



# ICLG

The International Comparative Legal Guide to:

## **Cartels & Leniency 2015**

**8th Edition**

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirmaet Wiersholm AS

Affleck Greene McMurtry LLP

Allende & Brea

Attorneys at law Borenus Ltd

B. Golan Law Firm

Bloomfield Advocates & Solicitors

Crowell & Moring

Debarliev, Dameski & Kelesoska, Attorneys at Law

DLA Piper Nederland N.V.

Drew & Napier LLC

ELIG, Attorneys-At-Law

Gjika & Associates Attorneys at Law

INFRALEX

Keane Vgenopoulou & Associates LLC

Khaitan & Co

King & Wood Mallesons LLP

KLEYR GRASSO

Koutalidis Law Firm

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Nagashima Ohno & Tsunematsu

Odvetniki Šelih & partnerji, o.p., d.o.o.

Pachiu & Associates

Preslmayr Rechtsanwälte OG

Schellenberg Wittmer Ltd

Skadden, Arps, Slate, Meagher & Flom LLP

Sysouev, Bondar, Khrapoutski

Szecskey Attorneys at Law

Wilmer Cutler Pickering Hale & Dorr LLP

Yoon & Yang LLC



# The International Comparative Legal Guide to: Cartels & Leniency 2015

# GLG

Global Legal Group

## Contributing Editors

Simon Holmes and Philipp Girardet, King & Wood Mallesons LLP

## Head of Business Development

Dror Levy

## Account Directors

Antony Dine, Florjan Osmani

## Senior Account Managers

Maria Lopez, Oliver Smith, Rory Smith

## Sales Support Manager

Toni Wyatt

## Editor

Gemma Bridge

## Senior Editor

Suzie Levy

## Group Consulting Editor

Alan Falach

## Group Publisher

Richard Firth

## Published by

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

## GLG Cover Design

F&F Studio Design

## GLG Cover Image Source

iStockphoto

## Printed by

Ashford Colour Press Ltd  
November 2014

Copyright © 2014  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-910083-23-9

ISSN 1756-1027

## Strategic Partners



## General Chapters:

1	<b>Cartels: Balancing the Risk of Fines Against the Increasing Risk of Private Actions in Europe</b> – Sarah Turnbull & Victoria Keenan, King & Wood Mallesons LLP	1
2	<b>Rights and Obligations Under the EU Directive on Antitrust Damages Actions</b> – Ingrid Vandenborre & Thorsten C. Goetz, Skadden, Arps, Slate, Meagher & Flom LLP	7
3	<b>Private Antitrust Litigation in the EU: A New Age of Advocacy</b> – James Keyte & Paul Eckles, Skadden, Arps, Slate, Meagher & Flom LLP	11

## Country Question and Answer Chapters:

4	<b>Albania</b>	Gjika & Associates Attorneys at Law: Oltion Toro & Silvi Tola	16
5	<b>Argentina</b>	Allende & Brea: Julián Peña	22
6	<b>Australia</b>	King & Wood Mallesons: Sharon Henrick & Wayne Leach	28
7	<b>Austria</b>	Preslmayr Rechtsanwälte OG: Dieter Hauck & Esther Sowka-Hold	36
8	<b>Belarus</b>	Sysouev, Bondar, Khrapoutski: Alexander Bondar & Karyna Loban	44
9	<b>Belgium</b>	Crowell & Moring: Thomas De Meese	50
10	<b>Canada</b>	Affleck Greene McMurtry LLP: W. Michael G. Osborne & Michael Binetti	56
11	<b>China</b>	King & Wood Mallesons: Susan Ning & Hazel Yin	63
12	<b>Cyprus</b>	Keane Vgenopoulou & Associates LLC: Thomas Keane & Christina Vgenopoulou	73
13	<b>European Union</b>	King & Wood Mallesons LLP: Elaine Gibson-Bolton & Simon Holmes	80
14	<b>Finland</b>	Attorneys at law Borenus Ltd: Ilkka Aalto-Setälä & Eeva-Riitta Siivonen	91
15	<b>France</b>	King & Wood Mallesons LLP: Natasha Tardif & Delphine Cohen-Hadjian	97
16	<b>Germany</b>	King & Wood Mallesons LLP: Tilman Siebert & Martin Bechtold	106
17	<b>Greece</b>	Koutalidis Law Firm: Stamatis Drakakakis & Vasiliki Brisimi	114
18	<b>Hungary</b>	Szecskey Attorneys at Law: Dr. Anikó Keller & Dr. Miklós Boronkay	121
19	<b>India</b>	Khaitan & Co: Arshad (Paku) Khan & Anshuman Sakle	130
20	<b>Israel</b>	B. Golan Law Firm: Boaz Golan & Nimrod Praver	136
21	<b>Japan</b>	Nagashima Ohno & Tsunematsu: Eriko Watanabe	142
22	<b>Korea</b>	Yoon & Yang LLC: Paul S. Rhee & Sinsung (Sean) Yun	149
23	<b>Luxembourg</b>	KLEYR GRASSO: Gabriel Bleser	159
24	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska, Attorneys at Law: Dragan Dameski & Jasmina Ilieva Jovanovik	164
25	<b>Netherlands</b>	DLA Piper Nederland N.V.: Martijn van Wanroij & Sophie Gilliam	171
26	<b>Nigeria</b>	Bloomfield Advocates & Solicitors: Busayo Adedeji & Bode Adegoke	178
27	<b>Norway</b>	Advokatfirmaet Wiersholm AS: Anders Ryssdal & Monica Hilseth-Hartwig	183
28	<b>Portugal</b>	Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, R.L.: Inês Gouveia & Luís do Nascimento Ferreira	189
29	<b>Romania</b>	Pachiu & Associates: Remus Ene & Adelina Somoiağ	200

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

## Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

## The International Comparative Legal Guide to: Cartels & Leniency 2015



30	<b>Russia</b>	INFRALEX: Artur Rokhlin & Olesya Bogun	–
31	<b>Singapore</b>	Drew & Napier LLC: Lim Chong Kin & Scott Clements	–
32	<b>Slovenia</b>	Odvetniki Šelih & partnerji, o.p., d.o.o.: Nataša Pipan Nahtigal & Tjaša Lahovnik	–
33	<b>Spain</b>	King & Wood Mallesons LLP: Ramón García-Gallardo & Manuel Bermúdez Caballero	–
34	<b>Switzerland</b>	Schellenberg Wittmer Ltd: David Mamane & Dr. Jürg Borer	–
35	<b>Turkey</b>	ELIG, Attorneys-At-Law: Gönenç Gürkaynak & Öznur İnanılır	–
36	<b>United Kingdom</b>	King & Wood Mallesons LLP: Simon Holmes & Philipp Girardet	–
37	<b>USA</b>	Wilmer Cutler Pickering Hale & Dorr LLP: Steven F. Cherry	–

### EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Cartels & Leniency*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of cartels and leniency.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with a comprehensive overview of key cartels and leniency issues, particularly from the perspective of a European transaction.

Country question and answer chapters. These provide a broad overview of common issues in cartels and leniency laws and regulations in 34 jurisdictions.

All chapters are written by leading competition lawyers and industry specialists and we are extremely grateful for their excellent contributions.

We are also pleased to once again include a Wall Chart, which contains a summary table of key features relating to cartels and leniency laws and regulations in each of the 34 jurisdictions.

Special thanks are reserved for the contributing editors Simon Holmes and Philipp Girardet of King & Wood Mallesons LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

Alan Falach LL.M.  
Group Consulting Editor  
Global Legal Group  
[Alan.Falach@glgroup.co.uk](mailto:Alan.Falach@glgroup.co.uk)

# Hungary

Dr. Anikó Keller



Dr. Miklós Boronkay



## Szecskey Attorneys at Law

### 1 The Legislative Framework of the Cartel Prohibition

#### 1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition is provided for in Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (“Competition Act”). The consequences of the breach of this provision may be threefold:

- regulatory sanctions (including the impositions of fines on the undertaking involved);
- civil law sanctions, i.e., damages actions; and/or
- criminal sanctions, if the cartel relates to public procurement or concession bidding procedures (including the prohibition for the company to participate in future public procurements).

Although the rules of the EU competition law apply in Hungary, as Hungary is an EU Member State, in this chapter we present exclusively Hungarian national rules.

#### 1.2 What are the specific substantive provisions for the cartel prohibition?

Under Chapter IV of the Competition Act relating to restrictive agreements, any agreements or concerted practices between unrelated undertakings, as well as the decisions of social organisations of undertakings, public corporations, unions and other similar organisations, which are aimed at the prevention, restriction or distortion of economic competition, or which have or may have such an effect, are prohibited. This provision corresponds to Article 101 of the TFEU.

The Competition Act gives a non-exhaustive list of behaviour to which the prohibition of restrictive agreements applies, in particular:

- Fixing the purchase or sale price and defining other business conditions directly or indirectly.
- Restricting or controlling manufacturing, distribution, technical development or investment.
- Sharing the sources of available goods or restricting the freedom to choose from them, as well as excluding certain consumers or business partners from the option to purchase certain goods.
- Sharing the market, excluding anyone from selling, or restricting the choice of sales opportunities.

- Preventing anyone from entering the market.
- Discriminating against certain business partners.
- Making the conclusion of an agreement dependent on the acceptance of obligations which, due to their nature or with regard to the usual contractual practice, do not relate to the subject of the agreement.

#### 1.3 Who enforces the cartel prohibition?

It is the Hungarian Competition Authority (HCA) which enforces the cartel prohibition. The HCA is an administrative authority having jurisdiction for the whole territory of Hungary.

#### 1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The procedure when the HCA decides to investigate an agreement begins with an investigation phase. The HCA has the right to publish the opening of an investigation, and in practice it does so; nevertheless, the parties always obtain a notice on the opening of the investigation and the publication only takes place following the due notification of the parties. The investigation is carried out by an investigator. The investigator summarises his findings of fact as well as his proposals for further actions in the investigation report sent to the competition council, which is the decision-making body of the HCA.

On the basis of the investigation report, the competition council can:

- Terminate the procedure.
- Order further investigation.
- Impose interim measures.
- Prepare a statement of objections.

The statement of objections includes the facts of the case and the evidence, the evaluation of the facts, the summary of the aspects and conclusions necessary to pass a decision, as well as the aspects relevant in connection with the imposition of the fine. The parties may file a reply to the statement of objections within the deadline set by the proceeding competition council.

The proceeding competition council must hold a hearing if it considers it as necessary or if either party requests so.

By way of the interim measures, the HCA may prohibit the continuation of the probable infringement or may order the elimination of the probably unlawful *status quo* if this is immediately necessary due to the threat to competition.

The HCA has six months to issue its final decision from the date the investigator ordered the investigation and this deadline can be extended twice (by up to six months per extension), where it is justifiable to do so.

### 1.5 Are there any sector-specific offences or exemptions?

Certain agreements in the following groups of restrictive agreements are exempted by government decrees from the general prohibition:

- Vertical agreements (Government Decree 205/2011. (X. 7.)).
- Insurance agreements (Government Decree 203/2011. (X. 7.)).
- Motor vehicle distribution and servicing agreements (Government Decree 204/2011. (X. 7.)).
- Research and development agreements (Government Decree 206/2011. (X. 7.)).
- Specialisation agreements (Government Decree 202/2011. (X. 7.)).
- Technology transfer agreements (Government Decree 86/1999. (VI. 11.)).

These exemptions reflect the respective EU Block Exemption Regulations. They do not apply where there is a cumulative effect of similar agreements at the relevant market.

A sector-specific exemption has been introduced by a new law that entered into force on November 28, 2012 in respect of agricultural products. According to Section 18/A of Act No CXXVIII of 2012 on Inter-Branch Organizations and Certain Issues of the Regulation of the Agricultural Market, in the case of agricultural products, the infringement of Section 11 of the Competition Act (prohibition of agreements and concerted practices restricting competition) may not be established if, as a result of such an agreement, the distortion, restriction or elimination of competition does not exceed the extent necessary to reach an economically justifiable and reasonable income and the market players on the relevant market are not excluded from reaching such an income, and if Article 101 of the TFEU is not applicable in the case.

The Minister of Rural Development shall determine whether the above conditions are fulfilled. As a result of this, the HCA shall obtain the opinion of the Minister if it investigates a case relating to the infringement of Section 11 of the Competition Act in connection with agricultural products and shall act in accordance with such an opinion.

In addition to this, the HCA shall suspend the imposition of fines in the case of an agreement infringing Section 11 of the Competition Act, and in the case of an agreement or concerted practice between competitors infringing Article 101 TFEU which concerns agricultural products. In such a case, the HCA shall set a deadline for the parties to comply with the statutory rules. Should the deadline unsuccessfully expire, the HCA shall impose a fine.

### 1.6 Is cartel conduct outside Hungary covered by the prohibition?

The Competition Act applies to the market conduct of undertakings carried out in the territory of Hungary. The market conduct of undertakings carried out abroad shall also fall under the scope of the Competition Act, if the effect of such conduct may manifest itself within Hungary.

## 2 Investigative Powers

### 2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Yes
■ Right to retain original documents	Yes	Yes
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes	Yes

**Please Note:** \* indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

### 2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The HCA is authorised to use the documents, data and other information or means of evidence it has legitimately obtained in any other competition control proceedings as well.

### 2.3 Are there general surveillance powers (e.g. bugging)?

As far as the administrative proceedings carried out by the HCA are concerned, the HCA does not have such powers.

As to the criminal proceedings initiated on the grounds of an alleged crime (agreement in restraint of competition in public procurement and concession procedures, see questions 1.1 and 3.2), the investigating authority (police, prosecutor) may exercise surveillance powers after receiving an authorisation from the competent court.

### 2.4 Are there any other significant powers of investigation?

In case the HCA is carrying out an investigation in the course of a dawn raid in business or residential premises, the investigator shall be empowered to make copies of or seize any means of evidence suggesting any conduct in violation of the cartel prohibition or the prohibition of the abuse of dominance, even if such evidence is not directly related to the subject of the investigation and even if it is not covered by the court order ("fishing"). In the case of such means of evidence-gathering, the court order should be obtained subsequently, for which the request should be submitted within 60 days: (i) following the date when the investigative measure was carried out; or (ii) following the

date when the HCA may investigate the evidence if such evidence will not or cannot be investigated by the HCA at the premises where the dawn raid was held (e.g. evidence which may be considered as legally privileged). In the absence of a subsequent court order, evidence gathered by these means shall be inadmissible.

## 2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

In case of an administrative proceeding carried out by the HCA, it is the investigator(s) (being a representative of the HCA) who will carry out the search. The investigator may request police assistance when carrying out the search, in the course of which the police are entitled to take measures and use force in a manner permissible in accordance with the legal regulations governing the police.

The person carrying out the search is not obliged to wait for the legal representative to arrive. It depends on the individual situation as to how an investigator reacts and what tolerance may be bargained.

In case of criminal proceedings, the investigation is carried out by the police. However, the public prosecutor may be present at any search; moreover, it is entitled to carry out investigations itself, instead of the police.

## 2.6 Is in-house legal advice protected by the rules of privilege?

No. Only advice given by the attorney-at-law mandated by the undertaking enjoys privilege. According to the Act on Attorneys, in-house lawyers do not qualify as attorneys.

## 2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Searches in a residential premise (including cars) not registered as the seat or branch office of the undertaking may be carried out only if it is in the use of any executive officer, employee, mandatee or any person *de facto* exercising control over the undertaking at the time when the investigation takes place or in the time period in respect of which the investigation has been initiated.

The documents considered as legal privilege are not admissible, as they may not be examined. Legal privilege covers any document created in the interest or in the process of the client exercising his fundamental right to defence, during or for the purpose of communications between the client and his external attorney, or that is a record of the contents of such communications, provided in all cases that the nature of these documents is readily apparent from the document itself. Legal privilege will not cover documents which are not possessed by the client or the attorney unless they prove that they lost possession of such documents unlawfully. In practical terms, it means that the document has to indicate the following: "Privileged client-attorney communication".

If the investigator makes an attempt to compel the client to present a document under legal privilege, or if the investigator wishes to inspect, take possession or make copies of such document in the course of an inspection or the dawn raid, the client has the right to refuse. However, the investigator – in due respect of the rights

relating to the legal privilege – is entitled to inspect the document to ascertain whether relying upon the protection afforded by legal privilege is manifestly unfounded or not. If, contrary to the assertion of the person concerned, the investigator is of the opinion that the document in question should not enjoy the protection, the document (or the hard mirror image made on the data medium) shall be deposited in a container that is capable of preventing access to the document. The sealing of the container shall be witnessed and signed by the person concerned and the investigator, where the seal shall be affixed to prevent the opening of the container without tampering with the seal. As to whether a document should enjoy the protection under legal privilege, this shall be decided upon the request of the HCA by the court within 15 days.

## 2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

In the course of the proceedings, and at any stage, the HCA can impose a procedural fine on the undertaking and any other natural or legal person that is required to cooperate in the HCA's proceedings, if that person:

- engages in conduct aimed at or resulting in:
  - the delay of the proceedings; or
  - making it impossible to reveal the relevant facts;
- disturbs the hearing seriously or repeatedly; or
- fails to meet deadlines.

For natural persons, the penalty is at least HUF50,000 (about US\$207), and can be up to a maximum of:

- HUF500,000 (about US\$2,070); plus
- HUF50,000, in the case of failures to meet deadlines, for each day of delay.

For legal persons, the penalty is at least HUF200,000 (about US\$830), and can be up to a maximum of:

- 1% of its net sales revenue for the previous financial year; and
- 1% of its net sales revenue for the previous financial year, in the case of failure to meet deadlines, for each day of delay.

There are no available published statistics from the HCA on whether, or how frequently, such sanctions may have been used.

As far as we are aware, the HCA's approach has not changed recently.

## 3 Sanctions on Companies and Individuals

### 3.1 What are the sanctions for companies?

In its decision, the competition council can:

- declare that a conduct is illegal;
- determine that a block exemption (see question 1.5) will not apply to an agreement;
- order the termination of illegal conduct;
- prohibit the continuation of an illegal conduct;
- order the performance of commitments;
- order certain conditions or obligations in connection with an illegal conduct; or
- impose a fine.

In its decision, the competition council can impose a fine of up to 10% of the undertaking's annual net turnover. The method of setting fines in antitrust cases is set out in Notice 1/2012 of the President of the HCA and the President of the competition council (Antitrust Fine Setting Guidelines). According to the Antitrust Fine Setting Guidelines, the HCA first determines the basic amount of the fine and then makes certain adjustments, if necessary.

When determining the basic amount, the HCA starts from 10% of the relevant turnover (i.e. 10% of the turnover realised on the relevant market). Then the HCA adjusts this amount with regard to:

- the gravity of the infringement (the threat to competition and the impact of the infringement on the market); and
- the attitude of the offender towards the infringement.

Once this basic amount is determined, the HCA adjusts this amount with regard to the following factors:

- repetition of the infringement;
- gains derived from the infringement;
- deterring effect of the fine to be imposed;
- maximum amount of the fine as set out in the Competition Act;
- application of the leniency policy; and
- financial difficulties.

### 3.2 What are the sanctions for individuals?

Individuals can be liable for a procedural fine (see question 2.8). In addition, a person (including any person in a decision-making position) commits a crime which can be punishable by imprisonment for between one and five years, when he:

- influences public procurement or concession bidding procedures by way of:
  - price-fixing;
  - fixing other contractual terms;
  - market sharing;
  - engaging in other conduct in concert with other competitors; or
  - participating in making a decision of an association of undertakings, public body, society or other similar organisation in order to influence the result of the public procurement or concession bidding procedure; and
- as a result of this conduct, actually restricts market competition.

The punishment is up to two years, if the value of the public procurement or concession bidding procedures is not more than HUF50 million (US\$207,000).

Under Act V of 2013 on the Civil Code (New Civil Code), executive officers are liable to an undertaking under the rules of civil law liability for breach of contract. This means that, theoretically, the company which was held liable for participating in a cartel may bring a damages action against its management and claim the damage caused by the management (e.g. fines, depreciation of goodwill, defamation).

Under the New Civil Code, which entered into force on March 15, 2014, an undertaking's officers and employees may be liable directly and personally towards third parties for the damage they caused by a competition law infringement based on the following rules:

- an employee and the employer are jointly and severally liable for all damage which the employee caused wilfully;
- a company and its shareholder are jointly and severally liable for all damage which the shareholder caused wilfully; and/or
- an executive officer and the company are jointly and severally liable for all damage which the executive officer caused outside any contractual relationship (i.e. where the aggrieved party is not a contractual partner of the company or the damage was caused completely independently from any contract).

Based on the above provisions, it is possible that an undertaking's officers, shareholders and employees who took part in a competition law infringement (e.g. participated in a cartel meeting) will be directly and personally liable towards all those companies which incurred damage as a result of the infringement. However, it is important to note that since the above provisions are completely new, there is no related case-law and their interpretation is subject to much debate.

### 3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Under the Antitrust Fine Setting Guidelines, the HCA may, under exceptional circumstances, reduce the fines if the fines would deteriorate the market structure by forcing the undertaking being fined ("failing firm") to exit the market. The amount of a possible reduction is not set out in the Antitrust Fine Setting Guidelines. It is therefore within the HCA's discretion to determine it.

### 3.4 What are the applicable limitation periods?

The limitation period relating to the cartel prohibition is five years. In case of criminal liability, the limitation period is the upper limit of the term of imprisonment (two or five years, depending on the value of the public procurement or concession bidding procedures). In both cases, the limitation period shall commence at the time the infringement is terminated.

### 3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no specific rule which would prohibit such payment.

### 3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes. Generally, employees are liable for the damages caused by the breach of their obligations flowing from the employment relationship if they did not act in a manner that could be generally expected in the given situation. Participating in an anti-competitive agreement is illegal conduct that endangers the company's interests, and may therefore be also a violation of the employment relationship. Rules differ depending on the position of the employee as a "regular" employee or an "executive employee".

In case of "regular" employees, the employer has to prove that the employee did not act in a manner that could be generally expected in the given situation (intent or negligence), the fact and amount of the damage, and the causation. If only slight negligence (and not intent or gross negligence) can be proven, the employee's liability

is limited to a four months' absence fee, or to an eight months' absence fee if the collective agreement provides so. Damages that were not foreseeable at the time of the causing of the damage shall not be compensated.

Executive employees are the executives of the employer and their deputies directly controlled by them. The employment agreement may provide that employees in a position of outstanding importance or high confidence are quasi-executive employees, if their base wage reaches seven times the minimum wage. Executive employees are also fully liable for slightly negligent breaches. In the case of executives and quasi-executives, the employment agreement may deviate from the general employment rules on damages and compensation (e.g. state that the employer shall not prove intent or negligence, but the employee may exculpate him/herself).

## 4 Leniency for Companies

### 4.1 Is there a leniency programme for companies? If so, please provide brief details.

The basic rules of leniency are contained in the Competition Act and in the HCA's Leniency Notice.

An undertaking that participates in a cartel does not pay a fine if it is the first to submit a leniency request and to provide evidence to the HCA that enables the HCA to:

- a) obtain a judicial authorisation in advance to carry out targeted inspections ("dawn raid") in connection with the infringement, provided that the HCA did not, at the time of the application, already have sufficient information giving grounds for authorised targeted inspections or had not already carried out such investigative measures (application type 'A'); or
- b) prove the infringement, provided that it did not, at the time of the application, already have sufficient evidence to prove the infringement and none of the undertakings meet the conditions set out in point a) (application type 'B').

If the conditions for the exemption from paying a fine are not met, but the undertaking provides evidence that adds significant value to the evidence already available to the HCA, the fine will be reduced. The possible fine may also be reduced if the application for immunity from fines is reclassified *ex officio* as an application for a reduced fine.

Another situation where a fine may be reduced is if the undertaking provides evidence (relating to facts in connection with the infringement) that the HCA previously had no knowledge of and which is of direct importance on the circumstances to be taken into account when determining the amount of the fine. In such case, the HCA shall not increase this undertaking's fine for providing the aggravating evidence.

The level of the reduction in the amount of the fine for the first undertaking may be 30-50%, for the second undertaking 20-30%, and for the third or subsequent undertakings up to 20%.

A request for a reduced fine can be filed after the delivery of the statement of objections or by the day preceding the initial date of access to documents for inspection provided to either of the parties, whichever date is earlier, if the evidence is supported in relation to a fact or circumstance not known by the HCA earlier and it affects the assessment of the infringement on the merits.

In order to obtain immunity from fines, four further conditions must be met:

- The undertaking must end its involvement in the infringement immediately following its application. (However, if the HCA believes the undertaking's continued involvement in the infringement would be necessary for preserving the integrity of the targeted inspections, the HCA in some exceptional cases allows the continued involvement to the extent, of the nature, and until the time limit specified in its order. The HCA takes such measures exclusively to preserve the integrity of the targeted inspections; the undertaking cannot be obliged to continue infringement in order to collect further evidence.)
- The applicant shall cooperate genuinely, fully and on a continuous basis with the HCA until the competition supervision proceedings are concluded.
- The undertaking must keep confidential the fact that it filed a request to obtain immunity from fines and the contents of the evidence provided and it is prohibited to make those accessible to third parties (with the exception of similar requests filed with other NCAs) without the HCA's express consent.
- An undertaking that took steps to coerce other undertakings to participate in the infringement shall not be eligible for immunity from fines.

From the above four conditions, the first three must also be met in order to receive a fine reduction or to avoid the higher fine after providing evidence in respect of an aggravating circumstance. Therefore, an undertaking that took steps to coerce other undertakings to participate in the infringement is not excluded from benefiting from the reduction of a fine.

The Competition Act also sets forth rules on the preliminary ('marker') application for immunity from fines (see question 4.2 below) and the provisional application for immunity from fines filed simultaneously with the leniency application submitted to the European Commission.

In cases where the European Commission is particularly well placed to conduct a proceeding in accordance with its Notice on Cooperation within the Network of Competition Authorities, the undertaking may file a provisional application with the HCA where the undertaking considers the HCA might be well placed to proceed in the case under the Notice. The provisional application is not a complete application, it must only contain certain information as specified in the application form; there is no need to submit physical evidence.

If the HCA later initiates competition supervision proceedings in the given case, it shall request the undertaking to submit, by a certain deadline, the complete application, including the evidence qualifying it for immunity from fines. If the undertaking submits the required evidence, in terms of eligibility for immunity from fines, its application shall be deemed as submitted on the date when the provisional application was made.

It is important to note that it is not possible for several independent undertakings together, or for one undertaking on behalf of other independent undertakings, to apply for immunity from, or the reduction of, a fine. This restriction does not, however, prevent members of a group of undertakings that participated in the infringement from applying for immunity from fines.

As concerns complete applications, the proceeding competition council decides on the application on the basis of the proposal of the investigator. While the Competition Act provides no deadline, the proceeding competition council should adopt its order immediately, taking only the time necessary for carrying out its assessment.

The proceeding competition council shall grant conditional immunity from or the reduction of fines if the application of the undertaking meets the conditions set out above. In other words, an applicant is granted immunity from or the reduction of fines at the time of the decision on the merits of the case, provided that the applicant meets, at that time, all the necessary conditions set out above. The conditional order will be delivered to the applicant only.

#### **4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?**

It is possible to file a preliminary or 'marker' application with the HCA in the case of type 'A' applications for immunity from fines. According to the Competition Act, if an undertaking decides to submit an application for immunity from fines but does not yet have the necessary evidence/information to file a complete application, it may instead file a so-called marker application with the minimum information specified in the application form. In such case, the HCA sets a deadline to complete the application. However, only a complete application may be submitted when filing a type 'B' application for immunity from fines or when applying for a reduced fine.

#### **4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?**

While applications must generally be filed using a standard form issued by the HCA, applications can also be made orally. The undertaking may present its oral application on the date agreed in advance with the HCA investigator. The investigator records it in writing, makes an audio recording of the oral application, or writes a memorandum of it. Audio recordings must subsequently be transcribed into a memorandum, which the applicant must sign.

What is more, according to the Leniency Notice, the leniency applicant may request the HCA to communicate its decision on leniency orally.

#### **4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?**

The amendment of the Competition Act in force as of July 1, 2014, brought a comprehensive amendment in respect of the disclosure of evidence at the level of the HCA.

The new rules clarify that third parties cannot access leniency corporate statements (and settlement submissions). These documents shall be treated similarly to documents qualifying as protected data (including all kinds of secrets, among others business secrets and private secrets). This means that they may only be accessed by other parties to the same procedure (i.e. alleged participants of the cartel) if this is required in order for them to be able to exercise their statutory rights, e.g. their right to a defence. As a general rule, access may be permitted only after the statement of objections or the investigation report has been delivered to the party.

With regards to further documents in the files of the HCA, as a general rule third parties may request to have access to them only after the final and binding closure of the procedure. Access prior to

this may only be requested if this is required in order to enforce statutory rights or to perform statutory obligations or obligations based on the decision of an authority.

However, access to the file by third parties may be refused if this would threaten the legal operations and functioning of the HCA without legitimate outer influence or the protection of public interest, in procedures based on Articles 101 or 102 of the TFEU, or the Hungarian equivalents thereof, and in particular in the application of leniency.

Such further documents or parts of them may qualify as protected data, e.g. business secrets, if they meet the statutory conditions and if the party whom the business secret belongs to submits a justified request to the HCA to qualify such documents as a business secret. In the request, a detailed and specific justification must be included in respect of all data that, according to the applicant, qualifies as a business secret. As mentioned above, data or documents qualifying as a business secret cannot be accessed by third parties.

However, if access to documents is requested, the HCA may review whether documents that already qualify as a business secret still comply with the relevant criteria and, if not, the HCA will decide on the termination of the qualification of the document as a business secret and thus allow access to such a document. However, the beneficiary of the business secret may seek remedy against this decision before the court and third parties cannot access the document until a final and binding decision is made on the subject, or until the deadline to file the request for such a remedy has elapsed without its filing.

#### **4.5 At what point does the 'continuous cooperation' requirement cease to apply?**

The requirement of continuous cooperation applies in the course of the whole proceeding, i.e., until the final decision is made by the HCA. According to the Leniency Notice, the HCA requires cooperation to a limited extent also prior to filing the leniency application, e.g. an applicant must not destroy evidence immediately before filing its leniency application.

#### **4.6 Is there a 'leniency plus' or 'penalty plus' policy?**

No, there are no such policies.

## **5 Whistle-blowing Procedures for Individuals**

#### **5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.**

According to the Competition Act, a person or persons who provide indispensable information on hard-core cartels may be entitled to receive a reward (a system of informant reward). The informant is entitled to request the confidential treatment of his or her personal identification data. The reward will only be granted if the decision on the merits of the case establishes the infringement and imposes a fine. The amount of the reward shall be 1% of the fine imposed in the case, but maximum HUF 50 million (US\$207,000).

## 6 Plea Bargaining Arrangements

### 6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Competition Act sets forth rules in respect of the commitments procedure and the settlement procedure.

As for the commitments procedure, in the *ex officio* investigation of a restrictive agreement or practice by the HCA, the parties may undertake commitments to comply with the Competition Act and with Articles 101 and 102 of the TFEU. The competition council can decide to terminate the proceedings and to protect the public interest without establishing the infringement so that it makes – through this decision – the commitments binding on the undertaking, without reaching an infringement decision.

The HCA can, however, reopen the proceedings if there is any material change in the circumstances or if its decision was based on misleading information.

Also, the investigators conduct a follow-up investigation to establish whether the parties have satisfied their commitments. Based on the investigator's follow-up report, the competition council adopts a decision to impose a penalty if the undertaking failed to carry out the commitment, unless it was not fulfilled because of changes in the relevant circumstances. The investigation is terminated if there were changes in the relevant circumstances or the undertaking fulfilled the commitment. In practice, commitments are very rarely accepted in restrictive agreements cases.

The settlement procedure was introduced in the Hungarian competition law as of July 1, 2014. 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 (Articles 101 or 102 of TFEU). In the framework of the settlement procedure, the party must acknowledge its liability for the infringement, while the HCA reduces the fine to be imposed by 10%.

Formally, the party to the proceeding submits a unilateral settlement statement reflecting the results of prior settlement discussions. During the settlement discussions, the HCA must disclose the following:

- conduct infringing competition law rules;
- available evidence;
- legal qualification of the infringement; and
- aspects used for setting the fine as well as the minimum and maximum amount of the fine to be imposed.

The settlement statement includes the acknowledgment and the description of the infringement, as well as the maximum amount of fines the party considers acceptable. Furthermore, the undertaking must waive its right to legal remedy, further access to the file and the right to the hearing.

The competition council relies on the undertaking's settlement statement when it drafts its final decision. However, the competition council may also deviate from the undertaking's settlement statement. In case of a material deviation from the undertaking's settlement statement – including when a fine higher than the maximum amount indicated by the undertaking in its settlement statement is imposed by the competition authority – the

undertaking has the right to withdraw its statement, in which case it may not be used as evidence against the undertaking and must be returned to the party.

In addition, 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 a defence.

Settlement procedures may be combined with leniency.

## 7 Appeal Process

### 7.1 What is the appeal process?

The decision of the competition council on the merits of the case can be challenged by way of judicial review before the Metropolitan Administrative and Labour Court. The parties must file a statement of claim within 30 days of the decision being delivered. The Metropolitan Court of Appeals hears appeals from the Metropolitan Administrative and Labour Court. The party that has filed an appeal against the final judgment of the Metropolitan Court of Appeals may ask for a review of this judgment by the Supreme Court (“*Kúria*”).

### 7.2 Does an appeal suspend a company's requirement to pay the fine?

The request for the judicial review of the HCA's decision does not in itself suspend the obligation to pay the fine. However, the company can request a suspension of the fines. If this request is rejected by the first instance court, a separate appeal is possible. When deciding on the suspension, the court is required to assess whether the payment of the fine or the suspension would have more negative consequences.

### 7.3 Does the appeal process allow for the cross-examination of witnesses?

As a general rule, it is the court that hears witnesses and questions them. Under Hungarian law, the litigating parties can propose certain questions to be asked of a witness. The court can also, on request, allow the parties to directly ask a witness questions. According to court practice, leading questions are not admitted and no cross-examination is allowed. Ultimately though, it is the court that decides on the permissibility of questions proposed or asked.

## 8 Damages Actions

### 8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

The HCA's public enforcement powers do not preclude courts from directly applying the cartel prohibition contained in the Competition Act.

Individuals can therefore bring damages actions before the Hungarian civil courts for losses resulting from breaches of the Competition Act, even if the HCA has not reached a prior infringement decision. In such litigation, the court shall notify the

HCA, which may present its opinion (“*amicus curiae*”). The argument presented by the HCA may be used as evidence.

If the HCA notifies a civil court addressing a civil law claim that it has started competition law proceedings in the same matter, then the court must stay the proceedings until the HCA makes a decision and that decision becomes final and binding (either with or without judicial review).

If there is a final and enforceable decision of the HCA for the prohibited restrictive agreement or practice, it is binding on courts. Thus, in the case of follow-on actions, the party claiming compensation for damages can rely on the HCA decision (or the judgment of the court reviewing that decision) in respect of the infringement and it must only prove the:

- Amount of damage suffered.
- Causal link between the damages suffered and the prohibited restrictive agreement or practice.

It must be noted that in private damages actions against a participant of an alleged agreement or concerted practice aiming, directly or indirectly, at the fixing of prices, market sharing, or at establishing production or sales quotas, for the purpose of determining the impact of the infringement on the price charged by the infringer, it shall be presumed (until proven otherwise) that the infringement distorted the price to the extent of 10%.

In order to ensure that undertakings are not prevented from revealing unknown cartels, as of June 1, 2009 the Competition Act provides that an undertaking that has been granted immunity from fines may refuse to reimburse the damages caused by the cartel as long as the claim can be collected from other undertakings held liable for the same infringement. This provision does not prevent the claimant from commencing a lawsuit jointly against the infringing undertakings causing the damages, although the proceedings shall be suspended until the final closing of the administrative lawsuit commenced to review the HCA’s decision establishing the infringement.

### 8.2 Do your procedural rules allow for class-action or representative claims?

There is a so-called public interest action that can be used, among other things, in connection with the breach of competition laws. The HCA can bring a civil law claim on behalf of consumers against anyone who harms a large number of (individually unknown) consumers as a result of an activity that breaches the Competition Act. As of January 1, 2011, the statute of limitation for such claims has been increased from one year to three years. What is more, the HCA may also request the court to declare that the undertaking breached competition law rules. In this case, individual consumers only have to prove their loss (but may rely on the 10% presumption – see question 8.1 above) and its causal link to the infringement in order to enforce a damages claim against the undertaking.

In addition, a joint action is the only collective action that allows an award of damages in an antitrust case. Two or more claimants can initiate a joint action if any of the following apply:

- The subject matter of the claim is a joint right or obligation that can only be judged uniformly, or the judgment will affect the claimants jointly, irrespective of one of the claimants’ absence from the procedure.
- The claimants’ claims are based on the same legal relationship.

- The claimants’ claims have similar legal and factual bases and the same court has jurisdiction for all defendants.

### 8.3 What are the applicable limitation periods?

The general limitation period for damages actions is five years. However, if the damage results from a criminal offence, the limitation period does not expire as long as the limitation period for the crime does not expire. If the HCA brings a civil law claim on behalf of the consumers, the statutory limitation period is three years from the date of the infringement, excluding the period for the competition control procedure.

### 8.4 Does the law recognise a “passing on” defence in civil damages claims?

There is no court practice to answer whether “passing-on” is admissible. Hungarian law recognises the principle of full compensation, which means, *inter alia*, that the aggrieved party is generally not entitled to realise profits as a result of the damages it is awarded. This principle is probably the strongest argument in favour of the passing-on defence. It is also important to point out that Hungarian law does not require a direct causal link between the unlawful act and the loss. Therefore, indirect purchasers on whom the damage (e.g. higher prices) was passed may be entitled to enforce claims against the cartel members.

### 8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

There are no special rules for bearing costs in civil damages follow-on claims in cartel cases.

According to the general procedural rules, the unsuccessful party pays the successful party’s costs, including its lawyers’ fees. However, the court can decide to take into account only part of the successful party’s legal expenses, if it considers those expenses excessive. The courts usually set these fees at about 5% of the amount of the claim.

The court can also deny the successful party’s costs if, for example, there was no reason to initiate the proceedings or if the other party acknowledged the claim at the first hearing. Similarly, costs incurred unnecessarily cannot be recovered. If one party is partially successful, the court usually splits the costs among the parties.

### 8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

We are not aware of any published judgment in cartel damages actions. According to publicly available information, some procedures are underway but have not yet been closed. There is one published judgment which rejected the plaintiff’s claim in a follow-on damages action. We are not aware of any substantial out of court settlement.

## 9 Miscellaneous

## 9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The amendment of the Competition Act introducing a settlement procedure and new rules, among others, regarding the disclosure of documents and access to the file entered into force on July 1, 2014.

**Dr. Anikó Keller**

Szecskay Attorneys at Law  
Kossuth tér 16-17  
H-1055 Budapest  
Hungary

Tel: +36 1 472 3000  
Fax: +36 1 472 3001  
Email: [aniko.keller@szecskay.com](mailto:aniko.keller@szecskay.com)  
URL: [www.szecskay.com](http://www.szecskay.com)

Dr. Anikó Keller is a Hungarian attorney admitted to the Budapest Bar Association. She joined Szecskay Attorneys at Law in 2003. Dr. Keller currently specialises in competition law, state aid, advertising law, consumer protection, data protection, employment law and commercial law. She received her JD, *summa cum laude*, from Eötvös Loránd Faculty of State and Legal Sciences in 2000 and completed a postgraduate diploma in a King's College London postgraduate course on European Union Competition Law in 2012. Dr. Keller is a member of the Hungarian Competition Law Association, the Hungarian Advertising Association and the Hungarian Self-Regulatory Advertising Board, and author of a number of articles on competition law. She is fluent in English and German.

## 9.2 Please mention any other issues of particular interest in Hungary not covered by the above.

There are no issues other than those already mentioned above.

**Dr. Miklós Boronkay**

Szecskay Attorneys at Law  
Kossuth tér 16-17  
H-1055 Budapest  
Hungary

Tel: +36 1 472 3000  
Fax: +36 1 472 3001  
Email: [miklos.boronkay@szecskay.com](mailto:miklos.boronkay@szecskay.com)  
URL: [www.szecskay.com](http://www.szecskay.com)

Dr. Miklós Boronkay is a Hungarian attorney admitted to the Budapest Bar (2011). He received his JD, *cum laude*, from the Catholic University Pázmány Péter in 2007. In 2004-2005 he studied at the University of Salzburg on an Erasmus scholarship. He is a member of the Hungarian Competition Law Association and the Competition Law Research Centre and is a lecturer of civil law at the Catholic University Pázmány Péter. He has written articles on the subjects of tort law, IP law and competition law. He currently specialises in competition law, dispute resolution and IP. He joined the firm in 2007 and is fluent in English and German.



Szecskay Attorneys at Law is a member of a number of local and international organisations including the Ligue Internationale du Droit de la Concurrence (LIDC) and the Competition Law Commission of Union Internationale des Avocats (UIA). Our attorneys regularly lecture at local and international conferences and participate in international research projects. This active participation ensures our colleagues have the most up-to-date information and knowledge on the most accurate stage of the development of competition laws and enables them to liaise with fellow colleagues globally on various aspects of competition laws and practices.

Our firm's involvement in domestic and cross-border transactions has allowed us to develop wide-ranging experience in competition and antitrust law matters, merger control procedures, and negotiations with the Hungarian competition authorities. Our firm is recognised for its expertise and practice in competition and antitrust (cartel and abuse of dominance). We also frequently represent or advise clients in merger control proceedings.

## Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet Laws
- Trade Marks

