

## CRIMINAL LEGAL REGULATIONS ON CARTELS IN HUNGARY

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**Abstract:** The present paper examines the system of legal means against unfair competition, with special regards to the means of criminal law and the characteristics of the criminal legal protection. The evaluation of the regulation is based on the provisions in force pertaining to the agreement in restraint of competition in public procurement and concession procedure, the emergence, and the correspondence of the rules of competition law and criminal law.

**Keywords:** *agreement in restraint of competition in public procurement and concession procedure, fair economic competition, cartels, leniency policy of competition law*

### 1. THE SYSTEM OF MEANS AGAINST UNFAIR COMPETITION

The *Fundamental Law of Hungary* declares that Hungary ensures the conditions of the fair economic competition, acts against the abuse of dominant economic position, and protects the rights of consumers.<sup>1</sup>

In order to avoid the compelling effects of the economic competition, companies often conclude negotiations that are advantageous only to the participants, while they are disadvantageous to the outsiders and limit or distort the economic competition to different extent.<sup>2</sup>

For the assurance of the fair economic competition, there is a need for state intervention, and the analysis of its system of means against unfair competition leads to the statement that it lies within the intersection of various fields of law. Competition law, administrative law, civil law, commercial law, and criminal law with their own means can all contribute to the fairness of the economic competition.

Competition law prohibits the restraint of competition in a wide range (antitrust law), the Competition Authority controls the realisation of the prohibition and imposes the legal sanctions when necessary. Among the means of civil law emphasis may be placed on nullity and compensation<sup>3</sup>, the most relevant means in commercial law from the point of analysis is the regulation of public procurement and concession

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<sup>1</sup> Fundamental Law of Hungary, Fundamentals, Article *M*) para. (2).

<sup>2</sup> Justification of Law XCI/2005 on the modification of Law IV/1978 on the Criminal Code and other laws.

<sup>3</sup> See MISKOLCZI BODNÁR Péter: A versenykorlátozó megállapodás, a kartell versenyjogi tilalma és a „versenyt korlátozó megállapodás közbeszerzési eljárásban” elnevezésű büncselekmény. *Miskolci Jogi Szemle*, XIV. évfolyam, 2019, 2. különszám, 2. kötet, p. 170.

procedures, and criminalisation of the agreement in restraint of competition in public procurement and concession procedure within the framework of criminal law.

## 2. DISTINCTIVE FEATURES OF THE CRIMINAL LEGAL PROTECTION

Agreements in restraint of competition are prohibited both under competition and criminal law, however, the scope of the prohibition is vastly differing, the criminal legal protection has several distinctive features.

Such features include the *narrow material scope* of the regulation and the *special aim*. The Criminal Code declares the agreement in restraint of competition, the concerted practices between companies, and the decisions of certain organisations punishable when they are aiming to manipulate the outcome of an open or restricted procedure held in connection with a public procurement procedure or an activity that is subject to a concession contract. The nature of the criminal legal protection is of *ultima ratio*, with significantly narrower scope than that of competition law. The justification of the Criminal Code in force<sup>4</sup> declares that there is no need to extend the criminal legal protection to all cartels, the system of means of competition law provides satisfactory protection in other cases. In contrast with the competition legal rules, criminal law only declares those acts punishable that have been committed with special aim and *dolus directus*.

Another distinctive feature of the criminal legal protection is the requirement of the *result* of the restraint of competition for the offence to be completed. It is worth referring to the fact that different professional viewpoints have emerged regarding the interpretation of the result of the offence. According to one of the viewpoints, the criminal offence is completed with entering into the agreement<sup>5</sup>, the negotiation aimed at the conclusion of the agreement, proposal for the decision could be considered as an attempt. Based on the other view, the announcement of the result of the public procurement or concession procedure is also required for the offence to be completed.<sup>6</sup> The material nature of the offence justifies the latter viewpoint, however, the restraint of competition is already realised with the conclusion of such agreement.

Comparing the norms of competition and criminal law, there is a remarkable difference regarding the recipients. Competition law regulates the competition control proceedings against the company, while in criminal law the subject of the offence may only be a natural person. This remains unchanged even in light of the fact that a measure could also be imposed against a legal person in a collateral way.

The subject of the offence as a perpetrator is typically an executive officer, member, supervisory board member, employee, or the agent of these, of a company, as well as any person having an interest in the restraint of competition, as well as a

<sup>4</sup> Justification of Law C/2012 on the Criminal Code.

<sup>5</sup> MOLNÁR Gábor: Versenyt korlátozó megállapodás közbeszerzési és koncessziós eljárásban. In: *Magyar Büntetőjog Kommentár a gyakorlat számára* (szerk.: KÓNYA István). Budapest, HVG-Orac, 2020.

<sup>6</sup> CSÉPAI Balázs – ÚJVÁRI Ákos: A versenyt korlátozó megállapodás közbeszerzési és koncessziós eljárásban való büntethetőségének kérdésköre. *Jogtudományi Közlöny*, 2006, 6, p. 227.

person taking part in the decision-making process of an association of companies, a public body, a grouping or a similar organisation.

The persons concluding the agreement are not co-actors, they are liable as perpetrators (necessary multiple contribution).

As known, the measures that can be applied against the legal persons – in case the conditions prescribed by law are met – are the abolition of the legal person, the limitation of the activity of the legal person (with regards to the analysed offence it can be mentioned that the legal person cannot take part in public procurement procedure, cannot conclude concession contract, etc.), and fine.

### 3. THE STRUCTURE OF THE CRIMINAL LEGAL REGULATION

The regulation of the offence of the agreement in restraint of competition in public procurement and concession procedure includes two basic cases, one privileged case, and grounds for the exemption from or limitation of criminal responsibility.

The main point of the *first basic case*<sup>7</sup> is the conclusion of an agreement restraining the competition with the aim of manipulating the outcome of the public procurement or concession procedure, or other concerted practices, meanwhile the *second basic case*<sup>8</sup> – besides having an identical special aim as the first one – prohibits the participation in the process of an association of companies, or similar organisations that make a decision restraining the competition.

The *privileged case*<sup>9</sup> of the offence is established when the value of the public contract involved in the act is below 50 million forints. In terms of the concession procedure, the evaluation of the privileged case is excluded.

The ground for exemption from criminal responsibility is the confession of the act in due course by the perpetrator to the criminal investigation authorities and the unveiling of the circumstances of the criminal act.<sup>10</sup>

<sup>7</sup> Criminal Code § 420 para. (1) “Any person who enters into an agreement aiming to manipulate the outcome of an open or restricted procedure held in connection with a public procurement procedure or an activity that is subject to a concession contract by fixing the prices, charges or any other term of the contract, or for the division of the market, or takes part in any other concerted practices resulting in the restraint of trade is guilty of felony punishable by imprisonment between one to five years.”

<sup>8</sup> Criminal Code § 420 para. (2) “Any person who partakes in the decision-making process of an association of companies, a public body, a grouping or similar organization, and adopting any decision that has the capacity for restraining competition aiming to manipulate the outcome of an open or restricted public procurement procedure or an activity that is subject to a concession contract shall also be punishable in accordance with Subsection (1).”

<sup>9</sup> Criminal Code § 420 para. (3) “The penalty shall be imprisonment for a misdemeanour not exceeding two years if the value of the public contract involved in the act specified in Subsection (1) or (2) is below substantial value.”

<sup>10</sup> Criminal Code § 420 para. (4) “The perpetrator of a criminal act defined in Subsections (1)–(3) shall not be prosecuted if he confesses the act to the criminal investigation authorities before they become aware thereof and unveils the circumstances of the criminal act.”

The Criminal Code defines grounds for the exemption from and the limitation of criminal responsibility with reference to the leniency policy of competition law as well.

It is a ground for the exemption from criminal responsibility when a request is submitted to the Competition Authority before the investigation of the case, which serves as a basis for the exemption from the financial penalty, and the perpetrator being in a certain position of the company unveils the circumstances of the criminal act.<sup>11</sup>

The (later) submission of a request for exemption from or the reduction of the financial penalty and the unveiling of the circumstances of the commission may result in reduction without limitation or dismissal in cases deserving special consideration.<sup>12</sup>

#### 4. THE MAIN CHARACTERISTICS OF THE CRIMINAL LEGAL REGULATION IN FORCE

The offence had been integrated into the former Criminal Code<sup>13</sup> by *Law XCI of 2005* and entered into force on 1st September 2005. The justification of the law referred to the fact that the state intervention against agreements restraining the competition and cartels is primarily carried out by administrative means, through the proceeding of the Competition Authority. The main rules in this sphere are prescribed by *Law LVII of 1996* on the prohibition of unfair trading practices and unfair competition (Competition Act) and the *Treaty on the Functioning of the European Union*<sup>14</sup>. The lawmaker has considered the criminal legal prohibition justified in the case of those acts restraining the competition which also violate the fairness of public procurement and concession procedures.<sup>15</sup> For the regulation to be applied the knowledge of the additional underlying laws is required, especially of *Law CXLIII*

<sup>11</sup> Criminal Code § 420 para. (5) “*The perpetrator of a criminal act defined in Subsections (1)–(3) shall not be prosecuted if at the time of commission the perpetrator serves as an executive officer, member, supervisory board member, employee, or the agent of these, of a company that has submitted – before the competition authority opened an investigation of the case – a request for exemption from the financial penalty to be imposed under the restrictive market practices act with respect to the act in question, and unveils the circumstances of the criminal act.*”

<sup>12</sup> Criminal Code § 420 para. (6) “*The penalty may be reduced without limitation – or dismissed in cases deserving special consideration – against any person who serves as an executive officer, member, supervisory board member, employee, or the agent of these, of a company that has submitted a request for exemption from or a reduction of the financial penalty to be imposed under the restrictive market practices act with respect to the act in question, and unveils the circumstances of the criminal act.*”

<sup>13</sup> Law IV/1978 on the Criminal Code.

<sup>14</sup> Treaty on the Functioning of the European Union, Article 101.

<sup>15</sup> This regulation can also be evaluated as a differentiating protection of public assets, therefore, it may raise constitutional questions. See SINKU Pál: A kartellbűncselekmény. In: *A negyedik magyar büntetőkódex – régi és újabb vitakérdései* (szerk.: HOLLÁN Miklós – BARABÁS A. Tünde). Budapest, MTA Társadalomtudományi Kutatóközpont–OKRI, 2017, p. 263.

of 2015 on public procurement (Public Procurement Act) and Law XVI of 1991 on concessions (Concessions Act).

The *legal subject* of the regulation is the freedom of competition, the functioning of the free market without limitation, the legal functioning of the system of financial aids, as well as the transparent, fair, and rational use of public funds and central budget sources.

By the creation of the *Public Procurement Act*, it was a basic objective to ensure the rational and efficient use of public funds, the transparency, and the opportunity of control in a wide range, the fairness of competition. The Public Procurement Act is to be applied in public procurement (concession procurement) procedures that have to be carried out by contracting authorities with the aim of concluding *quid pro quo* agreements pertaining to procurements of a given subject and value.

The *Concessions Act* declares that one potential way for efficiently operating assets under exclusive ownership of the central or local authorities or associations of local governments, and for the exercise of the activities conferred under the exclusive competence of the central or local authorities, is the assignment of all these by way of contracts of concession. The Act prescribes the acts that must fall under the scope of concession – with reference to the act on national assets – and states that – apart from the exceptions described by law – the state and the local authority are obliged to organise tender proceedings. Tender proceedings are mostly to be held publicly. Restricted procedures could be held primarily based on national defence or national security considerations.

According to paragraph (1) of the regulation the *conducts of the offence* are the entering into an agreement of fixing the prices, charges or any other term of the contract, or for the division of the market, or taking part in any other concerted practices that result in the restraint of trade, while paragraph (2) renders to punish taking part in the decision-making process of an association of companies, a public body, a grouping or similar organization, and adopting any decision that has the capacity of restraining competition.

Based on Article 11, paragraph (1) of the *Competition Act* the agreements and concerted practices between companies, as well as the decisions of the organisations of companies established on the basis of the right of association, their public bodies, associations and other similar organisations (hereinafter referred to collectively as “association of companies”) (hereinafter referred to collectively as “agreements”), which are aimed at the prevention, restriction or distortion of economic competition, or which may display or in fact display such an effect, are prohibited. Hence, under the Competition Act, all three of the conducts fall under the concept of “agreements”. A settlement between companies that are not unrelated does not constitute an agreement. Besides the general prohibition of cartels, the Competition Act provides a non-exclusive listing of the characteristic cases of agreements restraining the competition (price cartel, cartels dividing the market, etc.).

It is worth emphasising that the economic cooperation between companies is not restricted when it is not contrary to the fairness of the competition and the interests of the consumers and the economic partners. Agreements concluded by the members

of a consortium that constitute one contracting partner, participant, also fall outside the scope of the regulation.

Such view has also been expressed that there are unjustified differences between the lack of competition legal prohibition, the cases serving as basis for exemption from responsibility, and the obstacles to criminal prosecution. In competition law, acts complying with the preconditions of the regulation are not necessarily prohibited. The prohibition does not apply to the agreements restraining the competition of companies that are not unrelated, the exempted agreements and – except for cartels – the agreements of minor importance. In the criminal procedure reference can be made to the lack of potential harm for the society, while exemption from the competition legal prohibition and sanctions are regulated by exact norms.<sup>16</sup>

It is worth referring to the fact that those rules of the Competition Act, which make the agreements restraining the competition possible, are to be considered as grounds for the exclusion of unlawfulness<sup>17</sup>, the Criminal Code of 2012 explicitly lists the statutory authorisation among the grounds for the exemption from criminal responsibility.

The Competition Act prohibits both the formation of horizontal and vertical cartels. The criminal legal regulation targets the horizontal cartels when the agreement is concluded between competitors. (In the case of vertical cartels agreements are formed between companies on different levels of the market system, operating in differing phases of the trading process – e.g. producers and traders.)

The main point of the concerted practices is that the participants of the competition with attention to one another – even independent from their position on the market – follow the same trading behaviour. The so called parallel conduct, which is carried out by the competitors as a result of the same market initiatives and mechanisms (e.g. currency devaluation), does not serve as sufficient basis for criminal legal responsibility.

The agreement of competitors, concerted practices can either target the price offered within the framework of public procurement or concession procedure (fixing of prices), or who will provide an offer of more favourable conditions in the given procedures (division of market).<sup>18</sup> The result of the agreement or other concerted practice is the restraint of the competition.

The difference between competition and criminal law can also be observed in the fact that in competition law the negative outcome may occur in three different forms. The company targets the restriction or distortion of the competition or acts in a way which may display or in fact displays such an effect. In the worst scenario the effect on the competition is its elimination, restraint, or distortion. The prohibition also

<sup>16</sup> MISKOLCZI BODNÁR: loc. cit., p. 177.

<sup>17</sup> HEGEDŰS István – JUHÁSZ Zsuzsanna – KARSAI Krisztina – KATONA Tibor – MEZŐLAKI Erik – SZOMORA Zsolt – TÖRŐ Sándor: *Kommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez*. Wolters Kluwer Hungary, Jogtár Kommentár.

<sup>18</sup> In Hungary areas specifically affected include the construction of roads and properties, the health and the energy management sector. SINKU: loc. cit., p. 260.

applies to less severe cases when the competition remains unviolated, but the conduct is objectively capable of bringing one of the abovementioned consequences forward. Finally, it may be enough when the intent of the participants is aimed at causing one of the listed negative effects.<sup>19</sup>

The *subject of the offence as a perpetrator* is generally an executive officer, member, supervisory board member, employee, or the agent of these, of a company, any person having an interest in the restraint of competition, as well as a person taking part in the decision-making process of an association of companies, a public body, a grouping or a similar organisation.

As already mentioned, the persons concluding the agreement are not co-actors, they are liable as perpetrators.

The offence of agreements restraining the competition in public procurement or concession procedure can only be committed *intentionally*. The offence could only be committed with direct intent due to the fact that the regulation substantially evaluates the special aim (aiming to manipulate the outcome of an open or restricted procedure held in connection with a public procurement procedure or an activity that is subject to a concession contract).

The law defines a *ground for exemption from criminal responsibility* when the perpetrator confesses the act to the criminal investigation authorities before they become aware thereof and unveils the circumstances of the criminal act. The criminal political reasoning behind the regulation is the priority of the interest related to the unveiling of acts violating the prohibition on cartels and the fairness of public procurement or concession procedures.

The Criminal Code – also with reference to the leniency policy in competition law, in order to affiliate the underlying legal political intention – describes additional grounds for exemption from criminal responsibility, besides, it makes the reduction of the punishment without limitation and dismissal in cases deserving special consideration possible. The leniency policy described in the Competition Act – if the legal preconditions are met – provides the companies involved in the cartel with the possibility of being exempted from the financial penalty in whole or in part in case of cooperation with the Competition Authority. The leniency policy has been based on the idea that there could be participants of covert agreements who would be ready to seize their participation and provide information about the existence and the functioning of the cartel if they had not been dissuaded by the competition legal and other sanctions. Criminal law, with its own means, aims at increasing the efficiency of the leniency policy and achieving the correspondence of the two spheres of regulation.

Article 78/A paragraph (2) of the Competition Act defines two cases of exemption from the financial penalty. Immunity from the fine shall be granted to the company that first submits an application to that effect and supplies any evidence:

a) to the Competition Authority serving reasonable cause to request and receive a prior court order for carrying out a site search in connection with the infringement, provided that the Competition Authority did not have enough information at the time

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<sup>19</sup> MISKOLCZI BODNÁR: loc. cit., pp. 171–172.

of submission of the application serving reasonable cause to request a prior court order for carrying out the site search, or did not carry out a site search previously,

b) sufficient to prove the infringement, provided that the Competition Authority did not have enough evidence at the time the evidence was provided to prove the infringement, and neither of the companies involved meets the condition set out in subparagraph a).

According to Article 78/A paragraph (3) of the Competition Act, upon request, the competent competition council shall reduce the fine if no immunity may be granted, and the company in question supplies any evidence relating an infringement to the Competition Authority that is recognized considerably more valuable than any proof the Competition Authority has in its possession at the time the evidence is provided.

In terms of the criminal legal responsibility, it is also relevant whether the competition authority has initiated a control proceeding. The request within the framework of the leniency policy could serve as a ground for the exemption from criminal responsibility in case it is submitted by the executive officer, member, supervisory board member, employee, or the agent of these at a point in time when the competition authority has not yet started a control proceeding. If the control proceeding is already in progress, only the reduction of the penalty without limitation or its dismissal in cases deserving special consideration may take place. However, there is also such view that it is absolutely unjustified to connect the ground for the exemption from criminal responsibility to the start of the competition control proceeding and it is not in line with the interests of the competition authorities.<sup>20</sup>

The ground for the exemption from criminal responsibility based on paragraph (4) and (5) requires separate examination. The application of one of the grounds is independent from the compliance with the requisites of the other, since if a perpetrator is exempted based on paragraph (4), another perpetrator cannot be exempted due to the same reason, and exemption in terms of the remaining perpetrators is possible only connected to the request submitted in the competition control proceeding. An exception is the case when the executive officers, members, etc. of a given company involved in the cartel make a confession to the criminal investigation authorities at the same time. It is not a precondition of the application of the ground for the exemption from criminal responsibility connected to the leniency request that the person in question makes a confession to the investigation authority, but there is an obligation to cooperate throughout the criminal procedure.

The ground for the exemption from criminal responsibility connected to the leniency request, the reduction of the punishment without limitation, and its dismissal may all be applied in the case of that perpetrator who – at the time of the commission of the offence – was an executive officer, member, supervisory board member, employee, or

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<sup>20</sup> NAGY Csongor István: Az engedékenységi politika keretében való együttműködés fékező- és hajtóerői. Összehasonlító jogi adalékok. *Verseny és Szabályozás* (szerk.: VAL-ENTINY Pál – KISS Ferenc László – NAGY Csongor István – BEREZVAI Zombor), Budapest, MTA KRTK, 2018, p. 182.

the agent of these. The request needs to provide basis for the dismissal or the reduction of the fine, about which the criminal investigation authority can gain sufficient information by acquiring the conditional decision of the competition authority. With regards to the application of paragraph (5) and (6) it is also an additional precondition that the perpetrator unveils the circumstances of the commission.<sup>21</sup>

For both the legal person and the perpetrator of the offence to be exempted from the competition legal and the criminal legal sanctions, the request in the name of the company needs to be handed in by the legal representative of the company or an authorised person.<sup>22</sup>

It is worth mentioning that the established grounds for the exemption from criminal responsibility in terms of the perpetrator may be boundaries to the imposition of a measure against the legal person as well.<sup>23</sup>

## 5. THE EVALUATION OF THE CRIMINAL LEGAL REGULATION

The evaluation of the offence of the agreement in restraint of competition in public procurement and concession procedure is ambiguous, the possible conclusions may be vastly differing.<sup>24</sup>

The regulation has been part of the criminal legal system since 2005, still, there is an irrelevant number of cases in which accusation took place, there is no established legal practice.

*“Based on the fact that financial penalties of value of milliards have been imposed by the Hungarian Competition Authority, could criminal law in fact mean a more effective and certain way of protection than the consequent and severe competition legal sanctions?”*<sup>25</sup> – professor Mihály Tóth has put up the question.

Based on the abovementioned, the justification of the regulation can be questioned, the idea of decriminalisation may be raised.

<sup>21</sup> GULA József: Versenyt korlátozó megállapodás közbeszerzési és koncessziós eljárásban. In: *Magyar Büntetőjog Különös Rész.* Budapest, Wolters Kluwer Hungary, 2020, pp. 881–886.

<sup>22</sup> GVH tájékoztató a kartellek feltárását segítő engedékenységi politika alkalmazásához kapcsolódó büntetőjogi kérdésekről, 2018.

<sup>23</sup> See MOLNÁR Erzsébet: A kartellmagatartások büntetőjogi szankcionálásának kriminálpolitikai vizsgálata. *Versenytükör*, 2019, 1, pp. 36–37.

<sup>24</sup> It is known that the criminal legal prohibition of the acts restraining the competition derives from the United States, on the basis of the success of which a tendency of criminalisation – of lesser success – could be observed in Europe as well. GERENCSÉR Ágnes: *Büntetőjogi szankciók a versenyjogban.* [https://www.gvh.hu/data/cms1024125/print\\_4449\\_h.pdf](https://www.gvh.hu/data/cms1024125/print_4449_h.pdf).

<sup>25</sup> TÓTH Mihály: *Gazdasági bűncselekmények és bűnözés a rendszerváltozás éveiben.* Doktori értekezés, 2007, p. 153. Up to this point there has been no realisation of the expectation that *„it may be possible to diminish the whole, often corrupt system by the forward bringing of the criminal responsibility, merely through the unveiling of the insider agreements”*.

However, significant arguments stand for the necessity of the maintenance of the regulation<sup>26</sup>, even the possible expansion of its scope. For instance, considering the nature of the offence, there is certainly high latency, the actual number of such offences can be significantly higher than the one appearing in the criminal statistics.<sup>27</sup> Another argument could be that these offences also violate the clarity of the public procurement and concession procedures. We may also find such viewpoints according to which cartels are the most severe ones among the agreements restraining the competition, therefore, the system of means of criminal law is required in general.<sup>28</sup>

According to my view, the criminalisation can be considered reasonable, however, the European pieces of experience of criminalisation so far do not justify the expansion of the scope of the regulation.

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<sup>26</sup> According to Pál Sinku, the regulation of the Criminal Code is in line with the rules of competition law, the international standards, and there is no need for modification. On the other hand, he considers the issue of the civil claim from a procedural perspective unsettled, and raises that if the contracting authorities in the public procurement suffer civil legal damage connected to cartelling, their position as victim could be acknowledged. SINKU: loc. cit., p. 266.

Ágnes Roxán Kéryné Kaszás takes the view that the regulation is capable of fulfilling its function, what is left to be realised is the more determined and more mature attitude in terms of the legal subject within the legal practice. KÉRYNÉ KASZÁS Ágnes Roxán: *Korlátok és lehetőségek, avagy a kartelltilalom büntetőjogi szabályozásának helye a magyar jogrendszerben*. Doktori értekezés, Pécs, 2013, p. 189.

<sup>27</sup> On the international level, from the aspect of competition law, cartels are unveiled only with an approximate rate of 15%, and the number of the ones getting to the criminal authorities is even smaller. SINKU: loc. cit., p. 260.

<sup>28</sup> Yet, the justification of Law C/2012 on the Criminal Code states that the expansion of the criminal legal protection to the cartels generally, would rather carry threats than possible progress.

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- [5] KÉRYNÉ KASZÁS Ágnes Roxán: *Korlátok és lehetőségek, avagy a kartelltilalom büntetőjogi szabályozásának helye a magyar jogrendszerben*. Doktori értekezés, Pécs, 2013.
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