

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE  
INTERNATIONAL LEAGUE OF COMPETITION LAW  
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

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**Question A: Abuse of a Dominant Position and Globalization Is there any consistency between the recent approaches of the different jurisdictions to the notion of abuse? Are there too many restrictions on legal rights and business opportunities?**

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*References and abbreviations:*

APA	Act CXL of 2004 on the General Rules of Administrative Procedures and Services
Competition Act	Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
HCA	Hungarian Competition Authority ( <i>Gazdasági Versenyhivatal</i> )
TFEU	Treaty on the Functioning of the European Union
Trade Act	Act CLXIV of 2005 on Trade
Civil Code	Act V of 2013 on the Civil Code
Retailer-Supplier Act	Act XCV of 2009 on the prohibition of unfair distribution practices vis-à-vis the suppliers of agricultural and food products
New Fine Setting Notice	Notice No 1/2012 of the President of the HCA and the Chair of the Competition Council of the HCA on the Method of Setting Fines in Antitrust Cases
Guidelines of Abuse of Dominance	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 (2009/C 45/02)

## 1. Introduction

### 1.1 General description of the Hungarian rules prohibiting anticompetitive unilateral conducts

Hungarian law includes a number of provisions prohibiting anticompetitive unilateral conducts. These prohibitions, in addition to the general rules set forth in the Competition Act, are found in different statutes with broader remit than competition law.

The Competition Act (which exclusively concerns competition law) sets forth the prohibition of abuse of dominant position in Sections 21-22 as follows:

Section 21:

“It shall be prohibited to abuse a dominant position, particularly:

- a) in business relations, including the application of standard contractual terms, to impose unfair purchase or selling prices or to stipulate in any other manner unfair advantages or to force the other party to accept disadvantageous conditions;
- b) to limit production, distribution or technical development to the prejudice of final business partners;
- c) to refuse, without justification, to enter into or maintain business relations appropriate for the type of transaction;
- d) to influence the economic decisions of the other party in order to gain unjustified advantages;

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- e) to withdraw, without justification, goods from circulation or withhold them from trade prior to a price increase or with the purpose of causing a price increase or in any other manner which may possibly result in unjustified advantages or to cause competitive disadvantages;
- f) to make the supply or acceptance of goods subject to the supply or acceptance of other goods, furthermore to make the conclusion of contracts subject to the acceptance of obligations which, by their nature or according to commercial usage, do not belong to the subject of such contracts;
- g) in the case of transactions which are equivalent in terms of their value or character to discriminate, without justification, against trading parties including in relation to the application of prices, periods of payment, discriminatory selling or purchase terms and conditions or methods thereby placing certain trading parties at a competitive disadvantage;
- h) to set extremely low prices which are not based on greater efficiency in comparison with that of competitors and which are likely to foreclose competitors from the relevant market or to hinder their market entry;
- i) to hinder, without justification, market entry in any other manner; or
- j) to create, without justification, disadvantageous market conditions for competitors, or to influence their economic decisions in order to obtain unjustified advantages.”

The Competition Act defines dominant position in Section 22 as follows:

Section 22:

- (1) “A dominant position shall be deemed to be held on the relevant market (Article 14) by persons who are able to pursue their economic activities to a large extent independently from other market participants substantially without the need to 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 property status, financial strength and profitability of the undertaking or the group of undertakings (Article 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) Dominant positions may be held by individual undertakings or group of undertakings or jointly by more than one undertaking or more than one group of undertakings.”

The Trade Act (a statute with a broader remit than competition law) prohibits large retailers that have significant market power (“SMP”) from abusing their market power vis-à-vis suppliers as follows:

Section 2, Point 1a:

“The term "supplier" shall mean an entity selling products or services for the purpose of resale to the retailer.”

Section 2 Point 9:

“The term "commercial activities" shall mean retail and wholesale activities, as well as commercial agency activities.”

Section 2 Point 11:

“The term "retailer" shall mean an entity pursuing trading activities.”

Section 2, Point 7:

“The term “significant market power” shall mean a market situation where the retailer has become indispensable for the supplier in selling its goods and services to the consumers by virtue of the retailer’s ability the influence, either regionally or nationwide, the conditions for the market entry of the goods or group of goods.”

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Section 7 (3):

“A retailer is deemed to hold “significant market power” if its group turnover – including the turnover of parent companies and subsidiaries – or in case of purchasing associations the member’s turnover exceeds from retail activities HUF 100 billion.”

Section 7 (4):

“Furthermore, the retailer’s significant market power is deemed to exist if, based on the surrounding market structure, the market entry barriers, the retailer’s market share, its financial strength, and all other relevant business considerations, the retailer enjoys a one-sided advantageous bargaining position vis-à-vis its suppliers.”

Section 7:

- (1) “It shall be prohibited to abuse significant market power vis-à-vis suppliers.
- (2) An abuse within the meaning of Section (1) may, in particular, consist in:
  - a) unjustifiably applying discriminative measures against suppliers,
  - b) unjustifiably restricting suppliers access to sales opportunities,
  - c) imposing unfair conditions on suppliers, which result in an allocation of risks one-sidedly benefiting the retailer, in particular disproportionately shifting costs which are incurred also in the business interests of the retailer, as costs of storage, advertising, marketing etc., on the suppliers,
  - d) unjustified amendment of contractual conditions to the detriment of the supplier, after concluding the contract or reserving this option for the retailer,
  - e) subjecting future business relations of the retailer with the suppliers to conditions, in particular stipulating or retrospectively enforcing the application of a most-favourable-conditions clause or obliging the suppliers to give discounts, in respect of certain products and for a specified period of time, exclusively to the retailer in question or obliging the suppliers to produce, in order to get any of their products to be distributed, products sold under the trade mark or brand of the retailer,
  - f) charging fees one-sidedly to suppliers for, in particular, putting them on the retailers suppliers-list or allowing their goods to become part of the retailers product range or in consideration of services not demanded by the suppliers,
  - g) threatening with termination of the agreement (delisting) with the intention to enforce one-sidedly beneficial contractual terms,
  - h) unjustifiably forcing suppliers to avail themselves of third persons as suppliers or of an own service provider of the retailer,
  - i) applying sales prices, in cases in which the retailer is not the owner of the goods, which are lower than the invoice prices determined in its contracts, save for prices applied in the sales of substandard goods or in clearance sales within a seven-day period before the expiry of the quality preservation term or introduction prices applied no longer than 15 days or prices applied in end-of season clearance sales or in cases where the types of products dealt with or the field of activities are changed or in clearance sales of stocks of outlets which will be closed down.

The above provisions of the Trade Act are not applicable in respect of agricultural goods and food, as there are special rules (see below under **Sections 1.4 and 5.2.2**) protecting the suppliers of agricultural goods and food which apply irrespective of the dominant position or market power of the retailer.

As of 1 January 2016, a new provision is to be introduced in the Trade Act, according to which any retailer with net turnover from sales on the market of daily consumer goods in excess of HUF 100 Billion in a year is presumed to hold a dominant position on that market in the context of the Competition Act, as follows:

Section 7/A:

- (1) “In the application of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition [i.e. the Competition Act], dominant position in the retail market of daily consumer goods - as the relevant market - shall be deemed to exist, if the previous year’s (consolidated) net turnover from the retail supply of daily consumer goods of the company, and the affiliated companies provided for in

Point 23 of Section 4 of Act LXXXI of 1996 on Corporate Tax and Dividend Tax, combined exceeds HUF 100 billion.”

For further assessment of the Section 7/A of the Trade Act, please see **Section 5.2.2** (point (iii)) below.

Finally, the Civil Code includes a provision in respect of the breach of contract by virtue of abusing a dominant position:

Section 6:72

“Breach of obligation to contract by abusing a dominant position

Where a party unjustifiably refuses to conclude or maintain a contract by abusing its dominant position, the other party shall have the right to bring action and request the court to establish the contract between them under the principle of statutory obligation to contract.”

## 1.2 Indicative/exhaustive lists of prohibitive practices

Section 21 of the Competition Act stipulates that “[i]t shall be prohibited to abuse a dominant position, particularly: [list of conducts from a) to j)].” Thus, it is clear from the wording of the Competition Act that the list of prohibited practices is indicative. The same holds true in respect of the list of abuses included in the Trade Act which is also an open catalogue. However, the list of the prohibitive practices set forth in the Retailer-Supplier Act (see **Section 1.4** below) is exhaustive.

## 1.3 Brief history

The first rule prohibiting the abuse of dominance position in Hungary was enacted in 1984 (Section 16 of Act IV of 1984 on the Prohibition of Unfair Economic Activities) which entered into force on 1 January 1985. This included a very short indicative list of conducts that may be considered as abuse.

On 1 January 1991, Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices entered into force (at the same time it repealed Act IV of 1984). Sections 20-22 of this act included a longer open list in respect of the conducts that may be considered as abusive. In addition to this, Section 21 included an open list as to what constitutes a dominant position on the market. The Competition Act entered into force on 1 January 1997 (repealing Act LXXXVI of 1990), in which the abuse of dominant position practically mirrors its EU equivalent in Article 102 TFEU. The reason for this is that the Competition Act was adopted as a result of Hungary's obligation to harmonize its competition laws with those of the EU (at that time: EC) based on the Europe Agreement concluded between the EU and Hungary (signed in December 1991).

The rules relating to significant market power as regulated in the Trade Act were introduced as of 1 June 2006.

## 1.4 Similar legal rules in other areas

Similar rules to those prohibited by the competition rules on anticompetitive unilateral conduct can be found in the Retailer-Supplier Act, which entered into force on 1 January 2010. These rules regulate the relationship between suppliers and retailers in the agricultural and food sector by providing an exhaustive list of unfair distribution practices vis-à-vis suppliers. Such unfair distribution practices are prohibited irrespective of the market power of the retailer. The National Food Chain Safety Office (“**NFC**SO”) has the competence to investigate unfair practices of retailers based on a detailed list of prohibited practices described in Retailer-Supplier Act. The list of the prohibited practices in the Retailer-Supplier Act is exhaustive and sets forth the following prohibited conducts:

Section 2:

“The scope of the act shall extend to:

- a) legal persons, business associations without legal personality, other business organizations, natural persons (including small-scale agricultural producers, private entrepreneurs and family farmers) producing or processing agricultural products and food, as well as to producer organizations or producer groups set forth in a separate legal norm,
- b) legal persons, business associations without legal personality, other business organizations, natural persons distributing agricultural and food products or selling them to final consumers without processing, and related undertakings as set forth in

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Act C of 2000 on Accounting (hereinafter: Accounting Act), as well as to intermediaries providing services for the above organizations or persons in connection with the supply or sale of such products by establishing a direct business relationship with the product supplier.”

Section 3

- (1) “Unfair distribution practices are prohibited.
- (2) The following shall be considered as unfair distribution practices:
  - a) imposing conditions on suppliers which result in a distribution of risks that one-sidedly benefit the retailer;
  - b) applying contractual terms – other than obligations in connection with deficient performance - which requires the supplier:
    - ba) to take back products supplied, with the exception of products purchased by the retailer for the first time in the course of an introduction to the products in its assortment, and the products purchased with a short durability which remained in the stock of the retailer after the expiry of the durability or the "use by" date; and
    - bb) to take back products supplied at a price not properly reduced in comparison to the supply price, taking into account the features of the product and the possibility of their use by the supplier;
  - c) the charging of a part of or all the costs to the suppliers by the retailer or through the involvement of a third intermediary which serves the business interests of the retailer, in particular costs relating to the establishment of stores, operation, and those relating to the transport of products from a logistical unit used by the retailer to another logistical unit or to the store;
  - d) the charging of fees, by the retailer or through the involvement of a third intermediary, to suppliers for putting them on the retailer’s suppliers-list or for allowing their goods to become or to remain part of the retailer’s product range,;
  - e) the charging of fees to suppliers under any legal title by the retailer or through the involvement of a third intermediary:
    - ea) for services not provided;
    - eb) for activities in connection with the sale of products to the final consumer by the retailer which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the retailer's store that provides no additional service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals;
    - ec) in consideration for services, or obliging suppliers to use services not requested by them or not serving their interests,
    - ed) which are disproportional or which are calculated in a certain ratio of the supply price by taking into account the tax rate incurred in connection with the product, for services requested by the supplier and provided by the retailer in connection with the distribution of the products;
  - f) requiring (partial or full) contribution of the supplier to the discount provided to the final consumer by the retailer for a certain duration, for a duration that is longer than the duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer, as well as the non-compliance with the provision set forth in paragraph (2a);
  - g) charging the costs to suppliers, which arise in connection with the non-compliance of the retailer with the legal requirements applicable to retailer;
  - h) with the exception of deficient performance, the payment of the purchase price of the products to the supplier or to the person to whom the suppliers assigned it:
    - ha) later than 30 days after the taking into possession of the products by the retailer or by the person acting in favour of the retailer (as for item h) hereinafter: takeover) if the supplier provides the retailer with the proper invoice within 15 days following the takeover;
    - hb) later than 15 days after the receipt of the proper invoice, if the invoice was provided to the retailer more than 15 days after the takeover;
  - i) applying rebate if the retailer pays the purchase price within the payment deadline;

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- j) the exclusion of late payment interest, contractual penalty or other collaterals for the benefit of the supplier;
  - k) with the exception of products branded under the retailer's brand, applying exclusive supply obligation for the benefit of the retailer without proper consideration, or requiring a most-favourable-conditions clause;
  - l) the application of non-written contractual terms if such terms were not put down in writing within 3 business days following such a request by the supplier;
  - m) notifying the supplier about the purchase order or the amendment thereof beyond a reasonable deadline;
  - n) unilateral amendment of the contract by the retailer due to a reason which is objectively not justifiable and which is not occurring outside of the operations of the retailer;
  - o) omission of the publication of the standard contractual terms, deviation from the standard contractual terms made public, as well as the application of terms not included in such standard contractual terms;
  - p) the restriction of the legitimate use of the trademark of the supplier;
  - q) distribution of the product to the final consumer below costs, including the general operational expenses, in the case of the supply price invoiced by the supplier and in the case of production by the retailer, with the exception of clearance sales lasting for at the most 15 days, notified to the agricultural authority in advance, due to the termination of the retailer's operations or due to the retailer's profile change, and with the exception of the clearance sales of reduced value products (including the products of short duration accumulated in the stocks of the retailer due to an unforeseeable reason);
  - r) the imposition of a rebate, commission or fee payable by the supplier, based on the quantity distributed by the retailer, on any legal title whatsoever, with the exception of a retroactive rebate which motivates the retailer to increase sales based on additional distribution in comparison to distributed quantities in a previous period or in comparison to an estimation, in accordance with the features of the distribution of the product and in a proportional rate;
  - s) if the retailer does not reimburse the supplier the amount of the public health product tax payable by the supplier within the deadline as set forth in item h);
  - t) the non-compliance with the provisions set forth in paragraphs (2b) or (2c);
  - u) discriminatory pricing on the basis of national origin in respect of the consumer prices of products which are identical from the point of view of their composition and their visible properties.
- (2a) The retailer shall settle the rebate provided and the related quantity with the supplier within 30 days following the final date of the discount provided to final consumers with the contribution of the supplier, or, if the retailer's net turnover in the previous year calculated as set forth in Section 6 (3) did not exceed HUF 100 million, within 30 days after the preparation of the inventory related to the preparation of the report in accordance with the Accounting Act.
- (2b) The retailer shall notify the supplier in respect of its claim for compensation 5 days prior to enforcing the same. The compensation claim may be enforced if the supplier does not dispute the amount thereof with a well-grounded reasoning or does not object to it by making a well-grounded reference to deficient performance. The retailer shall notify the supplier about the fact of the claim compensation within 15 days following the enforcement thereof. The issuance of the invoice of the supplier may not be restricted or bound to conditions after the takeover. The retailer shall return the wrongly issued invoice to the supplier within 5 days after the receipt thereof.
- (2c) The supplier shall inform the retailer in respect of the tax rate in relation to the product as set forth in item (2) e) ed) and (2) r).
- (2d) Should the payment not be performed by the deadline as set forth in item (2) h), the retailer shall pay a late payment interest which amounts to double the base interest rate of the National Bank of Hungary. The contract shall contain the authorization of the supplier by the retailer to file a direct collection order relating to the consideration of the product and the interest amounting to double the base interest rate of the National Bank of Hungary in the case that the payment is not performed by the deadline set forth in item (2) h).

- (3) The contractual term which includes unfair distribution practices or circumvents the same shall be null and void. The omission of the publication of the standard contractual terms as set forth in paragraph (5) itself shall not result in the contractual term becoming null and void.
- (4) The supplier may not validly consent to the exercising of unfair distribution practices towards it.
- (5) The retailer shall make the terms and conditions relating to the services that may be provided to the supplier in connection with the distribution of products - in accordance with paragraph (6) - in the form of standard contractual terms, and the amendments thereof, public - if it has a homepage, on the homepage, if not, in the customer area open for the public - and shall send the same to the agricultural authority in advance.
- (6) The standard contractual terms set forth in paragraph (5) shall contain the contents of the services that may be provided to suppliers by the retailer, the terms and conditions of the provision of such services, the maximum fee payable for the service and the method of calculation used in the case of settlement; furthermore, they shall contain the terms and conditions of becoming a supplier of the retailer and the termination of this status.
- (7) The obligation of preparation and publication of the standard contractual terms shall not apply to retailers the net turnover of which in the previous year to be calculated in accordance with Section 6(3) does not exceed HUF 20 billion.
- (8) In respect of item h) of paragraph (2), the payment day shall be the day when the bank account of the retailer has been credited.
- (9) In respect of this Section, "final consumer" shall mean all those to whom the retailer sells the products.

Please also see our answers in **Section 5.2** below which elaborate on the enforcement of the Retailer-Supplier Act.

## **2. Definition of ‘Abuse’**

### **2.1 Definition of ‘abuse’ in the legislation**

Hungarian competition law defines the notion of “abuse” [of a dominant position] in Section 21 of the Competition Act indicatively by way of setting forth the most common types of behaviours presumed to be abusive. For the description of these typical abuses please see **Section 1.1** of this Report, where the literal translation of Section 21 is given. Section 21 of the Competition Act, as a result of Hungary’s accession to the EU and transposing the basic EU competition principles into Hungarian law, includes the behaviours treated as abusive by Article 102 TFEU.

However, Section 21 sets forth additional behaviours that, in case it pursued by an undertaking holding a dominant position, are treated as abusive. All these additional conducts in Section 21 are treated as abusive practices under the soft laws of the EU; i.e. the extended list of the Competition Act cannot be considered as a conflicting, or incompatible, legislative measure with the notion of abuse set forth in the EU legislation. For the detailed description of these additional abusive behaviours, please see **Section 4.4** below, while for the academic criticism towards the prohibited conducts, please see **Section 5.3.4 ii.)** below.

### **2.2 Definition of ‘abuse’ provided by the competition authority**

The HCA regularly publishes a compilation of its decisions it considers to have fundamental significance (“Fundamental Resolutions of the Competition Council based on the Competition Act”<sup>1</sup>; hereinafter “**Fundamental Resolutions**”). Pursuant to the most recent edition of the Fundamental Resolutions, the following “fundamental principles” are noteworthy in setting the limits of the notion of “abuse” by the HCA.

The prohibition of abuse of dominant position is to be treated as an “objective” behavioural requirement. Therefore, the prohibition [of abuse] is applicable to the dominant market players without any recourse to the fundamental principles of fairness and good faith set forth in the civil law. The business conduct of the dominant player is to be assessed exclusively on the basis of the competition law principles and can be treated as abusive

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<sup>1</sup> In Hungarian the most recent version: [http://www.gvh.hu/jogi\\_hatter/magyar\\_piacra\\_iranyado\\_szabalyozas/elvi\\_jelentosegu\\_dontesek](http://www.gvh.hu/jogi_hatter/magyar_piacra_iranyado_szabalyozas/elvi_jelentosegu_dontesek)

even if the infringer proves that it acted in good faith and in a fair manner. Reason for this higher “objective” liability is that the dominant undertakings bear special responsibility vis-à-vis their business partners<sup>2</sup>.

The HCA recognizes that a dominant position on a market can be abused on a neighbouring market where no dominance is held by way of leveraging the [effects of the] dominant position. In one of the underlying cases, the construction and development of the street lighting facilities in a larger Hungarian municipality was subject to the prior approval of the local electricity supplier which was dominant on the local electricity supply market. (Please also see the reference to case No. Vj-022/2009 under **Section 3.3**) The electricity supplier was active on the street lighting market also where it faced competition. Under these circumstances, the HCA considered it abusive that the electricity supplier hindered the market entry of its competitor on the street lighting market by virtue of subjecting its approval to a number of unreasonable conditions.<sup>3</sup>

However, the HCA did not consider abusive if the dominant purchaser, applied unfavourable trading conditions vis-à-vis its supplier provided that it was not dominant on the market when it entered into the supply contract with its supplier (i.e. it gained the dominant position later)

In many cases, though, the HCA treats the otherwise prohibited unilateral conduct abusive only if it detrimentally affects the effective competition. For example, the HCA treats a refusal to deal as an abuse of dominant position only if the refusal has, in addition to the detrimental effects caused to other undertakings, negative impacts on the effective competition on the affected market.<sup>4</sup> In the same vein, the HCA concluded that the formally prohibited conduct by a dominant undertaking, even if it results in exclusion of a vertically integrated undertaking, cannot be treated as abusive as long as the conduct does not confer any negative impacts on the final consumers.<sup>5</sup> However, if the exclusionary conduct by a dominant undertaking targets the exclusion of one of its competitors from the market, it is abusive even if the exclusionary conduct does not succeed (i.e. the dominant undertaking’s competitor survives).<sup>6</sup> Furthermore, the HCA accepts the application of dissimilar conditions to equivalent transactions with other trading parties by a dominant undertaking as long as the [otherwise prohibited unilateral] conduct does not endanger the supply of the final consumers<sup>7</sup>.

In cases of price based exclusionary conducts, the HCA considers that the failure to cover average variable cost most likely indicates abusive predatory pricing. However, pricing above average total cost can never qualify as predatory. Any price between the average variable and the average total costs normally does not indicate predatory element, but it may be abusive subject to the assessment of other available evidences.<sup>8</sup>

It also needs to be mentioned that predatory pricing, as one of the distinct abusive conducts, is enforced by the HCA in slightly differently from that of the EU Commission. In particular, it is apparent from the practice of the HCA related to predatory pricing conducts<sup>9</sup> that the HCA specifically requires the ability of the recoupment of the costs suffered by the dominant firm after the successful foreclosure of its competitors. Hence, the EU Commission considers predatory pricing to be abusive without needing to prove that the infringer undertaking realistically had the opportunity for the recoupment<sup>10</sup>. This conceptual difference implies that the HCA takes a more lenient stance towards predatory pricing schemes.

On the basis of the foregoing, while the HCA has not delivered new definitions for the abuse; it is apparent that the HCA interprets in general the notion of abuse broadly (except for the predatory pricing conducts where the HCA’s approach is narrower than that of the Commission). The HCA tends to view business conducts of dominant undertakings abusive if they (are likely to) result in detrimental effects to the effective competition and/or to the final consumers. If in the HCA’s view the effective competition and/or consumer welfare is jeopardized by an abusive conduct, it is extremely difficult for the dominant undertaking to justify its business conduct.

### 2.3 Definition of ‘abuse’ provided by the case law

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<sup>2</sup> Case number: Vj-126/2000

<sup>3</sup> Case numbers: Vj-176/2001 and (in a repeated investigation): Vj-74/2008

<sup>4</sup> Case number: Vj-10/2002

<sup>5</sup> Case number: Vj-10/2002

<sup>6</sup> Case number: Vj-78/2003

<sup>7</sup> Case number: Vj-63/1997

<sup>8</sup> Case number: Vj-32/2012

<sup>9</sup> VJ-159/2003, Vj-94/2000, Vj-76/1999, VJ-138/2003

<sup>10</sup> C-333/94 (Tertra Pak II) C-202/07 (Wanadoo)



The courts in most abusive cases confirmed the findings of the HCA so far. We found one court decision over the last five years which might add an important new element in defining the abuse. In the judgment, the Appellate Court of Budapest concluded that as long as an undertaking holds a dominant position on any market, it is required to pursue its business activities in a manner that safeguards the effective and undistorted competition, without jeopardizing the activities of its competitors.<sup>11</sup> In addition, the Appellate Court of Budapest treated the dominant undertaking's conduct abusive because it "clearly failed to show reasonable self-control [vis-à-vis its competitors] which was expectable from it under the requirements of the competition law". This conclusion, as a rather subjective and broad statement, can be understood that the requirement of "showing reasonable self-control" [by a dominant undertaking vis-à-vis its competitors on the market] stems from the prohibition of the abuse of dominant position, i.e. the failure to "show the reasonable self-control" amounts to an abusive behaviour in itself.

### 3. Exploitative and Exclusionary Abuse

#### 3.1 Exploitative and exclusionary abuse in the legal provision prohibiting anticompetitive unilateral conduct

The Competition Act prohibits the abuse of dominant position in the form of a general clause and also provides a non-exhaustive list of conducts which qualify as abuse of a dominant position. These abusive practices may be divided into two categories on the basis of case law, various notices of the HCA and the literature:

- (i) *exploitative* abuses mostly harm consumers and the demand side of the market in general (unfair pricing, discrimination, tying and bundling, etc.);
- (ii) *exclusionary* abuses aim to exclude competitors or to make entering the market more challenging for potential new competitors (predatory pricing, vertical exclusion, etc.).

Although this categorization of the types of abuse is not explicitly mentioned in the Competition Act, the HCA has consistently expressed its views on the two types of abuse by making a reference to the concept and differentiation of the two types of abuse in its decisions and at several places in its non-binding notices. This is the main type of categorization followed by the HCA in assessing the abusive conducts, for which the HCA had earlier published official statistics on its website (unfortunately not in the last few years).

In the earlier notice on setting fines<sup>12</sup>, the HCA expressed its views on the two categories as follows: "The conducts which classify as abuse of dominance can be divided in two categories, i.e. abuses which exploit consumers (unfair pricing, discrimination, tying and bundling etc.) and abuses which directly restrict competition (predatory pricing, vertical exclusion) practices." The earlier notice also indicated that exclusionary abuses have more severe effects on competition, which may justify interventions from the HCA with measures similar to those applied in hardcore cartel cases.<sup>13</sup>

The New Fine Setting Notice, issued in 2012, also distinguishes the two abuse categories. The New Fine Setting Notice, in a comparison with hardcore cartels that pose the most serious threat to competition, takes a more lenient approach to exploitative abuses. In the view of the HCA, exploitative abuses, even if they are clearly unlawful measures, do not, or only barely, restrict competition on the market, as they have a direct impact on the consumer welfare, while only indirectly pose any significant harm to competition.<sup>14</sup> This lenient treatment of the exploitative abuses in the new Fine Setting Notice seems to contradict to the HCA's views on consumer welfare (as the ultimate goal of competition law enforcement) expressed elsewhere (e.g. in the HCA decisions referred to under **Section 2.2**).

This lenient treatment of exploitative abuses is apparent in the fine setting mechanism under the new Fine Setting Notice. It includes the method for determining the amount of fine to be imposed by the HCA. This method provides for a non-exhaustive overview of impacts caused (or potentially caused) by the infringement and which are relevant in calculating the fine. Maximum (30 points) out of 100 is given for the actual threat/harm to competition. The differentiation between exploitative and exclusionary abuses is assessed within this category. The New Fine Setting Notice specifically elaborates that the points which the HCA will take into

<sup>11</sup> Appellate Court of Budapest, 2.Kf.27.165/2008/14

<sup>12</sup> Notice No 2/2003 of the President of the HCA and the Chair of the Competition Council of the HCA on the Method of Setting Fines in Antitrust Cases as amended by Notice No 2/2005 "2/2003 notice on setting fines"

<sup>13</sup> Notice No 2/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the Method of Setting Fines in Antitrust Cases as amended by Notice No 2/2005, Section 12. [http://www.gvh.hu/data/cms1024015/print\\_4566\\_h.pdf](http://www.gvh.hu/data/cms1024015/print_4566_h.pdf)

<sup>14</sup> Notice on Setting Fines, section 22.

consideration [in setting the fine] for exploitative abuses “will fall in the lower end of the zone for this category”.<sup>15</sup>

The difference in the actual threat to competition also appears in the points given in individual cases. For instance, in case Vj-43/2013 the HCA took 15 points out of the 30 into account for an abuse which was defined as exploitative. In section 110 of decision Vj-175/2001 the HCA noted with respect to exclusionary abuses that these practices are capable of causing substantial harm to competition, having the potential to prevent functioning of competition at all or at least to delay the establishment of a healthy competition.<sup>16</sup>

In a 2007 decision referenced in the HCA’s Fundamental Principles of Competition Policy,<sup>17</sup> the HCA also provided a more detailed overview and aspects of differentiation between exclusionary and exploitative abuses. In general, the HCA distinguishes the two types as follows: “exclusionary abuses are aimed at increasing or protecting market power; exploitative abuses are characterised by the exploitation of consumers”.<sup>18</sup> Accordingly, a unilateral conduct falls in the category of exclusionary abuse if it changes the structure of the market in a way which restricts competition. These conducts may result in the exclusion of competitors, in higher barriers to entry, or both. According to the HCA, the typical example of exclusionary abuse is predatory pricing, but (by way of contradicting to its opinions expressed elsewhere) tying, bundling, refusal to deal and price discrimination may fall under this category, as well. The document also provides examples for conducts which are not directly addressed by competition law (i.e. cannot be treated as abuse of dominant position) but may qualify as exclusionary measures, such as untrue announcements on the development of certain new products, early market introduction of incomplete products, acceleration or deceleration of developments, etc. In contrast, the HCA concluded that exploitative abuses do not aim to restrict competition but ultimately exploit the consumers in order to gain extra profit. In case of an exploitative abuse there is no need for assessment of the impact on competition or the efficiency benefits. Excessive pricing is the most common form of this category of abuse.

The description of exclusionary and exploitative abuses also appears in the HCA’s merger control notice<sup>19</sup> in connection with horizontal effects.

### 3.2 Exploitative and exclusionary abuse in the decisional practice of the competition authority

In most of the decisions, the HCA's competition council – the ultimate decision-making body of the HCA – only refers to the general clause (Section 21) and to the indicative conducts listed as abusive in the Competition Act. Only a few decisions include explicit references whether the abusive behaviour in the given case qualifies as exploitative or exclusionary. Nevertheless, it is possible to ascertain which category (i.e. exploitative or exclusionary) of the abusive practices the decision deals with on the basis of the case law and the literature. In the latest edition of the Fundamental Resolutions, the HCA made a detailed assessment of the categories as follows: “A necessary condition for the HCA in determining to open a competition procedure is the harmful effect the conduct has on consumers, which is different in the two basic types of abuse of dominant position, the exploitative and exclusionary abuses.

- (i) The very nature of *exploitative* abuses is that on a short-term they are necessarily harmful for the consumers; however the extra profit of the companies engaging in such conduct may provide an incentive for new participants to enter the market, ultimately strengthening competition and serving the interests of the consumers on the long run. Thus, in these cases it needs to be assessed whether the possible future benefits justify the lack of sanctions for the harmful effects in a given period of time.
- (ii) Those *exclusionary* abuses which provide benefits for consumers are without any harmful effects on the consumers on a short term (on the contrary: they are beneficial for consumers). However the restrictive effect on the competitors may lead to the restriction of competition itself, which is harmful for the consumers on a long term. The arising competition dilemma in these cases is basically the opposite of the above mentioned, thus it needs to be assessed under which circumstances it is

<sup>15</sup> Notice on Setting Fines, section 22.

<sup>16</sup> VJ-175/2001., 110.

<sup>17</sup> Fundamental principles of competition policy as applied by the Hungarian Competition Authority, p.79-81. These principles describe the general competition policy approach and considerations of the HCA, for details see:

[http://www.gvh.hu/en/analyses/fundamental\\_principles/4241\\_en\\_fundamental\\_principles\\_of\\_competition\\_policy.html](http://www.gvh.hu/en/analyses/fundamental_principles/4241_en_fundamental_principles_of_competition_policy.html)

<sup>18</sup> Fundamental principles of competition policy as applied by the Hungarian Competition Authority, p.104

[http://www.gvh.hu/en/analyses/fundamental\\_principles/4241\\_en\\_fundamental\\_principles\\_of\\_competition\\_policy.html](http://www.gvh.hu/en/analyses/fundamental_principles/4241_en_fundamental_principles_of_competition_policy.html)

<sup>19</sup> Notice of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority no. 1/2014 on Considerations in Differentiating Between Concentrations Subject to Authorization in Simplified or Full Procedure, 11. a).

reasonable to take away these benefits from the consumers on the basis that they may suffer a more significant harm in the future.”

### 3.3 The proportion of exploitative and exclusionary abuses in the case law

In the last 5 years (between 2010 and March 2015) the HCA ruled on 26 abuse of dominance cases<sup>20</sup>. Ten of these cases were based on an exploitative conduct<sup>21</sup> (only in three of the cases was this category explicitly specified in the decision<sup>22</sup>), 13 of them were based on exclusionary abuse<sup>23</sup>, while three of the cases<sup>24</sup> related to both categories.<sup>25</sup>

When looking back to a period from 2004 (Hungary's accession to the EU) to 2014, the ratio of proceedings of abuses which classify as exploitative was higher than those which classify as exclusionary. A large number of cases involved the assessment of both categories in the same decision.

In the following we provide a few examples from recent case law where the differentiation was explicitly mentioned.

In a recent case decided in 2013<sup>26</sup> the HCA ruled that the regional water supplier imposed excessive and unfair prices in connection with maintenance services, which amounted to an exploitative abuse. However, the HCA did not fine the infringer due to several additional factors as mitigating circumstances (including the short duration of the infringement and reparation paid by the undertaking). The HCA referred to the New Fine Setting Notice and stated that exploitative abuses are not to be considered substantially harmful<sup>27</sup>.

In case Vj-111/2010 in connection with excessive pricing of the Hungarian Office for Translation and Attestation Ltd. (“OFFI”), the HCA noted that although exploitative abuses mostly harm consumers directly, in certain cases it is possible that the exploitative abuse effects and distorts the competition itself. The case was terminated without establishing an infringement, but the HCA signalled to the legislator to regulate the situation and clarify the legal monopoly of OFFI.

The HCA concluded in case Vj-121/2009 in 2011 that the contractual and technical restrictions imposed by Invitel (and incumbent telecommunication service provider) qualified as an exclusionary abuse. The ruling was issued in a repeated proceeding ordered by the court where the HCA imposed a significantly higher fine than that it imposed in the first decision. The new decision, which imposed a HUF 200 Million fine on Invitel, explained the difference between exclusionary and exploitative abuse. It concluded that although on a short term exploitative abuses are necessarily harmful for consumers, the generated extra profit may be an incentive for undertakings to enter the market, which ultimately benefits consumers. On the other hand, exclusionary abuses are beneficial for the consumers on the short term, but ultimately restrict competition.<sup>28</sup>

The MOL case (Vj-50/2010.) was conducted against MOL, i.e. the dominant Hungarian oil company, on the basis of alleged excessive pricing, margin squeeze and wholesale price discrimination (i.e. both exploitative and exclusionary issues were investigated). The case closed with commitments.

In another decision (Vj-022/2009) in connection with the practices of Magyar Telekom, the biggest incumbent telecommunication service provider and the Hungarian subsidiary of Deutsche Telekom AG, the HCA was of the view that a conduct may qualify as exclusionary if as a result of the behaviour, the competitors' presence in the market decreases or even does not increase as effectively as it would be able to without the (exclusionary) behaviour of the dominant undertaking. However, such changes may take place as results of healthy competition

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20 We have included in the calculation the following decisions (which are available on the GVHs website): any ruling of the HCA on the merits of the case concerning abuse of dominance, including establishing the infringement (regardless of whether any fine was imposed), terminating the case with commitments, or terminating the case without establishing an infringement. It does not include decisions of the case handlers (as opposed to decisions of the competition council) to terminate the proceeding, or follow-up investigations which aim to verify an undertaking's compliance with the HCA's earlier decision.

<sup>21</sup> Vj-181/2007/25.; Vj-16/2008/111.; VJ-22/2008.; Vj-16/2011. VJ-43/2013. VJ-99/2011. VJ-98/2011. VJ-32/2012. VJ-43/2012. Vj-111/2010.

<sup>22</sup> Vj-43/2013.; Vj-43/2012.; Vj-111/2010.

<sup>23</sup> Vj-106/2006/69.; Vj-55/2006/097; Vj-134/2006/060.; Vj-59/2005/103.; Vj-168/2005.; Vj-21/2008/65; Vj-63/2009/34; Vj-022/2009.; Vj-074/2008/025.; Vj-138/063/2009; Vj-121/029/2009.; Vj-95/2011.; Vj-097/2011.

<sup>24</sup> Vj-039-057/2009.; Vj-124/2010/79.; Vj-50/2010

<sup>25</sup> For the sake of categorizing the decisions from the last 5 years we qualified excessive pricing behaviours as exploitative; predatory pricing, tying and bundling, margin squeeze and discriminative behaviours as exclusionary abuses.

<sup>26</sup> Vj-43/2012

<sup>27</sup> Vj-43/2012., section 148.

<sup>28</sup> Vj-121/2009, section 83.

as well; therefore such conduct only qualifies as exclusionary abuse if it leads to long term exclusion of competitors<sup>29</sup>. The procedure was based on the “quasi tying” conduct of Magyar Telekom, which involved tying of fixed internet and mobile internet services. According to the arguments of the HCA, this conduct may have an anti-competitive foreclosure effect on the market due to the fact that Magyar Telekom may be able to leverage its (presumed) dominance on the internet market to the mobile internet market. The procedure was later terminated without establishing the infringement due to lack of evidence on the infringement.

#### **4. Price-Based and Non-Price-Based Abuse**

##### **4.1 Is there a distinction between price-based and non-price-based abuse in the legal provision prohibiting anticompetitive unilateral conduct?**

The Competition Act does not provide for any distinction between price-based and non-price-based abuses. Section 21 provides for a general prohibition of all abuses of a dominant position, and provides a non-exhaustive list of typical abuses. These include both price-based and non-price-based abuses.

As cited above, the text of the Competition Act is indifferent on the distinction based on price-relatedness.

##### **4.2 Is there a distinction between price-based and non-price-based abuse in the decisional practice of the competition authority?**

The Competition Council of the HCA frequently updates a summary of its most important decisions in its Fundamental Principles of Competition Policy, which is also a reflection of the current state of the decisional practice of the HCA. Therefore by answering the question, we will principally accept the guidelines in the Fundamental Principles of Competition Policy as the view of the authority and if historical experience would lead us to different conclusions, we will give precedence to the current practice or approach of the HCA.

The HCA did not expressly distinguish between price-based and non-priced based abuses in the case law. One decision (Vj-42/2006) however explains the difference between exploitative and exclusionary abuses. In both cases the HCA relied on the price effects of the two types of abuses. In the case of exploitative abuses, the main factor is whether the future benefits outweigh the short-term harms caused to consumers. In the case of exclusionary abuses, the HCA elaborates under what circumstances the competition law should limit the short term gains of the consumers. In both cases, however, the timeframe for looking at the pricing behaviour is the short term in which there is direct effect to consumer welfare. In the case of non-price based abuses, however, in several cases the HCA was willing to accept longer term effects on innovation and/or dynamic efficiencies. (e.g. Vj-126/2007)

In the HCA’s Fundamental Principles of Competition Policy, the authority states that it pays particular attention and sensitivity to restrictions on price. It states: “There are a number of factors underlying this. [...] First, competition is often dominated by price competition; secondly, price competition can be restricted more effectively than other aspects of competition. Consequently restrictions on price constitute a strong restriction of competition. The operation of pricing and price signals are particularly important to the functioning of an economy. Any distortion in prices will lead to further distortions downstream. Maintaining price competition is thus of particular importance. Naturally, this does not mean that the authority focuses solely on price competition in its analysis or automatically attributes overarching importance to it in all cases, without considering the particular circumstances of the case; in particular other relevant characteristics of competition.”<sup>30</sup>

Based on the recent decisions of the HCA, however, there is no observable difference between the two types of cases. The HCA takes on both types of cases and is also willing to accept commitments in both.

##### **4.3 Is there a distinction between price-based and non-price-based abuse in the case law?**

The Hungarian courts rarely face abusive cases in practice. None of these cases differentiate expressly or implicitly between price-based and non-price based abuses. There are very few cases reaching the court and no tendency is possible to read out of the judgements. We might even argue that recently abusive cases are the rarest cases before the courts.

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<sup>29</sup> Vj-022/2009., 23. b)

<sup>30</sup> Fundamental Principles of Competition Policy p. 22.

#### 4.4 Stricter rules than that contained in Article 102 TFEU in the sense of Regulation 1/2003 Article 3(2)

In general, the rules set out in the Competition Act are in line with Article 102 TFEU as well as the content of the Guidelines on Abuse of Dominance. However, there are a couple of differences based on which the Hungarian legislation can be viewed to contain somewhat stricter rules to be applied by the HCA than the EC regulations.

Neither Article 102 TFEU nor the Competition Act contains an exhaustive list of business practices that may be considered as abuse of dominance.<sup>31</sup> However, the Competition Act explicitly sets out some rules that may be considered as abuse of dominance but are not explicitly listed in Article 102 TFEU, and only discussed in the Guidelines on Abuse of Dominance. With respect to these more detailed regulations, an assessment of the legislative hierarchies sheds light on an important difference between the EU and the Hungarian regulations.

While Article 102 TFEU must be applied by the Commission (and the national competition authorities) directly, the Guidelines on Abuse of Dominance do not, in themselves, bind the European Commission in its decision making.<sup>32</sup> The Commission is not obliged to strictly follow the text of the guidelines. In contrast, similar rules to the ones set out in the Guidelines on Abuse of Dominance were adopted by the Hungarian Parliament in the form of national law (i.e. Section 21 of the Competition Act) which, by its legislative nature, must be applied by the HCA directly. Hence, in theory, the HCA, in cases of abuse of dominance, must comply with more comprehensive regulations than the Commission (although, in practice, the Commission does not tend to make decisions based on principles contradicting the Guidelines on Abuse of Dominance<sup>33</sup>). The below table lists the elements of Section 21 of the Competition Act (the section of the Competition Act that regulates abuse of dominance) and, for each element, we also indicated the corresponding EC legislation.

Hungarian regulation (Competition Act) <sup>34</sup>	Corresponding EC legislation
The dominant firm is prohibited to...	
... set unfair prices or to stipulate any other unjustified advantages or to force the other party to accept disadvantageous conditions (Section 21 a))	Article 102 TFEU (a)
... create, without justification, disadvantageous market conditions for competitors, or to influence their economic decisions in order to obtain unjustified advantages (Section 21 d) and j))	
... limit production, distribution or technical development to the prejudice of consumers or trading parties <sup>35</sup> (Section 21 b))	Article 102 TFEU (b)
... withdraw or restrict production to increase prices that may give the producer competitive disadvantages or may cause competitive harm (Section 21 e))	
... discriminate against trading parties including the application of different prices for the equivalent transaction, so that the discriminatory treatment places the trading partners at a competitive disadvantage (Section 21 g))	Article 102 TFEU (c)
... make the supply or acceptance of goods subject to the supply or acceptance of other goods, furthermore to make the conclusion of contracts subject to the acceptance of obligations which, by their nature or according to commercial usage, do not belong to the subject of such contracts (Section 21 f))	Article 102 TFEU (d)
... refuse, without justification, to create or maintain business relations appropriate for the type of transaction (Section 21 c))	Guidelines on Abuse of Dominance, Sections 75-79
... set extremely low (predatory) prices which are not based on greater efficiency in comparison with that of competitors and which are likely to drive out competitors from the relevant market or to hinder their market entry (Section 21 h))	Guidelines on Abuse of Dominance, Sections 23-27, 63-73
... hinder, without justification, market entry in any other manner (Section 21 i))	Guidelines on Abuse of Dominance, e.g. Sections 16-17, 68

<sup>31</sup> Both legislations, when listing business practices that may be considered as abuse of dominance, make use of the legal term “in particular”

<sup>32</sup> As the title of the Guidance suggests (“...enforcement *priorities* (emphasis added) on applying Article 82...”)

<sup>33</sup> This is also strengthened by Section 8 of the Guidelines on Abuse of Dominance: “The Commission may therefore adapt the approach set out in this Communication to the extent that this would appear to be reasonable and appropriate in a given case.”

<sup>34</sup> The descriptions are, in some cases, simplified versions of the text in the Competition Act.

<sup>35</sup> The Competition Act in Section 21 b) indicates that the Act should be applied to trading parties as well, while Article 102 TFEU does not. However, as noted above in footnote 36, the case law in Hungary reinforces that the law is to be applied to protect consumers (and competition) not competitors.

Although the implementation of the law by the HCA demonstrates that the HCA's decision-making is focused on consumer harm<sup>36</sup>, in some cases, the Competition Act places special importance on the actions of the dominant firm that may, instead, cause harm to competitors.

In particular, Section 21 i) of the Competition Act contains slightly stricter regulations based on the concept that a dominant undertaking bears special responsibility and its actions can have a significant influence on potential competitors. Specifically, the dominant undertaking must not hinder market entry by applying predatory prices (Section 21 j)) or "in any other manner" (Section 21 i)).

On the one hand, the wording used in the Competition Act ("in any other manner") may reflect the idea that foreclosure might take place in forms other than predatory pricing, which should also be prohibited (for example, in the form of margin squeeze or refusal to grant access to essential facility). On the other hand, Section 21 i) may give rise to more subjective interpretation of market foreclosure (not necessarily based on economic principles) that may otherwise be in line with vigorous competition.<sup>37</sup>

Hence, in theory, the HCA might apply slightly stricter rules on dominant undertakings hindering market entry than the Commission. Although the case law does not suggest that the HCA deviates (or intends to deviate) from the approach set out in the Guidelines on Abuse of Dominance.

As mentioned above, a separate national law on generally applicable trade conducts (the Trade Act) sets out regulations applied to the trade relationship between large (dominant) retailers and their suppliers. Based on the provisions of the Trade Act, the HCA supervises large retailers and applies the requirements of the Trade Act to their potential abusive conduct vis-à-vis non-dominant suppliers.<sup>38</sup>

The Trade Act regulates the business practice of large retailers to a significant extent. The rules applied to dominant firms are different from the ones set out in the Competition Act (see **Section 1.1** above). For example, the dominant retailer cannot force suppliers unjustifiably "to avail themselves of third persons as suppliers or of an own service provider of the retailer".<sup>39</sup> Furthermore, the Trade Act defines market power differently from competition laws based on standard economic principles. Based on the provisions of the Trade Act, a large retailer has a significant market power if the previous year's consolidated relevant net turnover of the group of undertakings in question (including parent and subsidiary companies) is higher than HUF 100 billion.<sup>40</sup> In case the relevant net turnover of the dominant retailer does not exceed this threshold, the HCA may investigate the existence of market power based on "general" market test.<sup>41</sup>

Large retailers, therefore, may be "automatically" considered dominant based on the above turnover threshold (i.e. possessing significant market power) even if, in the framework of competition law settings, the market is competitive (i.e. the dominant retailers cannot act independently from their competitors). Should the HCA find any infringement of the Trade Act, it may impose fines (and apply any other possible legal sanctions) against the infringer according to the rules of the Competition Act as if the infringer had abused its dominant position in violation of the Competition Act. From this perspective, this Hungarian regulation is stricter than the regulations set out in Article 102 TFEU.

## 5. Enforcement

### 5.1 Decision-Making Practice

#### 5.1.1 Number of cases concerning the prohibition on anticompetitive unilateral conduct decided in Hungary in the last five years by the HCA (How does this number compare to the number of cases on the other competition rules in your jurisdiction (excluding merger control rules))

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<sup>36</sup> Even if this is not explicitly set out in the regulation, the Hungarian case law (e.g. Vj-10/2002, Vj-136/2008) clarifies that the Competition Act should be applied to protect consumers and protect competition rather than competitors.

<sup>37</sup> For example, the pricing of the dominant firm may be aggressive yet not predatory.

<sup>38</sup> Section 7 and Section 9 (3) of the Trade Act

<sup>39</sup> Section 7 (2) (h) of the Trade Act. Sections like this are originated from other theories (e.g. fair trade) than competition economics.

<sup>40</sup> Approximately EUR 320-340 million. Section 7 (3) of the Trade Act

<sup>41</sup> Section 7 (4) of the Trade Act

Year	Number of investigations closed excluding merger control cases <sup>42</sup>	Number of abuse of dominance cases closed	Number of SMP <sup>43</sup> cases closed	Ratio of unilateral conduct cases
2010	89	11	3 <sup>44</sup>	15,73%
2011	83	4	0	4,81%
2012	81	1	1	2,46%
2013	83	4	0	4,81%
2014	88	6	0	6,81%

**5.1.2 Number of cases concerning the prohibition on anticompetitive unilateral conduct decided in Hungary in the last five years by the courts (How does this number compare to the number of cases on the other competition rules in your jurisdiction (excluding merger control rules))**

Year	Number of cases decided by the courts excluding merger control cases <sup>45</sup>	Number of abuse of dominance cases closed	Number of SMP cases closed
2010	67	1	0
2011	57	0	0
2012	52	1	0
2013	48	1	0
2014	20	0	0

**5.1.3 Exploitative and exclusionary abuse in the decisional practice of the courts**

There are only a few court decisions available where the differentiation between the two types of abusive practices is explicitly included in the decision. In the court's review procedure of the E.ON case, the Metropolitan Court recognized the two types of abuses and provided (upholding the HCA's view) that exclusionary types of abuses may constitute a larger threat to competition than exploitative abuses.<sup>46</sup> Pursuant to the HCA's argumentation, E.ON abused its dominant position by entering into a long term contractual relationships with municipalities, which provided exclusivity for ten years to the undertaking. This conduct qualified as an exclusionary abuse, restricting the possibilities of competitors to enter the market and also had exploitative effects on the municipalities, which could suffer from the restriction on competition. The court upheld the view of the HCA.

The tendency is that Hungarian courts only make a reference to one or both of the two categories by referring to notices of the HCA or the HCA's decision which is under review. The courts appear to be reluctant to make an explicit differentiation between the two categories of abuse in cases where the HCA had not made such a differentiation earlier in its decision which is under review. There is no case law of Hungarian courts would go against the decision of the HCA concerning the differentiation of these two categories.

<sup>42</sup> Includes investigations of cartels, unfair trade practices, abuse of dominance and merger control proceedings.

<sup>43</sup> Abuse of significant market power ("SMP") as defined in Art 7 of the Act CLXIV of 2005 on Trade ("Trade Act")

<sup>44</sup> Cases closed in frame of follow-up investigations

<sup>45</sup> Means any cases closed with binding decision either at first instance or second instance. Extraordinary legal remedies are not included.

<sup>46</sup> VEF. 2008.14.

## 5.2 Competent Courts and Authorities

### 5.2.1 Special courts dealing with competition infringements

#### i.) Judicial review before administrative court

There are no specialist courts in Hungary dealing with competition infringements. Any undertaking under investigation of the HCA may however request judicial review of the decision issued by the HCA before the Metropolitan Administrative and Labor Court ("**Administrative Court**"), which has exclusive competence in judicial review of administrative cases, including competition cases. The request for judicial review does not automatically suspend the enforcement of the decision, however, upon specific request, the Administrative Court may order so. The Administrative Court may uphold, repeal or amend the decision of the HCA, which includes right to lower the amount of fine, as well. In case of repealing the decision, the Administrative Court orders the HCA to reopen the case and to issue a new decision if the decision of the HCA was unlawful. Parties may appeal the decision of the Administrative Court before the Metropolitan Tribunal which decides the case on the merits without a formal hearing; however it holds a hearing if so requested by either party. The final judgment may be challenged before the Curia (the former Supreme Court) claiming the judgment unlawful.

#### ii.) Private enforcement of competition claims before civil courts

Any person claiming being harmed by an anticompetitive unilateral conduct may enforce its rights before civil courts. There is no specialist court having exclusive competence, since the competence and the jurisdiction of the court depends on the seat/place of residence of the defendant and the amount claimed. The acting court is however obliged to inform the HCA about the case according to which the HCA may submit its observations relevant to the case in question. Upon the specific request of the acting court, the HCA is obliged to present its opinion, acting as *amicus curiae*. If the HCA decides to initiate a separate investigation based on the facts of the civil procedure, the court suspends the procedure.

### 5.2.2 Regulators with concurrent powers

In a strict approach, there are no regulators in Hungary with concurrent powers that can enforce the same competition rules as the HCA. However, the requirements of the Retailer-Supplier Act, which are similar to those enforced by the HCA in respect of the abuse of dominant position under the Competition Act, are enforced by the NFCSO.

#### i.) Procedure of the National Food Chain Safety Office

As provided above, under **Section 1.4** above, the NFCSO may investigate unfair practices of distributors based on a detailed list of prohibited practices described in the Retailer-Supplier Act. The above prohibited unilateral anticompetitive conducts and their investigation differs from the general abuse of dominance because the previous one applies only in the area of agricultural products and food products. Furthermore, there is an exhaustive list of specified anticompetitive conducts which are prohibited; therefore, the interpretation of the NFCSO of the prohibition focuses on these specific types of infringement instead of applying the classical approach of investigating typical anticompetitive unilateral conducts, as for instance abuse of dominance. It is important to note that in the event the HCA initiates investigation procedure against the same undertaking due to the same practices on the basis of the Section 21 of the Competition Act, the NFCSO is obliged to suspend its procedure. If the HCA adopts a decision in the above mentioned case, the NFCSO must terminate its procedure, or revoke its decision, if already adopted.

#### ii.) Procedure of the HCA based on the Trade Act

The Trade Act prohibits the abuse of significant market power ("SMP") by retailers. Similarly to the Retailer-Supplier Act, there is a detailed list of specific practices which are prohibited. A retailer is deemed to hold SMP vis-a-vis suppliers if its group turnover – including the turnover of parent companies and subsidiaries – or in case of purchasing associations the member's turnover exceeds from retail activities HUF 100 billion, or otherwise if the retailer or purchasing association is in a one-sidedly advantageous bargaining position vis-a-vis its supplier. If a retailer holding SMP infringes prohibitions laid down in the Trade Act, the HCA may initiate investigation and apply rules generally applicable in cases based on the infringement of Art 21 of the Competition Act (e.g. abuse of dominance). As there is a significant overlap between the conduct prohibited by the SMP rules and the Retailer-Supplier Act, there is a conflict rule put in place to avoid parallel investigations/sanctions, similarly to the above mentioned case (e.g. procedures of NFCSO and HCA). Pursuant



to the applicable conflict rules the SMP rules of the Trade Act do not apply in case the Retailer-Supplier Act is applicable.

iii.) Irrebuttable presumption of dominant position

The amendment of the Trade Act entering into force in 1 January 2016 laid down an irrebuttable presumption according to which any food retail chain the turnover of which exceeds HUF 100 billion will automatically hold dominant position on the retail food market. This approach will be followed by the HCA from 1 January 2016 in cases where the undertaking under investigation is a retail food chain and where the Section 21 of the Competition Act (e.g. abuse of dominance) is applicable for the undertakings behavior in question. It is important to note, that this rule will exist parallel to the above mentioned SMP rules and prohibitions laid down in the Retailer-Supplier Act, however there will be no collision between these three laws due to the above mentioned scheme according to which the HCA may investigate retailers based on the Trade Act and SMP rules compared to which the Retailer-Supplier Act is a *lex specialis*, since it is applicable only for food retail chains. Finally investigations initiated on the basis of the prohibition of abuse of dominance (Section 21 of the Competition Act) take precedence over to the Retailer-Supplier Act, as described above (see **Section 5.2.2 i.)** above). However, in case of food retail chains, stricter rules apply for the establishment of dominant position laid down in Trade Act.

**5.2.3 No specific guidelines concerning the enforcement of or the substantive interpretation of the prohibition**

The HCA has not adopted a guideline concerning the enforcement priorities in abuse of dominant position cases yet. However, the resolutions of the Competition Council having fundamental statements are collected and published every year on the homepage of the HCA under its Fundamental Resolutions<sup>47</sup>.

**5.3 Approach Followed by Competent Courts and Authorities**

**5.3.1 Particular approach and/or standard of harm in the decisional practice of the HCA and the case law of the courts**

The HCA does not follow a special approach regarding the interpretation of abuse of dominant position. The HCA as an enforcer of EU competition rules uses the same standard of harm in abuse of dominant cases. It means that the HCA applies the “as-efficient-competitor-test” as a benchmark test, thus assesses the foreclosure of a hypothetical competitor having the same costs as the dominant undertaking.

Nevertheless, in the recent years the Competition Council adopted decisions having fundamental statements regarding the assessment of “abuse”. For a short overview of the approach followed by the HCA in interpreting the notion of “abuse”, we refer to Section 2.2 above.

The indispensable condition for initiating an investigation is that the conduct in question is likely to result in consumer harm. Consumer harm may occur in different forms depending on the type of abuses (i.e. exclusionary or exploitative abuses). (See **Section 3.2** above)

**5.3.2 Objective of the prohibition of anticompetitive unilateral conduct adopted by the competition authority and/or the courts**

The preamble of the Competition Act defines the aim of the prohibition of (unilateral) anticompetitive conduct. The key objective of the prohibition of abuses is to preserve the public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, moreover the interests of undertakings complying with the requirements of business fairness and the interests of consumers required the protection against anticompetitive (unilateral) conduct. The fundamental task of the HCA, as of any competition authority, is to protect and promote competition. However, competition in Hungary is not a goal per se, but a means to achieving the benefits that result from competition. The activities of the HCA are aimed at protecting competition instead of automatically protecting competitors. The HCA’s mission is to protect competition in the interest of long-term consumer welfare.

<sup>47</sup> [http://www.gvh.hu//data/cms1030604/VT\\_elvi\\_allasfoglalasok\\_Tpvt\\_2015\\_03\\_09.pdf](http://www.gvh.hu//data/cms1030604/VT_elvi_allasfoglalasok_Tpvt_2015_03_09.pdf)

### **5.3.3 Effects the Commission's Guidance on enforcement priorities on the approach of the competition authority and/courts in your jurisdiction**

The HCA as the member of the European Competition Network (ECN) uses the Commission's Guidance on enforcement priorities in its analysis and regularly refers to this guideline in its abuse decisions.

### **5.3.4 Criticisms towards the decisional practice of the competition authority or the case law of the courts regarding their approach<sup>48</sup>**

#### **i.) Parallel application of the Trade Act and the Retailer-Supplier Act**

The Trade Act, in respect of agricultural goods and foods, was applicable simultaneously with the Retailer-Supplier Act until August 1, 2012. The parallel application of the similar prohibitions led to the risk of conflicting decisional practice. It further increased the risk of inconsistency that the Trade Act was enforced by the HCA against retailers with SMP only, while the Retailer-Supplier Act was enforced by the NFCSO against all retailers of agricultural food and goods irrespective of market power. The HCA, in its annual report prepared to the Hungarian Parliament in 2010,<sup>49</sup> noted its concerns as to the overlapping prohibitions in the Trade Act and the Retailer-Supplier Act and stressed the importance of the close cooperation between the HCA and the NFCSO aimed at facilitating consistent and predictable interpretation of the rules<sup>50</sup>. The Hungarian Parliament, by acknowledging the risk of conflicting decisional practice, abolished the parallel application of the Trade Act and the Retailer-Supplier Act by way of giving priority of the Retailer-Supplier Act that remained exclusively applicable in respect of the agricultural sector as from August 1, 2012.

#### **ii.) Too many abusive conducts prohibited under Section 21 of the Competition Act**

Dr. László Szakadát, former member of the Competition Council of the HCA and professor of the Corvinus University of Budapest, argues in his study published in a book issued by the Law and State Sciences Faculty of the Pázmány Péter Catholic University<sup>51</sup> in 2011 that some of the abusive conducts indicatively referenced in Section 21 of the Competition Act are superfluous and inconsistent with the general principles underlying the prohibition of the abuse of dominant position. Dr. Szakadát, while accepts that the exploitative abuses pose significant harm to the consumer welfare, concludes that exploitative conducts should not be prohibited under the competition rules. Excessive pricing, as one of the most common form of exploitative abuses, can be excluded more effectively by way of regulatory measures (e.g. through a price monitoring authority). Moreover, with reference to the apparent shift in the US practice in treating more leniently the refusal to deal (in particular, the denial of access to essential facilities) cases, he demands similar changes in the European and the Hungarian competition law enforcement in respect of the refusal to deal, the predatory pricing and the margin squeeze cases. In his opinion, the current strict application of the abuse of dominant position rules in these cases is far too rigid and inherently involves the risk of the punishment of innocent market conducts. He also claims that the far too dogmatic enforcement of the European and the Hungarian rules is missing the point and protects the competitors instead of the competition on the market. He nevertheless considers the declining number of abusive cases dealt by the HCA as indirect evidence confirming that the HCA already recognized the need for the change of its enforcement priorities.

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<sup>48</sup> The HCA was not involved in answering this question and the views described herein should not be taken or understood as the official position of the HCA in respect of the topic.

<sup>49</sup> The HCA prepares for the Hungarian Parliament its annual report every year in which it gives a concise summary of its activities pursued and results achieved in the preceding year

<sup>50</sup> Annual report prepared for the Hungarian Parliament by the HCA in 2010, points 228-232

<sup>51</sup> Dr. László Szakadát "[V]erőfölénnyel való visszaélés?" ["Abuse of dominant position?"] in "A Magyar Versenyjog Múltja és Jövője" ["The Past and the Future of the Hungarian Competition Law"], PPKE JÁK, 2011, ISBN 978-963-308-024-5, Editors: Dr. Pál Szilágyi, Dr. Tihamér Tóth, pages 107-119