.<sup>60</sup> Nevertheless, the scope of this general principle is limited to ‘criminal proceedings’ and ‘criminal offenses’. According to this, no one shall be liable to be tried or punished in criminal proceedings for an offense which he or she has already been acquitted or convicted for by a final and binding decision in accordance with the law. However, due to the now widely accepted criminal law characteristics of antitrust competition proceedings, it can reasonably be argued that, by analogy, this principle shall be applied to antitrust competition proceedings as well.

In addition, the APA, serving as background legislation for the Competition Act, also contains a kind of ‘ne bis in idem’ clause.<sup>61</sup> According to this, if the court (having jurisdiction to review administrative decisions) has adopted a decision on the merits of the case, new proceedings may not be opened at the same authority in the same case, under the same grounds. From the mere wording of this provision, it seems that this ‘ne bis in idem’ principle only applies to cases which have been reviewed by the courts. Nevertheless, in the case of transactional resolutions, the decision of the HCA is often not followed by a judicial review.

Furthermore, the APA sets forth that, on one occasion, the HCA may withdraw or amend its decision if it establishes the unlawfulness of such a decision and the decision has not yet been reviewed by the court (until the filing of the plea). The decision, however, may be withdrawn or amended within 1 year following the delivery of the decision and only if this does not violate rights obtained in good faith.<sup>62</sup>

Also, in the case of commitments decisions, the Competition Act in force until 30 June 2014 sets forth that commitments orders are without prejudice to the power of the HCA to start a new competition supervision proceeding in the case where there has been a material change in the circumstances or where the order was based on misleading information concerning a fact which was fundamental to the making of the resolution.<sup>63</sup>

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<sup>59</sup> Section 339/B of CCP

<sup>60</sup> Article XXVIII (6)

<sup>61</sup> Section 109 (3) of APA

<sup>62</sup> Section 114 of APA

<sup>63</sup> Section 75 of the Competition Act in force until 30 June 2014

The Competition Act in force as of 1 July 2014 describes in detail the cases and the time limits when the HCA may amend or withdraw its commitments decision upon the request of the parties or *ex officio*.<sup>64</sup>

The HCA must amend the commitments decision

- a) upon request of the undertaking obliged to fulfill the commitments if the undertaking could not comply with the commitment due to an unavoidable reason outside of its control; or
- b) *ex officio* or upon request of the undertaking obliged to fulfill the commitment if the fulfillment of the commitment is no longer justified due to the change of circumstances, in particular the change of market relations or the conditions of competition;

and the result desired may be reached otherwise.

In respect of item a) above, the request may be submitted within 15 days after getting knowledge of the reason hindering compliance, but at the latest within 2 months after the occurrence of same.

The HCA must withdraw its decision not reviewed by court if the decision was based on the misleading communication of a fact material from the point of view of the passing of the decision. In such case, the decision may be withdrawn within 5 years following the delivery of the decision.

Finally, if the undertaking did not fulfill the commitment (as prescribed in the decision or in the amended decision) the HCA must withdraw its decision or impose a fine, taking into account the effective enforcement of public interests, in particular the characteristics of the market relations concerned, the conditions of competition, the degree of fulfillment of the commitment and in case of an omission, the culpability of the undertaking's conduct. In this case, the decision may be withdrawn within 5 years after the expiry of the deadline set to fulfill the commitment, or in case of continuous commitment, within 5 years following the breach of the commitment.

Should the decision be withdrawn, the procedure must be re-commenced so that the rules relating to the statute of limitations are not applicable and the HCA may also impose a procedural fine due to the conduct being the reason for the withdrawal.

The above mentioned rules set a strict limit for the authority to proceed in the same case twice and therefore such rules imply that in cases other than the above-mentioned ones, no procedure may be initiated based on the same facts.

Thus, from the above provisions of the Constitution and the APA, it follows that it is reasonable to expect that the HCA would be prevented from opening new proceedings if the very same conduct was already subject to a HCA proceeding which was closed with a transactional resolution (typically: commitments by the party), was not subject to court review and does not fall within the scope of the above-mentioned provisions on the possibility of amendment and withdrawal of decisions.

For the same reason, we are of the view that the *ne bis in idem* principle could also apply to leniency cases, including cases which were closed without finding an infringement, due to a

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<sup>64</sup> Section 75 of the Competition Act

lack of sufficient evidence. At the same time, if new pieces of evidence arise and the decision may be withdrawn or amended in line with the APA as mentioned above, then the position of the leniency applicant would have to be preserved in the case of type A leniency applications: this could be achieved for example by using the powers of the HCA under the Competition Act to “copy” and “use” evidence from one proceedings into another. If the earlier evidence submitted by the HCA is thus reused in the newly opened proceedings, then the HCA would be entitled to retain the status of the leniency applicant as well as its position which was achieved in the earlier proceedings.

As regards the immunity of individuals, the following has to be noted:

According to Hungarian law, individuals are not held liable for competition law infringements (unless they are undertakings themselves, i.e. they engage in economic activities). As a result, the question is not applicable / is irrelevant to these individuals.

At the same time, individuals can be held liable under criminal law in the specific cases of price fixing and market sharing in relation to public procurement and public concession procedures, which are punishable offences under both the Old and the New Criminal Codes. At the same time, according to both the Old and the New Criminal Code, the individual (e.g. employee, manager) may not be punished if the company first submitted a leniency application to the HCA.<sup>65</sup> The aim of introducing this provision in the Criminal Code was clearly to encourage leniency applications. As a result, an individual is protected if the company already submitted a successful leniency application.

As to the application of the ‘ne bis in idem’ principle for other members of the same group of companies, the following has to be noted. There is no clear guidance in this respect from the case-law, especially in relation to commitment / settlement decisions by the HCA. At the same time, in the case of leniency applications, the HCA has so far accepted in practice that leniency applications are submitted by an undertaking as well as all companies belonging to its group (even though the Competition Act in effect until 30 June 2014 stated that leniency applications cannot be submitted jointly by more than one undertaking.<sup>66</sup> As of 1 July 2014, however, the Competition Act will be changed to state that leniency applications cannot be submitted jointly by more than one “independent” undertaking: this means that the Competition Act will specifically allow leniency applications to be submitted by all the companies belonging to one company group: in case of such an application, all company group members will be protected and would receive leniency.<sup>67</sup>

## **2.3 Rights of third parties**

### **2.3.1 Right to be heard and access to file**

The Competition Act provides a general right for third parties, including damage claimants, that can substantiate sufficient legal interest to access the file. This right opens after the end of the procedure, but an earlier access may also be given if this is necessary in order for the third party to exercise its right as ensured in statutory rules or to perform its obligation based on statutory rules or a decision of a public authority.<sup>68</sup>

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<sup>65</sup> Section 420 of the New Criminal Code as well as Section 296/B of the Old Criminal Code

<sup>66</sup> Section 78/A (8) of the Competition Act

<sup>67</sup> Section 78/A (9) of the Competition Act

<sup>68</sup> Section 55 (3) of the Competition Act

There are several limitations on this right. First, it can be restricted if the access to the file (or rather to certain documents in it) would put the proper functioning of the HCA in danger, specifically for instance the integrity of its leniency policy.<sup>69</sup>

Second, access can only be given to non-confidential versions of the confidential documents in the file. Confidentiality covers personal data, the identity of protected persons (complainant, witness), business secrets, other qualified secrets and the internal documents of the HCA, the European Commission and other NCAs within the EU.<sup>70</sup>

Third, the right to take copies included within the right of access to the file may be restricted, or access can be given only to the third party's legal counsel or expert.<sup>71</sup>

It is important to note that settlement submissions and corporate leniency statements enjoy a *sui generis* protection as of 1 July 2014. They cannot be accessed by third parties but only by the parties to the procedure if they could not exercise their statutory rights without access, e.g. their right to defence. Such documents may only be accessed and used by such parties for the purpose of the procedure and the judicial review of the HCA decision passed in that procedure.

As for the right to be heard in the case of third parties, there are no special rules in the case of procedures involving leniency or settlement. This means that in such procedures, the HCA may request data from such parties upon its discretion, but they are not entitled to be heard.

Furthermore, in commitment procedures the competition council may choose to start a consultation with interested third parties on the commitments offered.<sup>72</sup> There is, however, no right for third parties to be consulted or to appear in any of the transactional procedures discussed in this note.

### **2.3.2 Right to a trial**

The HCA may request data from third parties in competition supervisory procedures, but third parties do not have rights in such procedures under the Competition Act.

The transactional decisions of the HCA, with the exception of the decision passed in a settlement procedure and the order passed regarding the leniency application, may be challenged before a court. The judicial review may be initiated by the party to the procedure, and also by other participants of the procedure in connection with provisions which concern such other participants.<sup>73</sup>

Typically in the competition supervisory procedure there are no third parties in respect of whom provisions are included in the decision, and therefore, it can be concluded that typically, third parties are not entitled to challenge the transactional decision of the HCA. In addition, even if they are entitled to do so, this right is limited to provisions concerning that certain third party.

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<sup>69</sup> Section 55(4) of the Competition Act

<sup>70</sup> Section 55/A (1) of the Competition Act

<sup>71</sup> Section 55/B (4) of the Competition Act

<sup>72</sup> Section 75/A of the Competition Act

<sup>73</sup> Section 327 of the CCP

A commitments decision in the form of an order (which existed until 30 June 2014) can be reviewed on the request of the parties, those who are directly concerned by the order and those who have to be notified according to the Competition Act.<sup>74</sup> APA requires notification of those who are directly and individually concerned by the order or those whose rights or legitimate interests might be affected by it or whose notification is required by law.<sup>75</sup>

In practice the Competition Council only notifies the parties who were investigated and not e.g. competitors, co-contractors. If any third party's right would be affected by the order, the Competition Council must notify it according to APA, but the current legal interpretation does not include competitors or any third party in the case of commitment orders.

Complainants enjoy the same rights as parties regarding Section 78 (2) of APA, but only in the pre-investigatory phase.<sup>76</sup> Since commitment orders are adopted only after an *ex officio* investigation was already initiated, the complainants do not enjoy the same rights as the parties. However, based on Section 78 (2) of APA, they were notified on the commitments order and, for example, in case Vj-22/2008, the complainant challenged the order before the court, as a result of which the court annulled the order and ordered the HCA to re-commence the procedure by giving detailed instructions on how to proceed.

As of 1 July 2014, the HCA's commitment decisions will take the form of a resolution, where complainants and other interested parties will not have any right to initiate judicial review.

If third parties have the right to challenge the order of the competition council, they must be considered as parties in the procedure before the court. There is no distinction in this regard.

### **2.3.3 Right of equal treatment**

Until 1 July 2014, complainants enjoyed a more favourable treatment than other interested parties because complainants had the right to request judicial review against the HCA's order accepting the undertaking's commitments. This unequal treatment ceases to exist after 1 July 2014 (see above at 2.3.2).

From 1 April 2010, an individual who has knowledge of a price-fixing or market-partitioning hardcore cartel and secretly informs the HCA and supplies essential written evidence, will receive an informant's fee.<sup>77</sup> The fee becomes payable once the HCA has established the infringement and imposed the fine in its final decision.

The HCA is required to treat the informer's personal data in strict confidence if he requests this treatment. However, the HCA has to inform the informer in advance that the full anonymity of his personal data might call into question the probative value of the evidence he supplied (i.e. the HCA, or the courts in the subsequent court review of the HCA decision, may set aside this evidence on the basis of its unknown origin). Accordingly, the informer has to decide: he either sacrifices his anonymity (in order to get the informant fee at the end

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<sup>74</sup> Section 82 (3) of the Competition Act

<sup>75</sup> Section 78 (2) of APA

<sup>76</sup> Section 43/H (2) of the Competition Act

<sup>77</sup> Section 79/A of the Competition Act. The fee equals to 1% of the fine that the HCA ultimately imposes on the cartel participants in respect of the disclosed infringement, with a cap of HUF 50,000,000 (approximately EUR 185,000).

of the procedure) or retains his secrecy and runs the risk of losing the informant fee. This poses an unfair and potentially unequal treatment, as the informer might lose the informant fee (due to his preference of maintaining the confidentiality of his personal data) even if the evidence he supplied is essential and sufficient to prove the infringement.

As of 1 July 2014, the competition council has the right to initiate negotiations with interested third parties before the adoption of any pre- or post-merger conditions/obligations or commitments. However, it is at the sole liberty of the competition council to initiate such negotiations, i.e. no conditions govern when and under what circumstances the competition council needs to initiate such negotiations with third parties. This implies that the competition council does not have to give any reason if he elects not to initiate the negotiations. This, at least theoretically, may lead to an unfair and discriminatory application of the negotiations which may result in the unequal treatment of third parties.

### **2.3.5 Principle of legitimate expectation and of good faith**

The APA sets the principles of the procedure for the HCA,<sup>78</sup> establishing that it may not misuse its powers, and shall exercise them in a professional manner in accordance with the principles of efficiency and with the cooperation of the parties in its proceedings. The HCA shall act in good faith, within the framework of the law, bearing in mind the rights and the lawful - including economic - interests of clients. It shall protect the rights of clients they have obtained in good faith. These principles set a framework for the transactional procedures of the authority.

While there is no right for transactional outcome, these legal principles impose an obligation on the HCA to see through the procedures once they are initiated. It may not simply change its mind and abandon a half-completed settlement or commitment negotiations without reasons provided by significant changes in the underlying legal or factual situation (e.g. the party is not acting in good faith).

During the phase of the investigation the officials of the HCA are not in a position to bring final decisions, either on the scope of the infringement or on its possible remedies, or on the question of leniency rewards. This is however made clear to the parties who then can decide on the pros and cons of engaging into a more in depth cooperation. Nevertheless, the investigators provide as much assistance as appropriate for the parties to ensure the success of their cooperation. Leniency applicants are kept in a discussion aimed at the maximisation of the added value of their submissions. The HCA requests clarifications and points out issues which need further elaboration.

Nevertheless, there is a tension between the public interest as perceived by the HCA, which aims at the collection of as much evidence as possible, and the interest of the leniency applicant in obtaining the maximum possible reduction without providing more evidence for it than necessary. The HCA is not partner in restricting the party's cooperation to the necessary minimum. This means that the investigators do not disclose their views on whether the party has already provided significant added value, and try to keep the applicant in a continuous readiness for cooperation.

In the case of settlements, the competition council already has a view on the scope of the infringement and its objective is to have that infringement acknowledged by the parties. The

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<sup>78</sup> Sections 1-7 of the APA

parties on the other hand have an interest, in light of the evidence, to reduce that scope as much as possible. While both parties are interested in an amicable outcome, both can use the cessation of the negotiations as a threat. The same is true of commitment procedures, where the competition council already has a clear view on the market issue to be remedied by the commitments. In this case, both parties can use as a pressure the possibility of stopping negotiations, though in this case the undertaking is in a more difficult situation than the HCA. Naturally the HCA shall not “aim higher” than justified by the identified competition issue.

Nevertheless, transactional procedures are less prone to misuses by either the parties or the HCA because, in those cases, their interest is converging rather than opposing each other, supposing a greater level of goodwill than in normal procedures.

### **2.3.6 Confidentiality and publicity of the transactional solutions**

Non-confidential versions of the decisions of the HCA are always made public. This rule applies to decisions affected by leniency, settlements or commitments too. Settlement decisions mostly consist of the settlement submissions of the parties and therefore will probably tend to be short and rather of a summary nature. It is a major advantage in settling that no detailed decision is adopted by the HCA. This in turn is of course a disadvantage to private damage plaintiffs. The non-confidential version of the statement of objections is, however, accessible to third parties after the closing of the procedure, as a general rule, and consists of the settlement submissions.

## **3. Merger control**

Remedies are possible and play an important role in merger control proceedings. Instead of prohibition the HCA clears the concentration if the significant lessening of competition on the relevant market may be eliminated as a result of the fulfilment of certain pre- or post-conditions, in particular the divestiture of individual parts of undertakings or assets, or the elimination of control over an indirect participant, or as a result of the compliance with certain behavioural rules and if the undertakings concerned undertake to amend the concentration in accordance with this or, in the case of the implementation of the concentration, they undertake to comply with such behavioural rules.<sup>79</sup>

As it is clear from the above, remedies are always negotiated between the notifying parties and the HCA, meaning that the HCA will only impose such remedies if the parties concerned voluntarily undertake to fulfil them.

### **3.1. Negotiation of remedies**

The parties are allowed to submit modifications or changes (i.e., remedies) to their transaction(s). The remedies are usually discussed with the HCA and then the parties concerned draft and submit their proposals. This approach is also confirmed by the HCA's Notice on Conditions and Obligations in Merger Cases, according to which the parties are entitled to suggest remedies to their transaction. In this way the parties would like to ensure that the HCA approves the planned transaction, since the undertaking will avoid future competition problems which may have arisen.

It is worth mentioning that, if after a while the parties believe that they cannot or can only

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<sup>79</sup> Section 30 (3) of the Competition Act

just partially fulfil the obligation or the condition, they are entitled to request the HCA to amend the decision clearing the concentration and prescribing remedies.

There is no difference between remedies submitted at the first stage (simplified procedure) and those submitted at the second stage (full procedure) of the procedure. According to the HCA's Notice regarding Considerations in Differentiating Between Concentrations Subject to Authorisation in the Simplified or Full Procedure, as a general rule, if conditions or obligations should be attached to the clearance, the assessment shall be carried out within the framework of a two phase procedure, unless the concerns in connection with the competition and the proper remedy can easily be identified.

We also note that in merger cases, the parties usually consult the HCA prior to the formal commencement of the procedure. In 2011, the HCA published its Pre-notification Guidance with the aim of facilitating the proper use of the contacts. In addition to this, as of 1 July 2014, the Competition Act also explicitly refers to such pre-notification procedure stating that the undertakings in charge of applying for the clearance may initiate pre-notification consultations with the HCA in order to clarify the scope of data and documents to be filed with the HCA.<sup>80</sup>

The pre-notification contact aims to facilitate cooperation between the HCA and well-informed and well-prepared parties and their representatives. It is not the purpose of the pre-notification contact to remedy any deficiencies in the preparedness of the parties and their representatives. Consequently, the parties themselves need to carry out the preliminary evaluation and risk assessment of the proposed transaction. The HCA may give aspects and make observations during pre-notification contact; however the substantive evaluation of the given transaction by the HCA is only possible in the course of a subsequent proceeding. However, the necessity of remedies is likely to turn out during the pre-notification phase.

According to the Pre-notification Guidance, pre-notification contact can generally take place in the following situations:

- (i) By evaluating whether the transaction concerned is subject to the competition rules, whether the transaction constitutes a concentration within the meaning of the Competition Act – if professionally well-prepared parties/their legal representatives cannot determine this unanimously according to the existing case law,
- (ii) On the extent of the data/information that is needed in order to assess the transaction, the clarification of the questions stemming from the fulfilment of the notification form (the circumstances that may lead to an application requesting the elimination of the questions that need to be answered)
- (iii) On the competition concerns identified by the parties before initiating a procedure that should be assessed within the course of the procedure and on the contemplated remedies.

The HCA must clear the merger if the proposals eliminate the competition concerns. This means that the HCA may not refuse the clearance of the concentration if it would not significantly reduce competition on the relevant market, in particular as a result of the creation or strengthening of a dominant position. However, it is in the HCA's discretion to assess the proposals on the basis of the 'substantial lessening of competition' test.

Concentrations shall be assessed upon weighing the advantages and disadvantages resulting

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<sup>80</sup> Section 69 of the Competition Act

from the concentration, such as in particular:

- (i) the structure of the relevant markets; the existing or potential competition; the purchase and sales opportunities on the relevant markets; the costs and risks, as well as the technical, economic and legal requirements for entering into and exiting from, the market; the foreseeable impact of a concentration upon competition in the relevant markets;
- (ii) the market position and strategy of the companies concerned, their economic and financial capability, their business policy, their competitiveness on national and foreign markets, and any expected changes therein;
- (iii) the effect of concentration upon the suppliers and trading parties.

The HCA makes its decision on accepting or rejecting such proposals based on information searched and collected from as wide a range of the market and other market players as is efficiently possible. However, after this suitability and executability check, it always remains at the HCA's own discretion to decide.

Objections of the HCA may arrive at the notifying parties both verbally and in written form. Practically, objections in respect of obvious concerns will be communicated during the pre-notification contact or after the notification verbally. In addition to this, the HCA may also communicate its concerns in the form of statement of objections.

Competitors and other interested parties may have a role in defining remedies, since the HCA may request data supply from competitors and third parties in order to be able to assess whether the remedy offered is appropriate. In addition to this, the Competition Act in force as of 1 July 2014 enables the HCA to publish the non-confidential version of the proposed remedies on its website simultaneously with the delivery of the statement of objections to the parties, and to request third parties to comment on it.<sup>81</sup> The comments must be made within 20 days following the publication of the proposed remedies. Other than this, third parties do not have the right to be heard. Also, the Competition Act provides a general right for third parties, including damage claimants, who can substantiate sufficient legal interest to access the non-confidential version of the file. For more information on the access to the file, please see Section 3.2.1.

In addition, a formal or informal complaint may be submitted to the HCA by any third party if and when detecting any infringement which falls within the competence of the HCA, including mergers executed in lack of or not in line with the HCA's clearance.

Parties have the opportunity to present their views during the pre-notification consultations, and also during the procedure. The HCA must hold a hearing if the party requests so or if the HCA considers it as necessary.

Waiver of basic rights (e.g. the right to be heard) shall not be a precondition of an acceptable remedy.

The HCA is entitled to use only those "means of pressure" that are foreseen by the law. For instance, an administrative penalty could be imposed if the party is not acting in good faith and hinders the procedure. Thus, putting pressure on the parties only for the sake of it e.g. by the delay in granting authorisation and/or excessive objections, cannot occur, because it would mean a breach of the basic legal principle of good faith.

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<sup>81</sup> Section 75/A of the Competition Act

### 3.2. Enforcement of remedies

Fulfilment of remedies shall be *ex officio* ensured by the HCA's follow-up investigation. As discussed above in detail, merger remedies include pre- and subsequent conditions, as well as obligations.

In respect of prior conditions, the clearance granted will enter into force by fulfilling such conditions. Clearances subject to the fulfilment of subsequent conditions will enter into force upon granting the clearance. However, the clearance will be rescinded in the case of the non-fulfilment of the condition.

Pursuant to Section 31 of the Competition Act, should the concentration be implemented without the fulfilment of the condition as prescribed in the clearance, the HCA will oblige the parties to terminate the concentration by setting a reasonable deadline, in particular with regards to the divestiture of the undertaking or part of the undertaking, the assets or shares in respect of which the control has changed.

Furthermore, the HCA will withdraw its decision on the clearance if the obliged party failed to fulfil the obligation set by the HCA.<sup>82</sup>

In addition, the HCA will amend its decision in the following cases:

- a) upon the party's request filed at the latest by the expiry of the deadline to fulfil the obligation or the condition, if the party cannot fulfil an obligation or condition due a reason beyond its control; or
- b) upon the party's request or *ex officio* if the fulfilment of the obligation is no longer required due to a change in the market relations and competition conditions;

and, the adverse effects of the concentrations which resulted in the prescription of the obligation may be eliminated in another way or also without the prescription of any obligation.

The decision may be amended within 5 years after the expiry of the deadline set to perform the obligation, or in the case of a continuous obligation, within 5 years after the infringement of the obligation.

However, it seems that the most important tool that the HCA has to ensure the fulfilment of remedies is the right to impose fines in the case of non-compliance.

In addition, if a merger is implemented without the fulfilment of conditions and obligations, any acts or legal statements arising from the exercise of control rights shall be null and void.

Finally, as mentioned above, any third party is entitled to file a formal or informal complaint with the HCA, if it is believed that a concentration has been implemented without the (proper) fulfilment of the remedies as prescribed by the HCA.

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<sup>82</sup> Section 32 of the Competition Act

#### 4. Conclusion and recommendations

It seems that the advantages offered by transactional procedures are attractive to the *parties* and such procedures may be considered as useful mechanisms both from the point of view of the HCA and the parties to such procedures.

Commitments decisions seem to be applied by the HCA mainly in abuse of dominance (and unfair commercial practices related) cases only (although the scope of application is not restricted by the Competition Act to this area), while according to the Competition Act, leniency is only applicable in certain cartel cases. As for settlements procedures, we do not have yet experience since this mechanism has been introduced in Hungary as of 1 July 2014.

As of 1 July 2014 *third parties* do not have a right to challenge such decisions (or other, non-transactional decisions) of the HCA before court (prior to 1 July 2014, complainants could challenge commitments orders before court). In addition, the scope of the review is limited, since administrative decisions which involve a margin of discretion are regarded as lawful if the competition authority has satisfactorily constituted the facts of the case and followed the procedural rules, if the principles of its considerations can be determined and if the causality is established in the reasoning.

This may be problematic in particular in respect of commitments decisions, since they are less likely to be challenged due to their nature.

As for *third parties, as damages claimants*, commitments decisions may be challenging from the point of view of private enforcement, since in such decisions, no infringement is established. Unfortunately there is not yet court practice in this respect.

It is also an open question how the different rules of leniency and settlement procedures on the access to the file (leniency statements or settlement submissions) by third parties may affect *private enforcement*, and in turn, how private enforcement may affect the motivation of undertakings to engage into transactional procedures. Prior to 1 July 2014 leniency applications were, as a general rule, accessible to third parties. As of 1 July 2014, leniency applications and settlement submissions will not be accessible to third parties, but otherwise, either on the level of the HCA or on the level of courts, even documents considered as business secret may be available to civil claimants, since both the HCA and courts have the right to re-consider the status.

As a matter of fact, private enforcement cases are rather rare in Hungary. The reasons for this seem to be versatile, including the vague legal background that may make difficult claiming damages in case of a competition law infringement even if there is a final decision of the HCA on the infringement.

Thus, currently it is not assumed that transactional decisions would hinder the enforcement of damages claims based on competition law infringements, but rather, the perception of transactional decisions is positive.

The Hungarian group does not have any particular recommendations for amendments, since the system of transactional resolutions seems to be well functioning in the practice.