Chapter [•]

Hungary

Álmos Papp and András Horváth[1]

Álmos Papp
Bán, S. Szabó & Partners, Budapest
E-mail: apapp@bansszabo.hu

András Horváth
Hegymegi-Barakonyi and Partner Baker & McKenzie, Budapest
E-mail: andras.horvath@bakermckenzie.com

1. The Competition Law Context of Online Sales

1.1. Competition Law Framework

The Competition Act[2] serves as a general code for the regulation of Hungarian competition law. The Competition Act regulates the entire scope of competition matters, such as: unfair competition, unfair manipulation of business decisions, agreements on the restriction of competition (horizontal and vertical), abuse of dominant position, merger control proceedings and private enforcement of claims. The Competition Act also sets forth basic organizational rules of the Hungarian Competition Authority ("HCA") enforcing competition law in Hungary.

The Competition Act aims to create a competitive market environment which serves the economy and social progress. Pursuant to the Competition Act, this requires the introduction of competition laws to prohibit trading practices that disregard the requirements of fair competition or that have the capacity to restrict competition, and prevent the concentration of undertakings that are detrimental to competition.

The prohibitions identical with rules stipulated in Article 101 and 102 TFEU are set forth in Section 11 and Section 21 of the Competition Act.[3]

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[1] The members of the working group preparing the chapter were Gusztáv Bacher, Virág Balogh, Adrienn Dömők, Márton Horányi, Anikó Keller, Márton Kocsis, Ádám Liber, Márk Pánczél, Ákos Réger, István Szatmáry, Pál Szilágyi, Péter Virág and Péter Vörös.

[2] Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition.

[3] Section 11 of the Competition Act reads as follows:
(1) Agreements and concerted practices between companies, as well as the decisions of the organizations of companies established based on the right of association, their public bodies, associations and other similar (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 displays such an effect, are prohibited. An agreement concluded between companies that are not unrelated shall not be construed as such.
(2) This prohibition shall, in particular, apply to the following:
a) fixing the purchase or sales prices, and defining other business conditions directly or indirectly;
b) restricting manufacture, distribution, technical development or investment or keeping them under control;
c) dividing the sources of supply and restricting the freedom of choosing from among them, as well as excluding specific trading parties from the purchase of certain goods;
d) dividing the market, excluding any party from selling, and restricting the choice of means of sales;
f) preventing any party from entering the market;
g) where, in respect of transactions of an identical value or of the same nature, certain partners are discriminated against, including the setting of prices, payment deadlines, discriminatory sales or purchase conditions or the employment of methods which cause disadvantage to certain business partners in the competition;
h) rendering the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, do not form part of the subject of the contract.
Section 21 of the Competition Acts reads as follows:
It is prohibited to abuse a dominant position, in particular:
a) to fix purchase or sales prices unfairly in business relations, including where general contract terms and conditions are applied, or to stipulate unjustified advantages by any other means, or to force the acceptance of detrimental terms and conditions on the other party;
b to restrict production, distribution or technical development to the detriment of final trading parties;
c) to refuse to establish or maintain business relations adequate for the nature of the transaction without any justification;
d) to influence the other party's business decisions for the purpose of gaining unjustified advantages;

Although the Competition Act contains several special procedural rules applicable to the proceedings of the HCA, the APA[4] that contains the basic administrative procedural rules is also applicable. From 1 January 2018, Act CL of 2016 on the General Rules of Public Administration Procedures will enter into force as the new act on administrative procedure. With the entry into force, competition supervision procedures will fall outside the scope of the APA and it is likely that all procedural rules will be included in the Competition Act. This major overhaul is underway and is expected to enter into force early 2018.

In addition to the rules of the Competition Act on unfair manipulation of business decisions applicable to B2B relations, unfair commercial practices in B2C relations are regulated by the UCP Act.[5] The UCP Act aims to protect the interest of consumers, to foster fair market practices and to improve the efficiency of combating unfair commercial practices, recognizing the weight of self-governance to eliminate unfair commercial practices and to foster the enforcement of codes of conduct established within the framework of self-governance. The UCP Act is enforced by the HCA if the commercial practice is capable of significantly affecting competition (e.g. nationwide practice). The UCP Act implements the Unfair Commercial Practices Directive.[6]

1.2. Sector Specific Regulation

The Civil Code[7] contains the general rules for concluding contracts by electronic means. These include the provisions on the information to be provided by the service provider before the conclusion of the contract and the process of conclusion (electronic contractual declaration and confirmation). The same rules applicable to the provision of information society services are set forth in the E-Commerce Act.[8] Both the Civil Code and the E-Commerce Act implement the Directive on Electronic Commerce.[9] With respect to these aspects of online sales, special rules apply to financial services marketed via means of distance communication. These are set forth in the Financial Distance Marketing Act,[10] which implements the Directive on Distance Marketing of Financial Services.[11] The B2C Contract Regulation[12] contains more general rules, applicable to all distance contracts between undertakings and consumers, however, some of its provisions may also apply to online sales.

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e) to withdraw goods from general circulation or to withhold goods without justification prior to price increases or for the purpose of causing prices to rise, or by means otherwise capable of securing unjustified advantages or causing a disadvantage in competition;
f) to render the supply and acceptance of goods contingent upon the supply or acceptance of other goods, or to render the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, does not form part of the subject of the contract;
g) in connection with transactions of an identical value or of the same nature, to discriminate against certain business partners without due cause, including the setting of prices, payment deadlines, discriminatory sales or purchase conditions or the employment of methods which cause disadvantage to certain business partners in the competition;
h) to force competitors off the relevant market, or to use excessively low prices which are based not upon better efficiency in comparison to that of the competitors, so as to prevent competitors from entering the market;
i) to hinder competitors from entering the market in any other unjust manner; or
j) to create a market environment that is unreasonably disadvantageous for the competitors or to influence their business decisions for the purpose of gaining unjustified benefits.

[4] Act CXL of 2004 on the General Rules of Administrative Procedures and Services.

[5] Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices.

[6] Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 of the European Parliament and of the Council and Regulation 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ 2005 L 149, p. 22.

[7] Act V of 2013 on the Civil Code.

[8] Act CVIII of 2001 on Electronic Commerce and on Information Society Services.

[9] Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on Electronic Commerce'), OJ 2000 L 178, p. 1.

[10] Act XXV of 2005 on the financial service contracts concluded as distance contracts.

[11] Directive 2002/65 of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619 and Directives 97/7 and 98/27, OJ 2002 L 271, p. 16.

[12] Government Regulation No 45/2014 (II. 26.) on the detailed rules of contracts between businesses and consumers.

1.3. National and Supranational Competition Law

As Hungary is a Member State of the European Union, both Hungarian competition law and EU competition law directly apply if a conduct is capable of (appreciably) affecting the trade between Member States.[13] In the context of competition law, there is no conflict or gap between the standards of the national system and the supranational legal system to which Hungary is subject, i.e. the laws of the European Union.

The relationship of Hungarian and EU competition laws is mainly regulated by way of Regulation 1/2003.[14] In the context of Regulation 1/2003,[15] national competition laws mean all those national laws that predominantly pursue the same objective as that pursued by Articles 101 and 102 TFEU.[16] Article 1 of Regulation 1/2003 establishes the direct applicability of Articles 101 and 102 TFEU, while Article 3 regulates the relationship between Articles 101 and 102 TFEU and national competition laws.

According to the procedural rule set forth in Article 3(1) of Regulation 1/2003, national competition authorities and national courts also apply Articles 101 and 102 TFEU, where they apply national competition law to agreements or practices that fall under Articles 101 and 102 TFEU. According to the rule of substance set forth in Article 3(2) of Regulation 1/2003, agreements and concerted practices which affect trade between Member States and which are not prohibited by Article 101 TFEU cannot be prohibited under national competition law. The situation is different with unilateral practices covered by Article 102 TFEU. Namely, Member States remain free to adopt and apply stricter national laws on their territories, i.e. Member States can prohibit unilateral practices that are not prohibited by Article 102 TFEU.

It must be noted that although there is no express obligation to harmonize EU competition law and national competition law, Hungarian competition law very much mirrors its EU counterpart.

1.4. Competition Case Law

List of competition cases concerning online sales are the following:

Nr	Case number	Parties to the Procedure	Type of Procedure	Market definition	Decision of the HCA
1	VJ/55/2013	Alcon Services AG Hungarian Branch Novartis Hungária Kft. Alcon Hungária Gyógyszer-kereskedelmi Kft.	agreement on the restriction of competition	contact lenses and contact care products	The HCA found that the undertakings concerned restricted competition by creating and operating a rebate system to the detriment of the online retailers of CIBA contact lenses and care products. The HCA imposed a fine on Alcon Services AG Hungarian Branch (HUF 51,356,000 ~ EUR 165,670) and Alcon Hungária Gyógyszerkereskedelmi Kft. (HUF 52,343,000 ~ EUR 168,850).[17]
2	VJ/113/2013	Allegro Group HU Kft. Hotel Outlet Internetes Utazásközvetítő Kft.	unfair commercial practices	offers related to accommodation	The HCA terminated the procedure.
3	VJ/70/2014	Booking.com B.V.	unfair commercial practice	offers related to accommodation	The HCA terminated the procedure.
4	VJ/106/2015	Portfolion Regionális Magántőke Alap	merger	online accommodation search,	The HCA approved the merger.

[13] Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101, p. 81.
[14] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, p. 1.
[15] This interpretation is based on Recital 8 and 9, as well as Article 3(3) of Regulation 1/2003.
[16] The relationship of EU and national merger control is separately regulated by way of the EU Merger Regulation (Regulation 139/2004), while national laws on B2C unfair commercial practices were fully harmonized by way of the Unfair Commercial Practices Directive.
[17] The decision of the HCA is currently under judicial review.

Nr	Case number	Parties to the Procedure	Type of Procedure	Market definition	Decision of the HCA
		Szallas.hu Kft. OTP Bank Nyrt. Magyar Export-Import Bank Zrt.		comparison and booking services	
5	VJ/17/2017	Booking.com Hungary Kft. Booking.com International B.V. Booking.com B.V.	agreement on the restriction of competition	online accommodation search, comparison and booking services	The HCA alleges that the undertakings concerned coordinated the prices of hotels and accommodation service providers. The case is still pending.

1.5. Guidelines on Vertical Restraints

The HUVBER[18] provides for guidance on vertical restraints. This mirrors Regulation 330/2010.[19] Therefore, when interpreting the HUVBER, the EU Guidelines on Vertical Restraints are most helpful, since Hungarian guidelines to this topic do not exist. These rules are general and sector-neutral in their nature and are relevant to the vertical relationships of internet-related and computer-software enterprises as well.

1.6. Sector Inquiry

The market of online travel agencies ("OTA") was subject to sector inquiry in Hungary from 2013 to 2016. The HCA published the final report of the sector inquiry on 8 June 2016 ("Sector Inquiry Report").[20] The online hotel booking market in the tourism sector showed several traits, which drew the attention of European competition authorities, including the HCA, to the sector. There were concerns that the price-parity clauses (most-favored nation or most-favored customer clauses, in short: MFN or MFC) may distort or restrict competition.

1.6.1. Focus of the Inquiry

As stated in the Sector Inquiry Report, there are three main fields in which the HCA received notes or remarks from market players.[21] These are the following:

a) Remarks related to comparative advertising

It was noted in case of a certain OTA that its website unlawfully suggested that it did not charge any fee compared to other OTAs. This practice put the OTA in question in a favorable light compared to its competitors. Nevertheless, the comparative nature of the advertisements was not confirmed in these cases, and therefore no competition supervision procedure was commenced.

b) Remarks regarding the "best price" expression

Other remarks related to the use of "best price" statement in different forms on OTA websites. The HCA concluded that the OTAs in question made package offers, which were formed uniquely. Therefore, it was possible that the offer in question was the best price offer in the market, and therefore no competition supervision procedure was commenced.

c) The practices listed in the third group of remarks were suitable for commencing competition supervision procedure.

[18] Government Regulation No 205/2011 (X. 7.) on the exemption of certain categories of vertical agreements from the prohibition of restriction of competition.

[19] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102, p. 1.

[20] The full version of the Hungarian language Sector Inquiry Report is available at: http://gvh.hu//data/cms1034253/Agazati_vizsgalat_online_szallashelyfoglalas_piacan_vegleges_jelentes_2016_06_08.pdf. The English language executive summary of the Sector Inquiry Report is available at: http://www.gvh.hu/data/cms1034473/Agazati_vizsgalat_online_szallashelyfoglalas_piacan_vegleges_jelentes_2016_06_08_a.pdf.

[21] See Sector Inquiry Report, p. 65.

The HCA took into consideration whether basic prices indicated in OTA websites were actually applied, and consequently whether the discounts compared to the basic prices indicated on OTA websites were actually real. The HCA also examined (i) whether the "best price guarantee" was suitable for indicating to the consumers that the relevant OTA offered the most favorable prices, (ii) whether such statements were suitable for influencing consumers' decisions and (iii) whether such statements were actually true. The procedures were not conducted because of classic anti-trust violations but rather for alleged breach of UCP rules.

1.6.2. Agency Agreements

In the Sector Inquiry Report the HCA also examined agreements between hotels and OTAs qualifying as agency relationships. In terms of agency relationships, competition law differentiates between genuine agency agreements and non-genuine agency agreements.

a) The genuine principal–agent relationship is a vertical relationship in which the parties in question constitute an economic unit from a competition law perspective, even though under Section 15 of the Competition Act, they qualify as undertakings that are independent from each other. The agent in such relationship is not considered as an economically autonomous market player or as an independent undertaking. Therefore, if the two companies conclude a genuine agency contract, it may not qualify as a restrictive agreement under Section 11 of the Competition Act.

b) Non-genuine agency agreements also have the formal attributes of agency agreements but in reality, the agents are independent market players from the principal. Therefore, non-genuine agency agreements fall under the prohibition on restrictive agreements.

c) Genuine and non-genuine agency agreements may be differentiated on the basis of the extent of the risks undertaken by the agent. Similarly to para. 16 of the Guidelines on Vertical Restraints,[22] Hungarian jurisprudence[23] also lists the factors which support that a contract does qualify as a genuine agency agreement (as the agent does not undertake risks associated with the market presence and the sale of goods in question) as follows:
   - the agent is not the owner of the contractual goods;
   - the agent does not contribute to the costs of distribution;
   - the agent does not take part in the promotions of the principal (and especially, does not bear the costs of marketing);
   - the agent does not build up stocks at its own cost, whereas remaining products may be returned;
   - the agent does not provide additional services, such as repairs, at its own costs;
   - the agent does not make promotional investments at its own costs;
   - the agent does not bear liability for damages related to the products;
   - the agent does not bear liability for the breach of contract by customers.

1.6.3. MFN Clauses

The HCA also examined the MFN clauses.

a) MFN/MFC or anti-discrimination clauses also drew the attention of national competition authorities. Relating to online booking systems, rate (or room) parity agreements belong to the group of MFN clauses. MFN clauses qualify as vertical agreements, while MFN clauses within agreements between OTAs and hotels are considered as platform MFNs. This means that the agent (or platform) does not buy the product / service, it only creates the connection between the OTAs and the consumers, whereas the agent (platform) is paid a commission. Platform MFNs have four problematic effects: (i) platform MFN clauses may make it difficult for new competitors to enter the market of platforms (entry barriers); (ii) they weaken the competition between platforms; (iii) such clauses make collusion between platforms and sellers easier; and (iv) they grant information on the operational costs of other platforms.

[22] Guidelines on Vertical Restraints, OJ 2010 C 130, p. 1.
[23] Kommentár a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvényhez, Budapest, 2014, HVG-ORAC, p. 218.

b) MFN clauses qualify as vertical agreements, but may be exempted from Article 101 TFEU and Section 11 of the Competition Act – in particular when the market share of the parties do not exceed 30% (block exemption). MFN clauses must always be subject to a case-by-case assessment. The anti-competitive impact of an MFN clause will depend mostly on the market situation surrounding the parties, the specificities of the market and the monitoring of, and the sanctions attached to, a breach of the MFN by the parties.

c) In general, in an MFN agreement one party agrees to perform a certain activity in favor of the other party under "most favored" conditions. Within MFN clauses, platform MFN clauses require the seller not to sell its product cheaper via another platform. The indirect beneficiaries of such agreements are the OTAs or platforms, whereas the direct beneficiaries are the consumers or buyers.

d) MFN clauses are typically rate-parity agreements, but there are clauses which relate to other conditions. In the case of rate parity, the seller (that is the hotel) agrees not to offer more favorable prices to other buyers (OTAs), which means that the seller offers its best offer to the buyer with which it has concluded the MFN clause. The rate-parity clause is somewhat narrower in comparison to MFN clauses, because rate parity concerns only prices, while MFN clauses can relate to other conditions too. A hotel may offer more favorable prices or conditions to its other contractual partners (other OTAs the hotel has agreements with) if it also offers such favorable conditions to the OTA with which it has concluded the MFN clause.

e) In the case of broad MFN clauses, the obligor (i.e. hotel) of the MFN clause agrees that it will not grant more favorable conditions (either by its own, direct sales system or through other sales channels) to any other OTAs than those granted to the obligee of the MFN clause. Meanwhile, in the case of narrow MFN clauses, the obligor is bound by such obligation only concerning its own sales system, but not concerning the indirect sales system. This means that in the case of a narrow MFN clause relating to online sales, the obligor may offer more favorable conditions (via its offline sales channels and in case of direct sales) than the ones offered to the obligee of the MFN clause.

The HCA also published the remarks of market players during the sector inquiry.[24] Szallas.hu, a major OTA in Hungary, stated that it switched to the practice of narrow parity. Meanwhile Expedia disagreed with the assessment regarding the static level of commissions and the lack of innovation on the Hungarian market. Expedia also stated that the practice of OTAs to apply MFN clauses fell under the scope of block exemption (it shall be noted that Expedia also switched to the use of narrow parity). Expedia also made a note on the billboard effect of OTAs and the risk of the free riding of hotels on the investment of OTAs. It argued that parity clauses were introduced for investment protection reasons. Expedia also disagreed with the HCA’s opinion that the agreements between OTAs and hotels were non-genuine agency agreements. Hotels also made remarks. They argued that narrow parity would not benefit them as it would not allow hotels to offer cheaper prices via their own sales channels than the ones offered via OTAs. They also stated that MFN clauses distorted competition and a high level of commissions drove up prices charged by hotels to customers. They concluded that the abolition of parity clauses would greatly benefit the market.

As a result of the sector inquiry, OTAs switched to the use of narrow-rate parity clauses. Therefore, OTAs in the future may only stipulate that a hotel may not give less favorable conditions to the OTA in question than what is indicated on the hotel’s website. However, the parity clause will not concern other OTAs or other sales channels, such as phone, fax or e-mail. This also means that hotels can provide discounts to consumers directly.

2. Market Analysis in Case of Online Sales

One of the cornerstones of the application of competition law is the determination of the relevant product and geographical market in which the relevant practice is applied. Also, certain practices are only prohibited in the possession of market power (e.g. abuse of dominance).

[24] The full version of the Hungarian language summary of comments is available at: http://www.gvh.hu//data/cms1034254/Agazati_vizsgalat_online_szallashelyfoglalas_piacan_eszrevetelek_2016_06_08.pdf.

2.1.1. Market Definition in Case of Online Sales

The definition of the relevant market is regulated in Section 14 of the Competition Act,[25] similarly to the Relevant Market Notice.[26] This definition is applied also in case of online sales.

The HCA published an OECD Contribution in 2000 on electronic commerce and competition.[27] In the OECD Contribution the HCA gave a general overview of the then-relevant situation and the potential problems. The OECD Contribution indicated in 2000 that there were no indications of possible problems concerning e-commerce from an antitrust perspective. However, there were several procedures regarding web-based advertisements which were investigated because of the breach of rules on unfair commercial practices.

In the OECD Contribution, the HCA laid down the principles for defining the relevant market. In the case of e-commerce, the relevant product is a special service which shows both the characteristics of internet services and traditional trade services. In the case of the internet services, the HCA distinguishes between access provision and content provision.

With respect to geographic markets, the OECD Contribution states that the criteria of considerably less favorable conditions must be assessed on case-by-case basis. Therefore, the geographical market would mean the geographical area where no additional costs, such as customs duties, tax and transport costs, would emerge. Downloadable software or light-weight products (books, CDs) from the neighboring countries would meet the requirements of the above geographical area. However, the OECD Contribution noted that in case of certain products or services, it may be reasonable to define the market as the territory of Hungary.

In the Allegro case[28], the relevant product was defined as offers related to accommodation. The sale of the accommodation was not of direct but rather indirect interest to Allegro, as Allegro was paid commission based on the sales of Hotel Outlet. Only the communication related to the hotels were the subject-matter of this proceeding. The HCA concluded that not the respective hotel offers were relevant from a competition law perspective, but the name of the website introduced and used by Allegro, the message carried by it, the information included in the newsletters / website, and the slogan applied systematically by Hotel Outlet.

In the Alcon case,[29] the relevant market was the market of contact lenses and contact care products. As Alcon's framework contracts also applied to contact lenses and care products, and from the retailer's perspective it is not relevant which types of products are sold, the relevant market was the market of contact lenses and care products, whereas the geographical boundaries of the relevant market were those of Hungary.

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[25] Section 14 of the Competition Act reads as follows:
(1) The relevant market shall be defined with regard to the goods subject to the agreement and to the geographical territory.
(2) In addition to the goods for which the agreement is concluded, the goods considered as reasonable substitutes in terms of use, price, quality and the conditions of performance (substitution in demand) shall also be taken into account, as well as the factors involved in substitution in supply.
(3) A geographical territory is an area, outside of which:
a) a business partner is unable to purchase the goods, or is only able to purchase the goods under substantially less favorable conditions; or
b) the seller of the goods is unable to sell the goods, or is only able to sell the goods under substantially less favorable conditions.

[26] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, p. 5.

[27] The full version of the Hungarian language contribution is available at: http://www.gvh.hu/data/cms1022123/hu_atev_oecdh_elker00_m.pdf. The full version of the English language contribution is available at: http://www.gvh.hu/data/cms1022135/us_atev_oecdh_elker00_a.pdf.

[28] VJ/113/2013.

[29] VJ/55/2013.

2.1.2. Market Power in case of Online Sales

The definition of dominance regulated in Section 22 of the Competition Act,[30] similarly to the Abuse of Dominant Position Notice.[31] Market power can be interpreted as the level of market shares in case of which a restriction may fall under a block exemption. Hungarian competition law also contains the market level powers relative to block exemption regulations, similarly to EU competition law:

Market power	Hungary	European Union
20%	Government Regulation No 202/2011 (X. 7.) on the exemption of certain categories of specialisation agreements from the prohibition of restriction of competition	Commission Regulation 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ 2010 L 335, p. 43
25%	Government Regulation No 206/2011 (X. 7.) on the exemption of certain categories of research and development agreements from the prohibition of restriction of competition	Commission Regulation 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ 2010 L 335, p. 36
30%	HUVBER	Regulation 330/2010

Also, the *de minimis* rule regulated in Section 13 of the Competition Act,[32] similarly to the De Minimis Notice, could be interpreted suggesting that – in case the combined market share of the parties do not exceed 10% – there is no market power.

The above definitions are also applied in case of online sales.

The OECD Contribution stated that barriers to enter the market could lead to the evolution of a dominant position. In the case of a merger between OTAs which is subject to prior authorization, the HCA may prevent the evolution of a dominant position.

3. Legal Analysis in case of Online Sales

Before analyzing in detail the most relevant type of restrictions (those in case of selective distribution agreements), it is worth presenting the general framework of the legal analysis of restrictions with respect to online sales.

[30] Section 22 of the Competition Act reads as follows:
(1) A dominant position shall be deemed to be held on the relevant market (Section 14) by persons who are able to pursue their economic activities to a large extent independently of other market participants without the need to substantively take into account the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct.
(2) In assessing whether a dominant position exists, the following factors shall be considered in particular:
(a) the costs and risks of entry to and exit from the relevant market, and the technical, economic and legal conditions that have to be met;
(b) the assets, financial strength and profitability of the undertaking or the group of undertakings [Section 15(2)], and the trends in their development;
(c) the structure of the relevant market, the comparative market shares, the conduct of market participants and the economic influence of the undertaking or the group of undertakings on the development of the market.
(3) A dominant position may be held by a single undertaking, a group of undertakings, jointly by more than one undertaking, or jointly by more than one group of undertakings.
[31] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45, p. 7
[32] Section 13 of the Competition Act reads as follows:
(1) Agreements of minor importance shall not be subject to prohibition.
(2) An agreement shall be construed of minor importance if the combined share of the parties to the agreement and of the companies that are not independent from such parties does not exceed ten per cent in the market in question. The requirement of a market share of ten per cent or less shall be satisfied during the term of the agreement or in each calendar year if the said term covers more than one year.
(3) Subsection (1) shall not apply to agreements between competitors or concerted practices which have as their object the restriction, prevention or distortion of competition, such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets, including bid-rigging, restrictions of imports or exports (hereinafter referred to as “cartel”), including any agreement aiming, directly or indirectly, for fixing purchase or sale prices, or concerted practices.
(4) The provisions of Subsections (1)-(3) notwithstanding, any agreement that is able to create an environment, in conjunction with other agreements of the like, whereby competition in the relevant market is substantially obstructed, restricted or distorted, shall be subject to prohibition. The Hungarian Competition Authority shall have powers to declare an agreement illegal, in which case no penalty shall be imposed.

3.1. Types of Infringements

As mentioned above, Hungarian competition law prohibits restrictive agreements and abuses of dominances. Prohibited restrictive agreements can be horizontal and vertical. The prohibition extends to restrictions by object and restrictions by effect.

At present, there is limited case law for antitrust cases involving e-commerce and online sales platforms in Hungary. So far, only a few merger and vertical restraint decisions, and mostly decisions related to unfair commercial practices have been published.

3.2. Exclusionary Practices

3.2.1. Prohibition of Exclusionary Practices

Although the categorization of exclusionary practices does not explicitly appear in the Competition Act, both bilateral / multilateral and unilateral exclusionary practices are prohibited:

- Section 11 (2) b) [restriction of distribution], c) [exclusion from purchasing], d) [exclusion from selling] and f) [prevention of market entry] of the Competition Act all refer to exclusionary practices in the form of an agreement, concerted practice or decision of an association of undertakings;
- Section 21 b) [restriction of distribution], c) [refusal to deal], i) [prevention of market entry] of the Competition Act all refer to exclusionary practices in the form of abuse of a dominant position.

In case law, exclusionary practices were assessed as a form of abuse of a dominant position. According to the case law, exclusionary practices are anti-competitive if they harm efficient competition. Competition law protects efficient competition leading to an outcome most beneficial for consumers rather than market players.[33] Furthermore, exclusionary practices are anti-competitive even if they are not successful in foreclosing competitors.[34] Otherwise, foreclosure effect was assessed as a theory of harm in case of other abusive practices.[35]

We are not aware of any abuse of dominant position cases in the area of online sales platforms in Hungary. Nevertheless, the above standards for assessing exclusionary practices are also applicable to all internet-related business markets.

3.2.2. Structural Prerequisite for Exclusionary Practices

In case of exclusionary practices in the form of agreements, concerted practices or decisions of an association of undertakings, there is no structural prerequisite for the prohibition to apply. However, safe harbors apply (see below Section 3.2.3) and market shares falling outside the safe harbor may be considered as a prerequisite for the prohibition.

In case of exclusionary practices in the form of abuse of a dominant position, the structural prerequisite is the dominant position of the undertaking carrying out the practice. Although there are no Hungarian guidelines on prerequisites (e.g. market share) for a dominant position, the HCA refers to the Abuse of Dominant Position Notice, which sets forth that in case of a market share below 40%, a dominant position is not likely.[36]

3.2.3. "Safe Harbor" for Exclusionary Practices

In case of exclusionary practices in the form of agreements, concerted practices or decisions of an association of undertakings, the HUVBER provides for a safe harbor. Pursuant to Section 3 of the HUVBER, it is the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market where it purchases the contract goods or services which determine the applicability of the block exemption. In order for the block exemption to apply, the supplier’s and the buyer’s market share must be 30% or less on their relevant markets respectively.

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[33] VJ/10/2002, para 44
[34] VJ/78/2003, para 43
[35] In case of predatory pricing: VJ/10/1997, VJ/76/1999, VJ/39/2009 and VJ/32/2012.
[36] Abuse of Dominant Position Notice, para 14.

In case of exclusionary practices in the form of abuse of a dominant position, the safe harbor is if the undertaking has no dominant position (see Section 3.2.2 above).

3.3. Use of Trademarks

Restrictions on online sales are sometimes due to the protection of trademarks. The reseller/distributor is in general entitled to use the manufacturer's trademarks, however, it shall use the trademarks only for advertising the products. The principle of exhaustion constitutes a limit of the trademark rights. We are not aware of any published Hungarian court decision on preventing the distributors to sell the product on third-party platform.

As the Trademark Act[37] is based on the Trademark Directive,[38] which provides full harmonization relating to the scope of the exclusivity rights arising from the trademark right, the case law of the Court of Justice of the European Union ("CJEU") can provide for guidance.

Regarding the exhaustion of the rights, Article 7(1) of the Trademark Directive provides that "The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the EEA under that trade mark by the proprietor or with his consent."

This rule means that if the retailer acquires the ownership of the goods, it can resell them. The purpose of the exhaustion principle is to facilitate the trade within the EU Member States and to promote competition (intra-brand competition). The CJEU established that in case of exhaustion, when trade-marked goods have been put on the EU market by the trademark-holder, a reseller is not only free to resell those goods, but it is also free to make use of the trade mark for advertising to bring to the public's attention the further commercialization of those goods.

There is only one exception in Article 7(2) of the Trademark Directive, which provides that the exhaustion "shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market."

In the Dior case,[39] the CJEU analyzed the dispute that Dior's luxury cosmetic products, which are distributed in a selective distribution system, by selected retailers were advertised in ad papers of Evora, which operates a chain of chemists' shops. Although they have not been appointed as distributors by Dior, the shops sell Dior products, which Evora obtained by means of parallel imports. The legality of reselling those products has not been challenged. The CJEU found that damage done to the reputation of a trademark may, in principle, be a legitimate reason to oppose the use of the trademark for further commercialization of goods. As regards prestige goods, the CJEU stated that the reseller must not act unfairly in relation to the legitimate interests of the trademark-holder, and must endeavor to prevent its advertising from affecting the value of the trademark by detracting from the prestigious image of the goods in question. However, the CJEU concluded that the trademark-holder may not oppose the use of the trademark, in ways customary in the reseller's sector of trade (i.e., chemists' shops), for bringing to the public's attention the further commercialization of the trade-marked goods, unless it is established that such use seriously damages the reputation of the trademark.

The CJEU has applied the exhaustion principle in the BMW case[40] started against the owner of a garage, concerning its advertisements for the sale of second-hand BMW cars and repairs of BMW cars. In view of the CJEU, BMW cannot prohibit the use of its trademark by another person for informing the public that it is a specialist in the sale of second-hand BMW cars, provided that the advertising concerns cars, which have been put on the EU market under that trademark by the proprietor or with its consent.

On the other hand, it may constitute a legitimate reason for opposing the use if the trademark is used in a reseller's advertising in such a way that it may give rise to the impression that there is a commercial connection between the reseller and the trademark-holder, and that the reseller's business is affiliated to the trademark-holder's distribution network or that there is a special relationship between the two undertakings. Such advertising is contrary to the obligation to act fairly in relation to the legitimate interests of the trademark-holder and it affects the value of the trademark by taking unfair advantage of its distinctive character or reputation. It is also incompatible with the specific object of a trademark, which is to protect the trademark-holder against competitors wishing to take

[37] Act XI of 1997 on the Protection of Trademarks and Geographical Indications.
[38] Directive 2008/95 of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ 2008 L 299, p. 25.
[39] ECJ, case C-337/95, *Christian Dior SA v. Evora BV*, ECR 1997 I 1603.
[40] ECJ, case C-63/97, *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV and Ronald Karel Deenik*, EU:C:1999:82.

advantage of the status and reputation of the trademark. If, on the other hand, there is no risk that the public will be led to believe that there is a commercial connection between the reseller and the trademark-holder, the mere fact that the reseller derives an advantage from using the trademark in that advertisements for the sale of goods, which are in other respects honest and fair, and the use of the trademark lend an aura of quality to its own business does not constitute a legitimate reason within the meaning of Article 7(2) of the Trademark Directive.

In connection with that, a reseller who sells second-hand BMW cars cannot in practice communicate such information to its customers without using the BMW trademark. In consequence, such an informative use of the BMW trademark is necessary to guarantee the right of resale and does not take unfair advantage of the distinctive character or reputation of that trademark. Whether advertising creates the impression that there is a commercial connection between the reseller and the trademark-holder is a question to be decided in the light of the circumstances of each case.

Considering the above case-law, it can be concluded that if the trademark holder wants to prevent the sale of goods bearing his trademark by third party retailers, it shall find out

- whether the goods are original or counterfeit products, and
- if original, what is the commercial source of the products, namely: whether the manufacturer sold them first within the EU, or outside.

The retailer does not infringe the trademark if it sells original products that had been placed on the EU market by or with the consent of the trademark-holder. The retailer usually bears the burden of proof that the relevant goods are original and the products had been placed on the EU market by the trademark-holder or with its consent, and thus that trademark rights were exhausted. However, this allocation of burden of proof is unsuitable for cases in which the trademark-holder has created a specific distribution system to prevent parallel imports, where an actual risk of market foreclosure exists if the retailer must disclose the dealers it supplies. In such a case, the trademark-holder could influence, based on either contractual agreements or on the actual behavior, the distribution partner to stop supplying dealers, which were excluded from the distribution system.

If the goods are original and were placed on the market by the trademark-holder, the supplier can prevent the reseller's advertising only if the website gives the impression that there is a commercial connection between the retailer and the trademark-holder. Thus, the overall outlook of the retailer's website needs to be examined. The overall outlook is influenced by

- the domain name,
- whether the website uses the manufacturer's logo or only the word format of the trademark without the logo,
- the use of graphic elements and colors which may create confusion with the manufacturer's distribution network.

3.4. Efficiency

Since antirust cases concerning online sales platforms do not usually fall within the scope of restrictions by object (where assessment of anti-competitive effects are not necessary), efficiency is one of the key elements that the HCA takes into account. Efficiencies can tip the balance in such practices, and the restriction can be considered pro-competitive (or at least not anti-competitive) despite certain anti-competitive elements of the investigated undertaking’s business conduct. However, the criteria of the acceptance of efficiencies are strict. The company under investigation is required to show that the efficiencies meet the conditions set out in the relevant provisions of the Competition Act and the TFEU (elaborated in Section 4.2 below).

In the Sector Inquiry Report, the HCA evaluated the potential efficiencies of MFN clauses. The assessment of efficiencies is based on three distinct potential pro-competitive features of price-parity clauses:

- avoidance of “free-riding”,
- strengthening intra-brand competition,
- reducing potential price discrimination.

In the absence of price parity clauses, hotels could free-ride on comparison websites offering lower prices on their own websites: if consumers were aware of such practices, they may search for and select their accommodation on the OTAs, then look for smaller prices (bargains) on the hotel’s own website. This may discourage OTAs from further investing in their services. The HCA included in its assessment that – according to a consumer survey done in the course of the sector inquiry – free-riding is a genuine business threat in Hungary.[41]

[41] See Sector Inquiry Sector, p. 93.

Intra-brand competition can be strengthened by price parity clauses because consumers only need to check a single OTA website in order to find the best valued accommodation. The Sector Inquiry Report points out that with the right level of price-parity clauses (i.e. narrow MFN clauses) even inter-brand competition is facilitated.[42]

Finally, price-parity clauses can hinder accommodation managers from applying different prices to different consumers (for example, for the same hotel room), but the HCA did not develop a complete theory of harm, and so did not reach a conclusion on this basis.[43]

4. Online Sales in Selective Distribution Systems

4.1. The Definition of Selective Distribution

The definition of selective distribution system is stipulated in Section 1 para. 5 of HUVBER,[44] similarly to Regulation 330/2010.

Selective distribution agreements restrict the number of authorized distributors on the one hand and the possibilities of resale on the other. The restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. The restriction on resale is not a restriction on active selling to a territory, but a restriction on any sales to non-authorized distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products.

As set forth in para. 175 of the Guidelines on Vertical Restraints, purely qualitative selective distribution and quantitative selective distribution can be distinguished. Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product (e.g. training of sales personnel, the service provided at the point of sale, a certain range of the products being sold, etc.). This form of selective distribution is not anticompetitive if (i) the nature of the product necessitates a selective distribution system, to preserve its quality and ensure its proper use; (ii) distributors are selected on the basis of objective criteria of a qualitative nature, laid down uniformly and made available to all potential distributors, and applied in a non-discriminatory manner; and (iii) the selection criteria is necessary and proportionate. The main difference between qualitative and quantitative systems is that in quantitative systems the number of distributors is directly (e.g. fixing the number of distributors) or indirectly (e.g. minimum or maximum sales) limited.

4.2. Block Exemption and Individual Exemption of Selective Distribution

As all vertical agreements, qualitative and quantitative selective distribution is exempted by the HUVBER as long as the market share of both supplier and buyer each do not exceed 30% and hardcore/excluded restrictions are not present. Block exemption applies regardless of the nature of the product concerned and regardless of the nature of the selection criteria. The HUVBER, similarly to Regulation 330/2010, sets forth the hardcore restrictions, which removes the benefit of block exemption in respect of the entire agreement in question. In case of selective distribution, these are (i) RPM, (ii) restriction of sales to authorized distributors, (iii) restriction of sales to end-users, and (iv) restriction of cross-supplies. Excluded restriction (where only the specific clause is null and void, not the entire agreement) in case of selective distribution is when the supplier limits the possibility of the distributor to sell specific competing brands.

Selective distribution not falling under block exemption, but not containing hardcore or excluded restrictions, is subject to case-by-case analysis. This assessment may lead to the finding that the distribution system (i) is not anticompetitive; (ii) breaches the prohibition of anticompetitive agreements; or (iii) falls under individual exemption due to the efficiencies created.

The HCA would likely follow the Guidelines on Vertical Restraints with respect to whether limitations on online sales in a selective distribution system are anticompetitive or not. In particular, that quality standards set by the supplier regarding online sales of the distributor are not anticompetitive in themselves (para. 54 of the Guidelines

[42] See Sector Inquiry Sector, p. 95.
[43] See Sector Inquiry Sector, p. 81 and p. 94.
[44] 'Selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

on Vertical Restraints), but the imposition of criteria for online sales that are not equivalent to the criteria for offline sales is anticompetitive (para. 56 of the Guidelines on Vertical Restraints).

The criteria for individual exemption are set forth in Section 17 of the Competition Act,[45] similarly to Article 101(3) TFEU. In case of limitations imposed by the supplier on online sales, the supplier would need to present evidence that the criteria for individual exemption are met.

4.3. Restriction of the Use of Online Sales Platforms in a Selective Distribution System

There is no Hungarian case law related to restrictions of sales through third-party internet platforms. Hungarian practice will likely follow the guidance which is to be laid down in the Coty case,[46] where the CJEU will rule on whether bans on sales through online marketplaces in selective distribution systems is a restriction of competition by object, and whether the preservation of a "luxury image" is an aspect of competition that is compatible with Article 101(1) TFEU. According to the opinion of AG Wahl,[47] contractual clauses prohibiting the use of third-party online sales platforms is compatible with Article 101(1) TFEU as long as the criteria under which purely qualitative selective distribution is not anticompetitive are met. The AG found that such a prohibition does not qualify as a restriction of sales to end-users or as a restriction of passive sales, therefore it cannot be considered as a hardcore restriction. It remains to be seen, whether the CJEU will follow AG Wahl's opinion. However, the European Commission came to the same conclusion in its E-commerce Sector Inquiry.[48]

The HCA may also take into account the CJEU's judgment in the Pierre Fabre case.[49] Under this decision, a (contractual or *de facto*) ban on the use of the internet as a method of marketing did qualify ("at the very least") as a restriction of passive sales, therefore, it was considered as a hardcore restriction. However, the European Commission in the E-commerce Sector Inquiry found that marketplace bans cannot be equated to a prohibition to sell via the internet, therefore, the relevance of this decision in this context may be limited.[50] Furthermore, pursuant to para. 54 of the Guidelines on Vertical Restraints, where the distributor's website is hosted by a third party platform, the supplier may require that the distributor's website is not linked from a site carrying the name or logo of the third party platform.

Restrictions on sales through third-party internet platforms, as opposed to total ban on internet sales, are narrower forms of online resale restraints. In essence, total ban on internet sales (be in any distribution arrangements, including selective distribution systems) leads to a prohibition from using the internet for any sales by the distributor. Yet, restrictions on sales through third-party internet platforms (often referred to as "distribution channel related restrictions" or "platform bans") forbid the sales via predefined online platforms while leave the sales permitted through other online channels.

Total ban on internet sales typically constitutes an infringement of competition law (see the judgment of the CJEU in the Pierre Fabre case). The compatibility of distribution channel related restrictions with competition law is debated. These restrictions usually prohibit the distributors from using the renowned "open sales platforms" or "marketplaces" that have the largest outreach among customers, such as Ebay, Amazon or Alibaba. For a distributor, selling through these open sales platforms is a cost-effective way to reach high number of customers without the need to invest in separate websites. Manufacturers (particularly those of high-quality branded products), in turn, frequently try to distance themselves from these open sales platforms where their products are displayed among numerous similar (in some instances possibly counterfeit) products of questionable quality. For

[45] Section 17 of the Competition Act reads as follows:
The prohibition defined in Section 11 shall not apply to an agreement if:
a) it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness;
b) a fair part of the benefits arising from the agreement is conveyed to final trading parties;
c) the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals;
d) it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.
[46] CJEU, case C-230/16, *Coty Germany vs. Parfümerie Akzente GmbH*.
[47] Opinion of Advocate General Wahl delivered on 26 July 2017 in Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:603.
[48] See Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, 10.5.2017 COM(2017) 229 final, para 42.
[49] ECJ, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS*, EU:C:2011:649.
[50] See Commission Staff Working Document - Accompanying the document Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, 10.5.2017, SWD(2017) 154 final, para (503).

these reasons, manufacturers often prohibit the use of these open sales platforms for their distributors or require certain quality criteria they fail to meet.

The resulting restrained online visibility affects small and medium-sized dealers more adversely as they usually have limited resources for creating, adequately maintaining and promoting their own online stores than their large rivals. In that sense, these platform bans constitute significant barriers to enter the market as they raise the costs of sufficient online presence. Further, even if a small and medium-sized dealer invests in its own online store, its customer-outreach will not be comparable to that of the worldwide active open sales platforms. The limited online presence reduces the competitive pressure they are able to exert on large online distribution networks and brick-and-mortar stores. As a consequence, the distribution channel related restrictions ultimately may result in appreciable detrimental effects on both intra-brand and inter-brand competition.

In the Alcon case,[51] the HCA took a hard line against restrictions of online commerce, ruling that the operation of a rebate system in which online distributors must meet more onerous conditions to get discounts than brick and mortar shops is a restriction of competition by object. The HCA regarded this as an agreement that the distributor pays a higher price for products sold online than offline, which is a hardcore restriction following para. 52(d) of the Guidelines on Vertical Restraints. Therefore, the agreement could not benefit from a block exemption and it was not exempted individually. However, this decision did not go into the issue of prohibiting retailers from selling via third-party internet platforms.

The right of suppliers in a (lawful) selective distribution system to prevent authorized distributors from selling to unauthorized distributors follows from the HUVBER. An analogy could be drawn here with prohibiting retailers from selling via third-party internet platforms. If such an approach were adopted, a marketplace ban could be block-exempted under the relevant market share thresholds.

Note that there is no presumption under Hungarian law that it is lawful to restrict sales to third parties. In fact, nevertheless, outside of the (lawful) selective and exclusive distribution systems, the scope for such restrictions is extremely limited. However, to the extent that distributors sell through, rather than to the third-party internet platform, the ban may not constitute a restriction of the customers to whom the distributor may sell.

The European Commission's E-commerce Sector Inquiry has also found that marketplace bans do not have the object of segmenting markets in the internal market based on territory or customers, because they concern the question of how the distributor can sell the products over the internet and do not have the object to restrict where or to whom distributors can sell the products.

From an economic perspective, such restrictions or bans can have both pro- and anti-competitive effects and, hence, they may serve or damage consumer interests. Whether pro- or anti-competitive effects dominate is dependent on the overall welfare effects of the particular case. These effects should be weighed against each other on a case-by-case basis.

Such restrictions are anti-competitive if – in the long term – they lead to higher prices, lower quality or restrictions on product choices. In an OTA setup, this could typically materialize in the form of lessening competition across platforms or barriers to market entry. If authorized distributors are obliged to use certain platforms only, this could lead to both unilateral price increases (due to market power of these platforms) or price increases through coordination between platforms. An efficient platform entry may solve these problems but barriers to entry are already in place in the form of these restrictions and bans.

However, restrictions can also have pro-competitive effects e.g. through eliminating the possibility of free-riding. In the case of OTAs there are significant upfront costs involved when the platform is set up. An OTA also must pay for regular software updates, IT personnel, etc. to make consumer experience better (consumers can efficiently find the most suitable accommodations). If restrictions were not allowed, OTAs may not invest in such quality-enhancing features. They would be worried that consumers just use their services and, once the most suitable accommodation is found, they would look for a cheaper alternative to pay for that accommodation.

[51] VJ/55/2013.

5. Cooperation with Authorities

In Hungarian competition law, settlement procedures[52] have to be distinguished from commitment decisions.[53] Under Hungarian competition law, commitment decisions and settlements can be applied both for restrictive agreements and unilateral practices.

To date, unfortunately there are no HCA decisions in connection with online sales platforms, but theoretically the HCA may adopt a commitment decision or apply a settlement procedure also in case of anticompetitive restrictions applicable to such platforms.

5.1. Commitment Decision

A commitment decision is reached when the HCA accepts the undertakings of a party to proceed in a specific way to bring its conduct in line with the provisions of the applicable laws. The HCA may only accept such commitments if it properly ensures the protection of public interest.

Undertakings proposing commitments want to avoid an infringement decision by voluntarily bringing their conduct in line with competition rules. Thus, one of the main purposes of the commitment is to close the proceedings of the HCA without any declaration of the infringement. 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 its liability, 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 favor of accepting the commitment. If the HCA accepts the undertaking's commitments, the HCA does not impose fines and does not even declare the undertaking's conduct illegal. Then, the HCA adopts a decision to dismiss the proceedings and to compel the party in question to undertake that commitment.

When the HCA imposes commitments on a party, it may launch a so called “follow-up investigation” in order to assess whether the party has complied with the undertakings in the commitment decision. The HCA may revoke the commitment decision and impose a fine if the original decision was based on misleading information from the party in question or if the party has failed to comply with the imposed commitments. The deadlines of the follow-up investigation are much shorter (three months which may be prolonged for a total of nine months). The difference in this case from the normal procedure is that the HCA needs to prove the non-compliance or the misleading conduct of the relevant party.

5.2. Settlement Procedure

In settlement procedures, the HCA, after the investigation report of the case handlers (i.e. when the facts have already been established), invites the parties to admit their involvement in the infringement under investigation. The undertaking participating in a settlement procedure may receive a reduction of up to 30% from the fine.

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. 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 undertaking commits to correct its conduct or indemnify third parties, etc.

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 before the statement of objections is finalized, 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 must answer within the deadline set by the competition council, which cannot be more than 15 days.

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

[52] Section 73/A of the Competition Act.
[53] Section 75 of the Competition Act.

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.

The Settlement Notice[54] deals with the question of non-compliance with settlement decisions. The party that participates in a settlement procedure may only revoke the written settlement statement in the following circumstances.

- the HCA decision differs on the merits from the settlement agreement between the party and the HCA;
- the fine imposed on the relevant party is higher than the maximum amount of fine set out in the settlement agreement between the party and the HCA.

If the party concerned unlawfully revokes the settlement statement or otherwise breaches its obligation to cooperate under the settlement rules (confidentiality requirement, waiving the right to apply for remedy against the final decision of the HCA etc.), the HCA may decide to close the settlement procedure and proceed in the ordinary course. In that case, the HCA may use the documents obtained during the settlement procedure as evidence, and the party's breach of its obligation will be considered by the HCA as an aggravating circumstance in the setting of the fine. The HCA may also impose a procedural fine on the party in question. The difference in this case from the normal procedure is that the HCA needs to prove that the party to the settlement procedure breached its obligation listed above.

5.3. Effects of Commitment and Settlement

Commitment decisions help the clarification of law since this tool is normally used in cases where for example there is no crystallized case law and therefore, undertakings may be uncertain how to act. By way of a commitment decision, the HCA can signal if a certain conduct is problematic and the commitments accepted can show the "way out".

As settlement decisions are supposed to be used if the unlawfulness of a conduct is crystal-clear and the finding of an infringement is supported by evidence, this type of decision does not hinder the development of standards of analysis, although – clearly – it does not improve it either.

The commitment most likely to be accepted by the HCA is a compensation of affected consumers. Thus, a commitment decision leads directly to consumer remedies. However, a successful settlement procedure may also 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.

The undertakings also must bear in mind that their acknowledgement of the infringement in the settlement declaration may put other undertakings, which still dispute the infringement, in a more difficult situation.

6. Private Enforcement in Case of Online Sales

6.1. General Considerations

In Hungary, private antitrust litigation and damages actions are possible and they are based on the general rules of Hungarian law governing liability for damages caused in non-contractual situations and relationships. The applicable rules for damages actions are in line with the Antitrust Damages Directive,[55] which was implemented into the Competition Act in December 2016 and entered into force on 15 January 2017.

The Hungarian regime applies the full compensation system, which ensures that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. In order to avoid any overcompensation, it is expressly stated in the Competition Act, that passing-on defense is available, so the defendant in an action for damages can invoke as a defense against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law.

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[54] Notice No. 3/2015 of the President and Vice-President of the HCA on settlement procedures, the Hungarian language Notice is available at http://www.gvh.hu//data/cms1035560/2015_3_egyezsegi_kiserlet_kozlemeny_egyseges_szerkezetben_20170115.pdf.

[55] Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349, p. 1.

The Competition Act also ensures that the final decision of a HCA is binding on the courts in the infringement part of the decision, therefore only the quantification of harm shall be proved in the court proceedings. The burden of proof regarding the quantification is on the claimant, however, a very unique Hungarian rule can be invoked by the claimants in case of cartels. According to this rebuttable presumption, it is presumed that the antitrust infringement had a 10% effect on the prices. The defendants can rebut this presumption (e.g. if proven that claimants passed-on the overcharge), but the claimants can also prove that they suffered more damages, i.e. the degree of the overcharge exceeded 10%.

6.2. Punitive Damages

No punitive damages claim is available in the Hungarian civil law regime. By virtue of the "*non bis in idem*" principle, no one can be held liable twice or more for the same conduct, i.e. the damages actions cannot aim to penalize the infringing party, the only objective can be to restore the situation that existed before the damage had been caused. The HCA may impose a fine on the infringing parties (which financial penalty is of a public law nature rather than a civil law consequence), however the civil court proceedings' sole objective is and can only be to compensate the entire loss suffered by the claimant by granting damages. The Hungarian full compensation doctrine also excludes overcompensation, by means of punitive, or multiple damages.

6.3. Use of Competition Law as Defense

The link between the civil law consequences of an unlawful agreement and an antitrust infringement is created by the Competition Act when declaring that for any agreement or other arrangement violating the prohibition of anti-competitive conducts (provided for by the Competition Act) the general civil law rules and consequences relating to unlawful contracts are equally applicable. Such contracts are null and void under Hungarian law and the most important consequence of such nullity is the unenforceability of the agreement. If an agreement is unenforceable, none of the parties are entitled to enforce the performance of the other party at court. Note that the general rule relates to the partial nullity of contracts only, i.e. only the unlawful part of the agreement is null and void, unless the nullity relates to such a significant element of the agreement without which the parties would not have entered into the agreement. Having said that, agreements violating competition rules are – as a general rule – unlawful since such significant terms are affected by unlawfulness (such as pricing, territorial restrictions, etc.) that result in the complete nullity of the agreement.

As stated above, any of the parties can refuse to perform such an unlawful agreement by referring to nullity. If the other party disputes the nullity of the agreement, it in principle can take legal action against the non-performing party to enforce performance (and by alleging that non-performance was a breach of the agreement). In such a scenario, the party not intending to perform the agreement can refer to the nullity thereof based on its conflict with competition law. If such defense is successful, the court will declare the agreement as null and void from the date of entering into the agreement by the parties and as such, no breach of the agreement can be established (null and void agreements cannot be breached). Consequently, the party successfully defending its position by reference to the unlawfulness due to competition law violations will be exempt from the liability for breach of contract (vis-à-vis the other contracting party). Nevertheless, vis-à-vis third parties, the liability of both parties still remains in place, should it be the case that their competition law infringement has caused damages to third parties. Such non-contractual liability cannot be lawfully excluded and can only be mitigated - to a certain extent - by applying for leniency or entering into settlement.

Further, a successful civil law defense will not result in an exemption from any competition law consequences (fines) or criminal law consequences (in case of bid rigging) either. Such consequences can only be avoided if the relevant party seeks leniency under the rules of competition law (public administrative law) or potentially under criminal law. According to newly introduced Hungarian competition law rules, leniency is possible even in vertical relationships (in RPM cases). It is again noted that not even full immunity from fines granted in a leniency program will result in lifting the civil law liability for damages caused by competition law violations.

We are not aware of cases in the area of online sales platforms in Hungary, where a contractual term was alleged to be unlawful due to competition law infringement and the party alleging such unlawfulness has defended its breach by referring to the nullity of the said term.

7. Applying Competition Law to the New Economy

In Hungary, there are no antitrust or competition law rules and case-law that would suggest that changes in the substance of the competition rules are required in order to deal more sensibly with the "new economy" of "internet-related" and "computer-software" enterprises.

Competition laws have had to grapple with a range of problems which – though not unique to the new economy – are more prevalent, more important or simply more complex when applied to the new economy. The general nature of the competition rules gives them an important advantage over most other legal rules, because they apply to the factual circumstances of a particular case, no matter how quickly industries develop or change. This allows them to keep pace with technological developments, in a way that more specific regulatory frameworks cannot.

The competition rules stay the same, but the application of these rules is remarkably adaptable to changing circumstances. Thus, there is no need for new rules or new principles, or a challenge to the fundamentals of competition enforcement. However, there is a need to understand the markets of new industries and how principles of competition law are applicable to those industries. This requires competition authorities to understand the underlying technology/business model and to closely follow market developments.

The internet-related new economy may benefit consumers from several aspects:

- It can increase transparency, both in terms of the goods and services available, and the price of those goods and services.
- It can reduce transaction costs, ultimately benefitting consumers.
- It can lead to growth in the size of markets and lowering barriers of entry: it allows companies to compete in wider geographic areas than would otherwise be possible. The availability of goods and services of the company on the Internet allows them to enter otherwise not reachable markets. Although consumer demand and regulatory considerations may moderate these benefits, these factors are changing in parallel with the development of the new economy: consumers are more ready to purchase online and both product regulations and online regulations are becoming more and more harmonized.

The above benefits may require a shift in the analysis of restrictions connected to online sales. However, these benefits need to be assessed on a case-by-case basis. Also, a change in the assessment of restrictions by object in this field seems unlikely. Currently, the benefits of online sales cannot be categorized, thus, competition law regulation (e.g. adopting online-specific block exemption regulations) does not seem possible.