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List of abbreviations

Agricultural and Food Product Retailer Act	Act XCV of 2009 on the prohibition of unfair distribution practices against suppliers of agricultural and food products
Civil Code	Act V of 2013 on the Civil Code
Competition Act	Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
CCP	Act CXXX of 2016 on the Code of Civil Procedure
Curia	Supreme Court of Hungary
Electricity Act	Act LXXXVI of 2007 on electricity
Equal Treatment Act	Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities
HCA	Hungarian Competition Authority (<i>Gazdasági Versenyhivatal</i>)
HEPURA	Hungarian Energy and Public Utility Regulatory Authority
Natural Gas Act	Act XL of 2009 on natural gas
NFCSA	National Food Chain Safety Authority
NMIA	National Media and Infocommunications Authority
PS	Position Statements of the HCA in connection with the Competition Act (2018)
Telecommunications Act	Act C of 2003 on electronic communications
TFEU	Treaty on the Functioning of the European Union
Trade Act	Act CLXIV of 2005 on Trade

1. THE NOTION OF DISCRIMINATION IN HUNGARIAN SUBSTANTIVE COMPETITION LEGAL FRAMEWORK**1.1. Statutory provisions and soft law concerning discrimination in the Hungarian competition law***1.1.1. Statutory provisions*

- [1] The Competition Act explicitly addresses discrimination. Discriminatory practices are prohibited as anticompetitive agreements and as abuses of a dominant position.
- [2] According to Section 11 (2) g) of the Competition Act the prohibition of anticompetitive agreements applies to cases "*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*". This provision is equivalent to Article 101 (1) (d) TFEU.
- [3] Section 21 g) of the Competition Act defines as an abuse of a dominant position in particular "*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*". This provision is equivalent to Article 102 (c) TFEU.
- [4] The Competition Act also addresses indirect discrimination, where the practices themselves are not discriminatory, but the objective or the effect of the conduct is the foreclosure of competitors. Under Section 11 (2) f) of the

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Competition Act, an agreement "preventing any party from entering the market" also qualifies as unlawful. Under Section 21 i) of the Competition Act it is prohibited for dominant undertakings "to hinder competitors from entering into the market in any unjustified manner", whereas Section 21 j) of the Competition Act prohibits "creating a market environment that is unreasonably disadvantageous for the competitors".

- [5] It must be noted that to a certain level, all types of abuse of dominance contains a discriminatory element (e.g. Section 21 c) of the Competition Act - refusal to deal). Also, the HCA brings cases of discrimination against consumers by dominant undertakings under Section 21 a) of the Competition Act: it is prohibited for dominant undertakings "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".

1.1.2. Soft law

- [6] As Sections 11 and 21 of the Competition Act do not provide an exhaustive list of anticompetitive practices, soft law could play an important part in identifying prohibited discriminatory practices. The HCA provides guidance on interpretation of certain statutory provisions to market players by issuing notices. However, apart from merger control issues (See Section 2.3 below), there is no soft law on discrimination prohibited by Section 11 or 21 of the Competition Act.
- [7] In addition to notices, the HCA annually publishes on its website a collection of the most important findings in its case-law, which market players may consult if they want to get further clarification on what conduct can qualify as discrimination. These are the so-called Position Statements. For example, Section 21.22 of the PS interprets the criteria to be assessed in case of discriminatory practices of dominant undertakings: "In order to decide whether or not discriminatory conduct is infringing Section 21 g) of the Competition Act, the following circumstances need to be assessed: (i) was the type of the transactions, which were discriminated, identical, (ii) did it cause a competitive disadvantage for business partners, (iii) was it unjustified."²

1.2. Types of discriminatory practices specifically mentioned in Hungarian competition law

- [8] The discriminatory practices mentioned in Section 11 (2) f) and Section 21 g) of the Competition Act refers to both "primary line discrimination" (aimed at excluding competitors) and "secondary line discrimination" (aimed to treat differently trading partners that are in equivalent situation).
- [9] As noted in Section 1.1.1, the HCA applies other provisions of the Competition Act to both "primary line discrimination" and "secondary line discrimination". For the purposes of this report, we discuss all cases aimed at or resulting the foreclosure of competitors as "primary line discrimination".

1.3. Other provisions covering the issue of discrimination in area of commercial and business law

1.3.1. Constitutional law and civil law basis

- [10] Both the prohibition of abuse of dominance and the prohibition of discrimination are mentioned in Hungarian law at a constitutional level.
- [11] According to Article M (2) of the Fundamental Law: "Hungary shall ensure the conditions of fair economic competition, act against the abuse of a dominant economic position and protect the rights of consumers."
- [12] According to Article XV of the Fundamental Law: "(1) Everyone shall be equal before the law. Every person shall have legal capacity. (2) Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, colour, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever. (3) Women and men shall have equal rights. (4) Hungary shall promote equal opportunities and social convergence by means of introducing special measures. (5) Hungary shall introduce specific measures to protect families, children, women, the elderly and the disabled."³ The constitutional protection against discrimination is further elaborated in the Equal Treatment Act. The Equal Treatment Acts sets out the requirement of equal treatment of person or groups with same characteristics and qualifies a breach of equal treatment as discrimination. In addition, Section 7 of the Equal Treatment Act sets out

² This was based on case No. Vj-7/2007, see footnote 18 below.

³ Before the effective date of the Fundamental Law (1 January 2012), the Section 70/A of the Constitution provided the same protection: "(1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. (2) The law shall provide for strict punishment of discrimination on the basis of Paragraph (1). (3) The Republic of Hungary shall endeavour to implement equal rights for everyone through measures that create fair opportunities for all."

the forms of discrimination,⁴ while Section 8 of the Equal Treatment Act specifies (non-exhaustively) the characteristics on the basis of which discrimination is prohibited.⁵

- [13] Hungarian civil law also deals with abuse of dominant position and discrimination. Section 2:43 c) of the Civil Code qualifies discrimination as a violation of personality rights. While Section 6:72 of the Civil Code creates an obligation for dominant undertakings to conclude contracts, the unjustified refusal of which qualified as an abuse.⁶

1.3.2. Sector-specific regulation

- [14] Special rules elaborating the general prohibition of discrimination are prescribed in several sector-specific regulation, including the Trade Act, the Food Product Retailer Act, the Natural Gas Act, the Electricity Act and the Telecommunications Act.
- [15] Section 7 (2) a) of the Trade Act prohibits any undue discrimination applied by a retailer having significant market power against a supplier.⁷ Similar, but special rules apply to retailers of agricultural and food products. According to Section 3 (2) u) of the Agricultural and Food Product Retailer Act qualifies "*the setting of the retail price charged to the final consumer of products discriminatively, on the basis of the country of origin of products considered identical on the basis of their composition and organoleptic properties*" as unfair retailer conduct.⁸
- [16] Under both the Natural Gas Act (Section 56) and the Electricity Act (Section 107), the regulator, the HEPURA may impose obligations for market players having significant market power in order to enhance and promote effective and sustainable competition. An example is the obligation to sell in an open and transparent way, apply price caps, apply cost-based pricing mechanisms, to make offers and apply non-discriminatory contract terms.⁹
- [17] According to Section 104 (2) of the Telecommunications Act "*obligations of non-discrimination shall ensure, in particular, that the service provider with significant market power on the wholesale markets: a) applies equivalent conditions in equivalent circumstances to other service providers providing equivalent services; and b) provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of the service providers it controls.*"¹⁰

2. THE NOTION OF DISCRIMINATION IN PRACTICE BY COMPETITION AUTHORITIES / COURTS

2.1. Discriminatory practices sanctioned as abuses of dominance

2.1.1. Case-law

- [18] The HCA applies provisions of the Competition Act when assessing discriminatory practices by dominant firms.
- [19] In 2001, the HCA investigated the practices of Gyertyaláng Kegyeleti Szolgálat Temetkezési Kft. (*Ócsa Funeral Company*).¹¹ The Ócsa Funeral Company operated the cemetery and provide burial services. The rent of the funeral home, which the company applied to its competitors (external burial service providers), was found to infringe Section 21 a) of the Competition Act (unfair terms), because it was too excessive, and Section 21 j) of the Competition Act (disadvantageous conditions for competitors), because it was only applied to competitors as was not included in its own burial service fee. An infringement of Section 21 g) ("primary line discrimination") was also part of the investigation, however, that part was terminated by the HCA.

⁴ "Direct negative discrimination, indirect negative discrimination, harassment, unlawful segregation, retribution, and any orders issued therefore mean a breach of the principle of equal treatment, especially as set out in Chapter III."

⁵ "Provisions that result in a person or a group is treated less favourably than another person or group in a comparable situation because of his/her a) sex, b) racial origin, c) colour, d) nationality, e) national or ethnic origin, f) mother tongue, g) disability, h) state of health, i) religious or ideological conviction, j) political or other opinion, k) family status, l) motherhood (pregnancy) or fatherhood, m) sexual orientation, n) sexual identity, o) age, p) social origin, q) financial status, r) the part-time nature or definite term of the employment relationship or other relationship related to employment, s) the membership of an organization representing employees' interests, t) other status, attribute or characteristic (hereinafter collectively: characteristics) are considered direct discrimination."

⁶ "Where a party unjustifiably refuses to conclude or maintain a contract by abusing his 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."

⁷ See detailed presentation of the provision of the Trade Act in Section 5.1 below.

⁸ See detailed presentation of the provision of the Agricultural and Food Product Retailer Act in Section 5.1 below.

⁹ See detailed presentation of the provision of the Natural Gas Act and the Electricity Act in Section 5.2 below.

¹⁰ See detailed presentation of the provision of the Telecommunications Act in Section 5.2 below.

¹¹ Case No. 108/2001.

- [20] The HCA investigated the practices of Tiszántúli Gázszolgáltató Rt. (*TIGÁZ*) a regional natural gas provider. TIGÁZ was responsible for qualifying companies having a license to build natural gas pipelines. In the qualification procedure, in addition to technical and security parameters, TIGÁZ also assessed the business relationship of the pipeline builder with TIGÁZ. The HCA investigated the practice as an infringement of Section 21 i) of the Competition Act (hindering market entry). However, in the end, the HCA qualified the practices as an infringement of Section 21 j) of the Competition Act (disadvantageous conditions for competitors). The HCA - without imposing a fine - obligated TIGÁZ to delete the incriminating provisions from its qualification procedure.
- [21] In another case concerning burial services, the HCA investigated both Városüzemeltető és Fenntartó Kft. (*Mosonmagyaróvár Cemetery*) and Anubisz Temetkezési Kft. (*Mosonmagyaróvár Funeral Company*).¹² On the one hand, the HCA found that the rent of the funeral home was set unfairly by the Mosonmagyaróvár Cemetery, which qualified as an infringement of Section 21 a) of the Competition Act (unfair terms). On the other hand, the rent of the funeral home was only partially included in the burial service fee of the Mosonmagyaróvár Funeral Company, which qualified as an infringement of Section 21 i) of the Competition Act (hindering market entry) and Section 21 j) of the Competition Act (disadvantageous conditions for competitors). The HCA imposed a fine of HUF 2 million jointly and severally. Contrary to the previous burial services case, an infringement of Section 21 g) (“primary line discrimination”) was not investigated.
- [22] The HCA started to investigate practices of Magyar Államvasutak Zrt. (*Hungarian State Railways*)¹³ in 2005. After the accession of Hungary to the European Union, railway undertakings had the possibility of entering the freight market, state railways were obliged to provide non-discriminatory access to the public railway network and its accessories in order to enable the operation of new entrant railway companies. However, Hungarian State Railways applied various terms towards its rival railway companies in the network access agreements hindering their market entry. The HCA established the infringement and imposed a fine of HUF 1 billion on Hungarian State Railways. In particular, the HCA considered the unjustified prescription of a bank guarantee from private railway operators for network access to be an infringement of Section 21 j) of the Competition Act (disadvantageous conditions for competitors) and the conclusion of exclusive agreements with freight forwarders an infringement of Section 21 i) of the Competition Act (hindering market entry). The infringement decision of the HCA was basically upheld by the courts, however, the amount of fine was reduced to HUF 700 million.¹⁴
- [23] In the case conducted against Balatoni Hajózási Zrt. (*Lake Balaton Shipping*)¹⁵ the HCA investigated several alleged abuses of the company - as the operator of most public ports - including refusal to rent docks, applying surcharge for charter boats, enforcing unjustified high fees and otherwise discriminate business partners regarding rent conditions. The latter was investigated as an infringement of Section 21 g) of the Competition Act (“secondary line discrimination”). The HCA terminated the case without the finding of any infringement. In the reasoning of its decision, the HCA set out that price discrimination is only prohibited if the business partners of the dominant company suffer harm leading to a decrease in consumer welfare. The HCA found that the investigation could not show that the discriminatory conduct applied by the dominant firm could have had an appreciable effect on competition in the relevant market.
- [24] In 2005, the HCA investigated TIGÁZ again, this time regarding its retail practices.¹⁶ The subject-matter of the investigation was the access fee applied by TIGÁZ to new customers or customers using excess capacity. The HCA investigated under Section 21 a) of the Competition Act (unfair terms), as well as, under Section 21 g) of the Competition Act (“secondary line discrimination”). In the end, the HCA only found that TIGÁZ set the access fee unfairly and imposed a fine of HUF 4 million. The part of the investigation regarding “secondary line discrimination” was terminated, because the HCA found no instance, where TIGÁZ applied a different access fee.
- [25] The HCA also investigated a certain subscriber tariff for fixed-line telephone services of Invitel Távközlési Szolgáltató Zrt. (*Invitel*)¹⁷ in 2005. The allegation was that the tariff was capable of hindering market entry and/or creating disadvantageous conditions on the market for competitors. The HCA terminated the case, because the tariff was not sold to subscribers anymore. Nevertheless, the HCA provided guidance on the interpretation of Section 21 i) of the Competition Act (hindering market entry) and Section 21 j) of the Competition Act (disadvantageous conditions for competitors). Former not only covers the hindering of market entry, but also making market entry significantly more difficult. Latter not only covers the situation, where the competitor exits

¹² Case No. Vj-118/2004.

¹³ Case No. Vj-22/2005.

¹⁴ Judgment of the Curia - Kfv.II.37.442/2009/12. (24 March 2010)

¹⁵ Case No. Vj-38/2005.

¹⁶ Case No. Vj-116/2005.

¹⁷ Case No. Vj-142/2005.

the market, but also, where market presence of the competitor appreciably decreases due to the disadvantageous conditions. Both practices need to be unjustified to be caught by the prohibition. The HCA mentioned that in case of measures directly impeding competition (e.g. limiting technical access), the undertaking under investigation must provide justifications. In case of indirect measures (e.g. price reduction), the practice is unjustified if the HCA proves its effects on competition, i.e. that it permanently decreases competition in the relevant market to the detriment of consumers.

- [26] In the case conducted against the television broadcasting company MTM-SBS Televízió Zrt. (*TV2*)¹⁸ in 2007 the HCA investigated whether the undertaking discriminated between television companies by setting and applying differentiated purchase prices and conditions towards the distributors of television programmes. The HCA closed the investigation establishing that the restriction of competition - prohibited by Section 21 g) of the Competition Act (“secondary line discrimination”) - could not be substantiated in course of the proceedings. One of the reasons was the uncertainty whether or not the various contracts for the distribution of the television channel can be considered as identical or similar transactions. The HCA also clarified that applying different prices to new entrants does not automatically qualify as an infringement of Section 21 i) of the Competition Act (hindering market entry). The HCA also did not find an infringement of Section 21 a) of the Competition Act (unfair terms).
- [27] In 2007 the HCA initiated proceedings against the Győri Ipartestület (*Industry Association of Győr*).¹⁹ The HCA in its statement objections found that the association by adopting a limit on taxi stands in the city - as a horizontal anticompetitive agreement - infringed Section 11 (2) f) of the Competition Act (preventing market entry) and - as a unilateral practices of an entity enjoying legal monopoly - infringed Section 21 i) of the Competition Act (hindering market entry). The statement of objections also set out that the association applied higher fees against non-member taxi drivers for accessing taxi stands, than for its members, thereby infringing Section 21 g) of the Competition Act. Although the taxi drivers are not strictly speaking business partners of the Association, this may be qualified as “secondary line discrimination”. The case was closed by the HCA accepting commitments from the association.
- [28] The HCA opened proceedings against Budapest Airport Zrt. (*Budapest Airport*)²⁰ in 2011 because the company offered less favourable conditions for independent taxi companies relating to the boarding of passengers at the area of the airport, compared to the conditions applied for contracted taxi companies. The original allegation of the HCA was that Budapest Airport’s practice infringed Section 21 a) of the Competition Act (unfair terms) and Section 21 g) of the Competition Act (“secondary line discrimination”). The HCA concluded that the investigation could not show sufficient evidence to substantiate that the discriminatory conduct applied by the dominant firm created a disadvantage in competition that actually resulted in consumer harm. As a result, the proceedings were terminated by the HCA.
- [29] However, a few years later the HCA proceeded against Budapest Airport Zrt.²¹ on grounds of another discriminatory abuse and this latter case was closed by the HCA accepting the commitments of the company. During the proceedings the HCA examined that the prices and conditions applied by Budapest Airport for drop-offs and short and long term stays at the airport parking premises were capable of eliminating undertakings providing parking and transfer services in the area of the airport. Unlike in the previous case, the HCA initially alleged an infringement of Section 21 j) of the Competition Act (disadvantageous conditions for competitors), in addition to the alleged infringement of Section 21 a) of the Competition Act (unfair terms). According to the commitments, Budapest Airport undertook to reduce the prices charged for using parking lots, to provide rebates and to make possible for rival undertakings to rent bus parking spots under certain conditions.
- [30] In a recent case opened in 2014 against Sanofi-Aventis Zrt. (*Sanofi*)²² the HCA investigated whether the firm has placed certain groups of pharmaceutical wholesalers in a disadvantageous market position against incumbent wholesalers by refusing to conclude contracts with them. The HCA suspected that the pharmaceutical manufacturer did not select its wholesaler partners based on an assessment of the anticipated and actual economic gains resulting from the business relation in question. Apart from an alleged infringement of Section 21 c) of the Competition Act (refusal to deal), the HCA also investigated if the practice qualifies as an infringement of Section 21 g) of the Competition Act (“secondary line discrimination”) or an infringement of Section 21 b) of the Competition Act (limitation of distribution). However, on the basis on data gathered in the course of the proceeding, there was no

¹⁸ Case No. Vj-7/2007.

¹⁹ Case No. Vj-44/2007.

²⁰ Case No. Vj-95/2011.

²¹ Case No. Vj-43/2014.

²² Case No. Vj-61/2014.

clear evidence that the conduct of the undertaking could result in significant adverse consequences for consumers, thus the HCA terminated the proceeding.

- [31] A 2015 the HCA investigated the practices of Balatoni Hajózási Zrt. again: the question was whether the company has abused its dominant position by applying discriminative prices towards its competitors on the market for pleasure boating for the renting of boat docks.²³ The case revolved around the alleged infringement of Section 21 a) of the Competition Act (unfair terms) and Section 21 j) of the Competition Act (disadvantageous conditions for competitors). The case was closed by the HCA by a commitment decision. According to the decision, Lake Balaton Shipping undertook to reduce prices for the rental of docks, to increase the areas of the ports that can also be used by its competitors and to provide rivals with an increased possibility to promote their services in the ports.
- [32] It should be noted that the HCA also investigated exploitative abuses where the dominant firms discriminated between consumers. The HCA initiated proceedings against UPC Magyarország Telekommunikációs Kft. (*UPC Hungary*)²⁴ in 2015 based on a large number of consumer complaints claiming that in certain geographical areas the quality of internet service provided by the dominant telecommunications company is lower, while prices are much higher, compared to other areas in Hungary. The HCA investigated the case as an infringement of Section 21 a) of the Competition Act (unfair terms) and Section 21 b) of the Competition Act (limitation of distribution) and not as “primary line discrimination” or “secondary line discrimination”. Finally, UPC Hungary offered commitments to the HCA and undertook to develop the infrastructure in certain regions, to guarantee a minimum upload and download speed, and to offer prices not higher than the average prices applied in the country for five years.
- [33] In summary, there have been no clear-cut “primary line discrimination” cases and in “secondary line discrimination” cases - as well as most indirect discrimination cases - the proceedings were either terminated on grounds of insufficient evidence or by accepting the commitments of the undertakings. An infringement decision with fines was only made in one indirect discrimination case. As for estimating the importance of discriminatory abuses compared to all cases conducted on the basis of Article 102 TFEU or Section 21 of the Competition Act, it can be established on the one hand that “secondary line discrimination” cases are of minor significance, the HCA has investigated two such cases in the past few years, on the other hand, in approximately 50% of the recently conducted abuse of dominance cases the HCA has investigated discrimination against rivals as the main focus of the proceedings.

2.1.2. Criteria for discrimination to qualify as an abuse of dominance

- [34] The HCA prohibits the discrimination by a dominant undertaking in the case of transactions, which are equivalent in terms of their value or character, provided that the dominant firm is not able to put forward justifications with respect to its discriminatory practice. As mentioned above, according to Section 21.22 of the PS, the test for assessing discrimination consists of 3 factors: (i) identical nature of the transaction, (ii) competitive disadvantage, and (iii) justification. The essential factor is that the abuse must result in a competitive disadvantage for other undertakings (business partners or competitors). This means that this conduct applied to consumers cannot qualify as such, because the concept ‘competitive disadvantage’ does not exist in that context.²⁵ This also means that if there is no competitive disadvantage or it is insufficient to create an appreciable effect on the relevant market, discrimination is not prohibited.²⁶ The only reference point regarding appreciable nature is that according to the case-law of the HCA, if the price discounts or payment methods, given by the dominant undertaking to two different business partners, differ only slightly, this does not constitute an abuse.²⁷ Although in a different context, the HCA provided guidance on justifications in the *Invitel* case above.
- [35] Regarding the criteria to how discriminatory practices qualify, the position relative to the dominant company matters. In case of Section 21 i) of the Competition Act (hindering market entry), the target of the anticompetitive practice is clearly a potential competitor. In case of Section 21 j) of the Competition Act (disadvantageous conditions for competitors), the target is an actual competitor. Although, the wording of Section 21 a) of the Competition Act (unfair terms) is not limited to consumers, the HCA applies this provision to discrimination of consumers. Section 21 g) of the Competition Act explicitly mentions business partners as the target, thus, it is

²³ Case No. Vj-14/2015.

²⁴ Case No. Vj-15/2015.

²⁵ In this situation Section 21 a) of the Competition Act could be applicable.

²⁶ Cases No. Vj-38/2005. and Vj-95/2011.

²⁷ Case No. Vj-47/1998. The case is not mentioned in Section 2.1.1 above, because the subject-matter of the case was not discrimination of competitors or business partners.

aimed at “secondary line discrimination”, but does not preclude its application to cases, where discriminatory practices are applied to business partners, but with the aim of excluding competitors.

2.1.3. Foreclosure as primary line discrimination

- [36] There are no decisions which expressly rely on “primary line discrimination” and became final. National cases where competitors were foreclosed or cases concerning such foreclosure all concerned other types of abuses, having such effect, but usually no - at least - express discrimination. These cases were dealt with - in part - based on the Competition Act provision that includes the prohibition of “primary line discrimination”.
- [37] Based on theory and also practical effects, discrimination shall be an independent exclusionary abuse. Criteria shall be defined independently and not subsumed under another type of abuse.

2.1.4. Exploitation as secondary line discrimination

- [38] As stated above at Section 2.1.1, the Competition Act expressly prohibits dominant undertakings from engaging in any practices that “discriminate against certain business partners [...] which cause disadvantage to certain business partners in the competition” [Section 21 j) of the Competition Act]. This provision is generally in line with Article 102 (c) TFEU. The “disadvantage caused to the business partners” in this provision can be interpreted to capture the harm - i.e. the exploitation - that occurs to such business partners, who are in such a case typically the customers of the dominant undertaking. The definition of “business partners” under the Competition Act (Section 2) encompasses all “clients, purchasers, buyers and users”, and as a result, the Hungarian national provisions capture exploitation and discrimination to the detriment of all types of trading partners (i.e. customers who may be consumers and also customers who are consumers). In addition, Section 21 a) of the Competition Act (unfair terms) could also be applied to tackle the issue of exploitative “secondary line discrimination” as this provision could also be relied on to act against dominant firms exploiting their customers (and thus, the final consumers): an example for this was the *Budapest Airport* case above.
- [39] It is apparent from the few existing cases, that the HCA was willing to take on these issues: at the same time, it is clear from the case-law that the HCA’s standard / aim in these cases was clearly overall consumer welfare and not the harm or negative effects incurred to any individual business or company. As the HCA itself indicated in the *Sanofi* case (although in relation to foreclosure issues) that “An intervention by a competition authority is [only] warranted if the consumers suffer calculable damages, a substantive harm”.

2.1.5. Discrimination and digital markets

- [40] The HCA has not yet had a chance to assess the interplay between “secondary line discrimination”, exploitation and the digital economy and we are also not aware of a relevant ongoing investigation in this regard. The cases before the HCA that concerned important players of the digital economy (such as Google²⁸, Apple,²⁹ Airbnb³⁰ or, most recently, PayPal³¹) have generally revolved around allegations of unfair commercial practices vis-à-vis consumers, such as misleading advertising.³² We are also not aware of any case-law concerning allegations of abuse (in the sense of “secondary line discrimination”) and the digital economy before Hungarian courts.
- [41] At the same time, it cannot be excluded that going forward more and more concerns could surface in relation such instances on a national level, e.g. in Hungary. First, there could be a number of such practices by large digital players, which are not caught up by the European Commission (even though the practice is universally applicable in a number of EU Member States), but which could still be relevant for the HCA. This could be, for example, due to the fact that a certain practice harms (or harms disproportionately) existing incumbents or national champions established in Hungary (or in a few other Member States), who are customers of a given dominant undertaking. Second, it could also be the case that the discriminatory practice affects Hungarian consumers disproportionately or if there is a cultural aversion in Hungary to the given business practice by a larger number of Hungarian consumers. Third, it also cannot be excluded that - either because the absence of an action by competition authorities or as a side issue in a civil litigation – “secondary line discrimination” issues arise in front of Hungarian courts.

²⁸ Case No. Vj-88/2016.

²⁹ Case No. Vj-32/2016.

³⁰ Case No. Vj-89/2016.

³¹ Case No. Vj-18/2017.

³² The HCA also published a detailed strategy document on its consumer protection powers in September 2018. It is available at http://www.gvh.hu/en/press_room/press_releases/press_releases_2018/results_and_new_directions_in_consumer_protection.html

2.2. Discriminatory practices pertaining to an anticompetitive agreement

- [42] Many forms of restrictive agreements are specifically mentioned as typical examples of anticompetitive agreements under Section 11 of the Competition Act. One of these is listed in Section 11 (2) g) of the Competition Act. However, despite this eminent role, only a very limited number of cases concerned discrimination through agreements between undertakings. Therefore, the HCA has no robust practice in this, nor any kind of settled approach for the assessment of these kinds of agreements. Moreover most of the cases where agreements contained an element of discrimination were dealt with during the first decade of 2000 and therefore their relevance in a possible present assessment may be limited.
- [43] Discrimination was primarily used to put competitors in a competitive disadvantage. This initiative could however originate from different quarters. Producers were favouring certain business partners over less preferred ones, or producers could team up with a major customer to achieve a general price increase on the market which affected competitors of the participating customer to a greater extent. Associations also tried to put their members into a more advantageous position than their non-member competitors by ensuring more preferential treatment by suppliers. A common point in most cases was the vertical element as it was usually through the behaviour of a supplier or a customer that discrimination among competitors was put into effect.
- [44] The *Easter ham cartel*³³ was primarily concluded among meat producers with the object to set a minimum price level for retailers but the joint purchasing partnership of Metro and Spar (Metspa) also got involved. Its involvement aimed at gaining competitive advantage over other retailers by supplementing the agreement on the general increase of these seasonal products with a clause according to which competitors of Metspa were to pay a price 5% higher than Metspa. This way the acceptance of the price increase by this main retailer was compensated by a competitive advantage over its own competitors. Ironically this discrimination had a backfiring effect as Metspa was not the main customer of each meat producer participating in the agreement, thereby putting these producers into a competitive disadvantage vis-à-vis the other participants. The decision did refer to Section 11 (2) g) of the Competition Act, without elaborating in depth the discrimination issue. It only stated that even in lack of the full application of the 5% price difference, the agreement had at least potential effect on the market, noting at the same time that as the agreement on discrimination was an infringement by object, the assessment of effects had no bearing on the outcome of the case. The HCA imposed a fine on the meat producers and the retailers. The decision was upheld by the appeal court.³⁴
- [45] A rather similar objective was identified in the *Cable TV Association case*.³⁵ The Association of cable TV service providers prepared and negotiated template agreements with TV channels on behalf of the members of the Association. On a number of occasions the templates included clauses on the negative discrimination of non-member cable TV service providers or the positive discrimination of members. First, it was set in the contracts that members of the Association were entitled for a price a certain percentage lower than the price set for non-member services providers. Second, the contracts also included an MFN clause according to which members were entitled to get the lowest available price from a given TV channel. The contracts also ruled out the application of these advantages in the case of non-member service providers. The HCA established that these clauses put the competitors of the members of the Association into a competitive disadvantage qualifying as a restriction by object. A calculation was also made according to which effects of the agreement were also established. Curiously, the infringement was established only as a price fixing agreement under Section 11 (2) a) of the Competition Act and not as a discrimination under Section 11 (2) g) of the Competition Act, without providing any particular reasoning to this aim. The HCA imposed a fine on the Association. The decision was upheld by the first instance court.³⁶
- [46] In the *Contact lenses case*³⁷ concerned discrimination among distribution channels. The supplier introduced a set of new conditions for the usual, rather high discounts for retailers. While opticians with brick and mortar sales points could easily meet these conditions, online retailers and retailers relying on internet sales above 50% of their overall trade faced a criterion which was extremely difficult to be met. The HCA established that the objective of the restructuring of the discount criteria was to put into disadvantage those retailers, which operated with low prices over the internet to allow a general price increase acceptable to brick and mortar retailers. The HCA refused the healthcare arguments raised by the supplier as those were previously not part of its considerations at all and as the extent of the measures required from internet retailers were not necessary to alleviate these alleged concerns. The infringement was established under Section 11 (2) b) of the Competition Act (restricting or controlling

³³ Case No. Vj-64/2000.

³⁴ Judgment of the Metropolitan Court of Appeal No. 2.Kf.27.225/2007/7. (13 February 2008)

³⁵ Case No. Vj-151/2009.

³⁶ Judgment of the Metropolitan Administrative and Labour Court No. 5.K.33.148/2013/41. (23 June 2014)

³⁷ Case No. Vj-55/2013.

distribution) and under Section 11 (2) g) of the Competition Act as well. The HCA imposed a fine on the contact lens suppliers. It must be noted that the Curia recently annulled the decision and ordered the HCA to repeat the investigation.³⁸

- [47] The latest case concerned the market of *lead waste collection*.³⁹ Here an agreement was negotiated among two major waste collector companies and a company which was planning the construction of a factory for the recycling of lead accumulators. In order to ensure sufficient quantities of waste accumulators to run the factory, the agreement under negotiation envisaged a pricing strategy which favoured the sale of waste accumulators collected in Hungary to this planned new facility in order to redirect the track of waste accumulators previously exported to foreign facilities. The envisaged pricing system made a distinction among the different waste collectors, putting into a more advantageous position the two participating entities by securing higher prices for them. Although the conduct of the undertakings was investigated as price fixing [Section 11 (2) a) of the Competition Act] and market sharing [Section 11 (2) d) of the Competition Act], as well as, limitation of resources [Section 11 (2) c) of the Competition Act] and discrimination [Section 11 (2) g) of the Competition Act], the HCA only found an infringement of former provisions, while terminating the proceedings regarding the alleged infringement of latter provisions. The HCA imposed a fine on all three waste collection companies. The decision was upheld by the first instance court.⁴⁰
- [48] The only purely horizontal example for discrimination through agreement appeared in the *Budapest taxi case*.⁴¹ In this hardcore cartel case the HCA established that an agreement among taxi service providers was reached with the aim to exclude from the market a maverick competitor by targeting its contracted customers with prices below their usual prices. This targeted price differentiation was investigated as price fixing, market sharing, as well as “primary line discrimination” [Section 11 (2) f) of the Competition Act]. In the end, the HCA qualified the conduct as market sharing. The price fixing part of the investigation was terminated by the HCA in a separate order without the finding of an infringement. The HCA imposed a fine on all seven taxi service providers. The decision was upheld by the first instance court.⁴²
- [49] Overall it seems that the HCA did not elaborate any specific test for the assessment of discriminative agreements. In order to meet the wording of Section 11 (2) g) of the Competition Act, the HCA did refer to the competitive disadvantage suffered by competitors because of the discrimination, but the previous practice of assessing such actual or potential effects was seemingly abandoned in the most recent case. Nevertheless, it seems clear that discriminative agreements were always considered to be restrictions by object.

2.3. Discrimination in merger analysis

- [50] Discrimination is part of the merger analysis of the HCA as a potential vertical effect. Pursuant to Section 30 (2) of the Competition Act, the HCA assesses the benefits and detriments of a concentration in a merger control procedure. The non-exhaustive list of criteria mentions explicitly the expected change of the concerned undertakings' business conduct, as well as, effects on suppliers and business partners.
- [51] Guidance on the types of potential detriments is set out in Notice 7/2017.⁴³ Notice 7/2017 is similar to the notice of the European Commission on simplified procedures⁴⁴ in elaborating, when a comprehensive review (i.e. phase II) is warranted. As part of that, Notice 7/2017 lists the effects of a concentration on competition. According to paragraph 18 of Notice 7/2017, these are horizontal effects,⁴⁵ vertical effects, and portfolio effects.⁴⁶ The Notice explicitly mentions the possibility of price discrimination as an example of vertical effects: an undertaking acquiring another undertaking active on another level of the production-distribution chain can use its market power

³⁸ Judgment of the Curia No. Kf.VI.37.870/2018/9. (10 April 2019)

³⁹ Case No. Vj-2/2015.

⁴⁰ Judgment of the Metropolitan Court No. 6.K.700.121/2018/13. (24 May 2018)

⁴¹ Case No. Vj-29/2008.

⁴² Judgment of the Metropolitan Administrative and Labour Court No. 16.K.28.069/2013/10. (25 March 2013)

⁴³ Notice No. 7/2017 of the president of the HCA and the chairman of the Competition Council on the criteria of "non-apparentness" applied with respect to the obligation to notify concentrations, the launch of merger control procedures and proceeding to comprehensive review (version including changes due to Notice No. 1/2018 effective as of 1 January 2018)

⁴⁴ Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366, 14.12.2013, p. 5-9

⁴⁵ Non-coordinated (unilateral) effects like increasing prices or hindering market entry and coordinated effects like anticompetitive agreements.

⁴⁶ Leveraging high market shares on one market on the new, complementary market (e.g. tying or bundling). Equivalent to conglomerate effects in EU competition law.

to discriminate competitors or business partners.⁴⁷ As the purpose of Notice 7/2017 is to provide guidance on when a concentration needs to be notified to the HCA, when a HCA procedure is warranted or when a comprehensive review is justified, it does not provide detailed guidance on detrimental effects as the notice of the European Commission on non-horizontal effects.⁴⁸

- [52] Discrimination as a potential vertical detrimental effect of a concentration was discussed by the HCA in several merger control cases in the past.
- [53] In the *Deutsche Telekom case*,⁴⁹ Deutsche Telekom - already controlling Matáv, the incumbent Hungarian fixed-line telephone service provider - acquired control over Westel, a leading mobile telephone service provider. The HCA found that due to the regulatory background, mobile telephone service providers need to cooperate with Matáv (i.e. a kind of vertical relationship existed between the parties). Therefore, authorization of the concentration was subject to the obligation⁵⁰ that Matáv continues to provide the services to the competitors of Westel on a non-discriminatory basis.
- [54] In the *Group 4 JV case*,⁵¹ Matáv and Group 4 - a security service provider - created a full function joint venture to take over the monitoring service business of the respective subsidiary of Matáv. The HCA found that signal transfer by connected lines in case of monitoring is provided by Matáv (vertical relationship between Matáv and the JV), which has a dominant position on that market. A substitute of signal transfer by connected line could have been internet-based signal transfer, which was under development at the time. Therefore, authorization of the concentration was subject to the obligation that Matáv provides the substitute service to any undertaking active in the monitoring market with the same conditions (or, if there is no feasible demand for the service, Matáv abstains from the service).
- [55] In the *Hungaropharma case*,⁵² several Hungarian pharmaceutical manufacturers, including Richter Gedeon, Egis and Béres, acquired joint control over dominant Hungarian pharmaceutical wholesaler, Hungaropharma. Several concerns were raised during the investigation: on the one hand, the manufacturers could discriminate other wholesalers (e.g. provide exclusivity for Hungaropharma), on the other hand Hungaropharma could discriminate other manufacturers (e.g. in setting together bids for hospital tenders). However, the HCA considered these unlikely. The only substantiated concern according to the HCA was that in some regions pharmacies and hospitals cannot procure from anyone else but Hungaropharma. Therefore, authorization of the concentration was subject to the obligation that Hungaropharma applies non-discriminatory terms in its sales to pharmacies and hospitals, in order to avoid any jeopardy to supply of pharmaceuticals.
- [56] In the *Chellomedia I case*,⁵³ the subsidiary of the cable and media conglomerate, Liberty Group, acquired control over the operator of the sports channel Sport1. The original concern was not that Liberty Group would discriminate its competitors, when selling broadcasting rights to Sport1, but the complete refusal to sell. Therefore, authorization of the concentration was subject to the obligation that Chellomedia sells the broadcasting rights of the Sport1 television channel on customary market conditions and non-discriminatory prices. The HCA emphasized that the obligation does not mean the application of the same price, only that the same pricing mechanism should be used.
- [57] In the *MédiaLOG JV case*,⁵⁴ publishers, Ringier group and Sanoma group, together with the newspaper distribution company F-LOG created a full function joint venture, MediaLOG, in order to carry out the distribution of the newspapers belonging to the parent companies. The HCA identified as concern that MediaLOG could discriminate other publishers, competitors of its parent company, in distribution, while MediaLOG has virtually no competitor on the distribution market. Therefore, authorization of the concentration was subject to the obligation that MediaLOG provides its subscription newspaper distribution services on non-discriminatory terms to publishers.

⁴⁷ Notice 7/2017 is effective as of 15 January 2017. Paragraph 11 of Notice 1/2014 - the predecessor of Notice 7/2017 - contained the same provision.

⁴⁸ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6–25

⁴⁹ Case No. Vj-176/1999.

⁵⁰ Under Section 30 (3) of the Competition Act, the HCA may authorize concentrations subject to a condition or an obligations. In case of a condition, the authorization becomes effective only after the condition is met, while in case of an obligation, the authorization is effective immediately, but becomes ineffective if the obligation is not fulfilled in the given deadline.

⁵¹ Case No. Vj-116/2001.

⁵² Case No. Vj-182/2001.

⁵³ Case No. Vj-61/2006.

⁵⁴ Case No. Vj-116/2006.

[58] Section 30.8 of the PS, summarizes the recent practice of the HCA concerning vertical effects: foreclosure can take place on the upstream market (input limitation) or in the downstream market (refusal to buy). The likelihood of such vertical effects depends on the capability of the undertaking created by the concentration to foreclose the market, the incentives to foreclose the market (e.g. profit from lessening of competition compensating losses), and any countervailing circumstance (e.g. buyer power, new entry or efficiencies). This section of the PS is based on three cases: *Chellomedia II case*,⁵⁵ *Prímagáz case*,⁵⁶ and the *Nordic case*.⁵⁷

[59] Based on the above, it is apparent that in merger control analysis “primary line discrimination” (i.e. foreclosure of competitors) was assessed as a vertical detrimental effect of a concentration. In almost all of the above-mentioned cases, the HCA resolved the issue by imposing obligations on the undertakings concerned regarding the application of non-discriminatory contractual terms. The average duration of these obligation was ca. 2 years after the decision.

3. OBJECTIVE JUSTIFICATIONS TO DISCRIMINATORY PRACTICE

[60] Since the contents and interpretation of Hungarian competition law is, as a general rule, the same or at least very similar to that of EU competition law, it is assumed that justifications to price discrimination similar to the ones admitted under EU competition law may be admissible also under Hungarian competition law (costs reduction and volume discounts, price reductions in return for services rendered (with conditions), new products and new markets (when a firm is launching a new product or entering a new market is represents a short term effort to increase demand for the new product), fixed costs recovery, charges according to intensity of use or value in use, price reductions for "special customer status", etc.).

[61] It has not yet happened that the HCA / the court reviewing the HCA’s decision did not sanction discriminatory practices under investigation, because those practices were shown to be objectively justified on one of the above grounds. As discussed earlier, most of the cases terminated by way of commitment decisions or were terminated on grounds of insufficient evidence for an infringement.

[62] It can be noted, however, that in some of the cases mentioned earlier, the HCA briefly referred to the Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,⁵⁸ more particularly, to paragraphs 28-31 referring to objective necessities and efficiencies when discussing the defence put forward by the undertaking under investigation. Therefore, it appears that the HCA would analyse the admissibility of such discriminatory practices in line with the Guidance and EU case-law.

4. OBJECTIVES JUSTIFYING TO PROHIBIT DISCRIMINATORY PRACTICES

4.1. Discrimination and effective competition

[63] Similarly to other European legislations, the Competition Act also prohibits companies with market power from unlawfully discriminating between customers or attempting to foreclose or marginalize competitors or customers. This is to ensure that competition is working in the market and to achieve the most efficient competitive outcome.

[64] Based on the existing case-law of the HCA and Hungarian courts, discriminatory practices are often sanctioned with the objective of restoring efficient competition in the market. This is not necessarily the objective of antitrust fines (they are levied with the purpose of deterrence) but ceasing unlawful behaviour is usually also part of the antitrust sanction, unless the investigated firms have already ceased it before the HCA or the courts reached their final decision. That said, sanctioning dominant companies that anti-competitively discriminate as efficient (or, in some cases, less efficient) rivals automatically ensures that effective competition is restored, although there is no example to-date of the HCA examining if rivals were actually as efficient in discrimination cases. In turn, effective competition may not explicitly be mentioned in the decision of the HCA or the courts, but it is assumed to be in place when an investigation is closed without sanctioning, unless the absence of sanctions is due to an absence of evidence regarding actual wrongdoing.

⁵⁵ Case No. Vj-61/2008.: the case was similar to the *Chellomedia I*, only with a different channel, informative channel called *Spektrum TV*.

⁵⁶ Case No. Vj-146/2009.: *Prímagáz*, the retailer of LPG, acquired control over *Intergas* that provided, inter alia, LPG transloading services. The imposed obligation was to provide transloading to independent LPG retailers on a non-discriminatory basis.

⁵⁷ Case No. Vj-71/2010.: *Phoenix group*, a pharmaceutical wholesaler acquired control over *UTA*, which belongs to a group operating *NOVA pharmacies*. The HCA concluded that no upstream or downstream foreclosure is likely and authorized the concentration.

⁵⁸ 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 (Text with EEA relevance) (2009/C 45/02)

- [65] In the investigations of unlawful discrimination, the HCA is safeguarding consumer welfare and, consequently, effective competition. This is even the case, when the focus of the finding of an infringement is the unfair or unjustified nature of the discriminatory practice. This approach is in line with the current competition regulations in Europe as it focuses on the competitive outcome rather than market processes or market structure. As long as consumer welfare is increasing, or at least not harmed, the competitive process is assumed to be working well.
- [66] Although the HCA has powers to impose obligations on undertakings that may lead to a structural change on the market both in antitrust and merger cases, the HCA's general task is not to proactively protect competitive structures or competitive processes as such. It is not the HCA's role to determine the most efficient competitive structure, it would go beyond their objectives of safeguarding competition, and would be interpreted by many as misusing their power as a monitoring agency. Similarly, the HCA does not impose restrictions on the structure of the markets under investigation and plays no role in determining how the optimal market structure should look like.⁵⁹

4.2. Fairness and effective competition

- [67] While European competition authorities, including the HCA, do not have the objective of telling the markets what market processes or structures ought to be, fairness appears as an explicit objective of competition laws in the EU.⁶⁰ Both Article 102 TFEU and the Competition Act prohibit undertakings in dominant position from imposing unfair prices.⁶¹ What exactly the European Commission or the HCA mean by unfair prices depends on the case at hand.⁶² It is important to emphasize that the fairness condition is linked to pricing practices only, other objectives that may stem from the fair behaviour of firms (e.g. refraining from discouraging market entry, from exploiting certain types of consumers) are not explicit objectives based on fairness but are certainly part of the objective of safeguarding competition.
- [68] In the antitrust investigations of the HCA the focus is on consumer welfare and efficient competition. Following the consumer welfare objective, however, fairness is also assumed to be achieved in the sense that market participants are ensured to have an equal level of playing field. For consumers, fairness manifests itself in the form of lower prices for consumers, wider choice and higher quality products. For producers, fairness can be interpreted in the form of equal opportunities and that dominant companies are prohibited abusing their market power to exclude a competitor.
- [69] Fairness, on the other hand, does not mean legal protection for competitors against failing,⁶³ and it does not mean that all customers and final consumers will get a fair share of the outcome of the competitive process. The inherent feature of a competitive process is that there will always be some who lose out: these can be inefficient firms that are obliged to exit the market or consumers who cannot purchase their desired goods at all price levels.⁶⁴ In addition, fairness in itself does not restrict even dominant undertakings to create and operate a distribution system in accordance with its business interests, including the selection and/or termination of contracts with distributors.
- [70] Following from the above, in an antitrust proceeding anticompetitive and countervailing procompetitive effects are not assessed by the HCA based on the principle of fairness. Although fairness in itself is not a criteria of the HCA's analysis regarding "primary line discrimination" or "secondary line discrimination", the HCA applies a fairness criteria in other cases involving discriminatory practices. As mentioned above, the HCA brings certain discrimination cases under Section 21 a) of the Competition Act (unfair terms). In such cases, like the cases discussed below, fairness was one of the main objectives reached.

⁵⁹ This is in contrast to the views of a new antitrust movement originated from the US: "hypster antitrust" or New Brandesians. New Brandesians believe that antimonopoly regulations should (also) focus on market structure and competitive process. See e.g. L. Khan, The New Brandeis Movement: America's Antimonopoly Debate, *Journal of European Competition Law & Practice*, Volume 9, Issue 3, March 2018, pp 131-132.

⁶⁰ See the speech of Commissioner Vestager (Danish Competition and Consumer Authority, Copenhagen, 9 March 2018) available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fair-markets-digital-world_en. See also the speech of Director General Laitenberger (GCLC Conference, Brussels, 26 January 2018), available at: http://ec.europa.eu/competition/speeches/text/sp2018_02_en.pdf.

⁶¹ The term "unfair" is used in Article 102 (a) TFEU and Section 21 of the Competition Act (in Hungarian: "tisztességtelen").

⁶² For example, pricing below average variable cost is *per se* prohibited for dominant companies by the European Commission as well as by the HCA.

⁶³ See e.g. the *Rónahír case* (Vj-10/2002.), where a local newspaper distribution terminated its contract with its competitor with adequate notice period and cause, which was not qualified as an abuse, even though Rónahír thereby removed its only competitor from the market.

⁶⁴ As Commissioner Vestager said in her speech: "It doesn't mean that just because something is unfair, it's automatically also against the competition rules." (GCLC Annual Conference, Brussels, 25 January 2018, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en)

- [71] For example, the HCA investigated the prices charged by the Északdunántúli Vízmű Zrt. (*North Transdanubian Waterworks*), a regional water supplier, which was found dominant in the regional market.⁶⁵ The prices set by North Transdanubian Waterworks to test and verify ancillary water meters were significantly above the relevant cost measures. The margins of North Transdanubian Waterworks related to this activity were unjustifiably high, which led to the exploitation of consumers.⁶⁶ The HCA ordered the company to cease their anticompetitive business practice, which eventually led to fair prices for consumers.
- [72] Also, after a lengthy investigation, the HCA required the, mainly audio and video, copyrights and royalty-rights manager *Artisjus* to revise the methodology underlying the calculations of blank carrier media remuneration.⁶⁷ The HCA obliged *Artisjus* to prepare a comprehensive economic study and update their pricing policy (i.e. how the blank carrier media remunerations are set) based on the results of that study.⁶⁸ The objective of the HCA with this decision is that blank carrier media producers, retailers and distributors pay a fee that is more in line with the end usage of the copyrighted material, and that media authors (copyright owners) receive a fair share of the remuneration. In turn, it is expected that a proportion of the remuneration (or perhaps the whole) are passed on to buyers of empty media devices. Hence, the decision of the HCA also ensures that consumers do not pay a higher (or lower) copyright fee than necessary which would be, in a way, unfair.
- [73] It should be noted that whereas the Competition Act has no explicit fairness objective other than the one linked to prices [Section 21 a) of the Competition Act], the Trade Act contains somewhat stronger criteria concerning retailers with significant market power. The Trade Act explicitly says that large retailers cannot apply unfair conditions vis-à-vis their suppliers⁶⁹ but other provisions of the Trade Act are also driven by the fairness objective. Larger retailers, therefore, should be more careful in choosing their business practices because the “unfairness-tool” can more easily be used against them due to the applicability of the Trade Act in those cases.
- [74] Finally, fairness is also sometimes interpreted as a global principle that connects competition law with other objectives of data protection or consumer protection.⁷⁰ While some other European national competition authorities have already faced data related issues in which they decided to apply competition law to the overlapping territories of competition and data protection,⁷¹ the HCA has not yet revealed their standpoint in an antitrust matter in this respect. This is probably due to the fact that such cases have not yet been brought in front of the HCA.

5. RELEVANCE OF OTHER LEGAL "AREAS" TO APPREHEND DISCRIMINATORY PRACTICES?

- [75] Under Hungarian law, several sector or activity-specific regulations exist providing similar legal framework to that set out in the Competition Act on discriminatory practices. These regulations aim to catch and prohibit unfair practices by undertakings having significant market power in certain sectors in order to protect the interests of their contracting parties who are in a weaker contractual and negotiating position. Moreover, in certain regulated sectors, the regulatory bodies may also impose certain obligations on the significant market players to ensure the effective competition on the market. The difference between these two sets of rules are their objectives which they wish to achieve: the first is to provide stricter protection for suppliers in a weaker position compared to the larger retail chains and to ensure protection of the general interests of consumers, while the second aims to ensure the required market structure to achieve more effective competition on the market and therefore imposing specific obligations (access to networks, unbundling, etc.) to market players.

5.1. Specific laws prohibiting unilateral unfair and discriminatory practices (ex post regulation)

- [76] As mentioned under section 1.3.2 and 4.2 above, the Trade Act explicitly prohibits the abuse of significant market power by retailers. A retailer is deemed to hold significant market power towards its suppliers if the retailer’s group turnover – including the turnover of parent companies and subsidiaries or members being part of the same purchasing group – realised from retail activities exceeded HUF 100 billion (approx. EUR 310 million) in the previous financial year. A retailer is also deemed to have significant market power if it holds a one-sided bargaining position vis-à-vis a supplier either due to the existing market structure, restrictions on entering the market, the

⁶⁵ Case No. Vj-43/2013.

⁶⁶ The HCA calculated margins to be around 20%, higher than the average margins in the industry.

⁶⁷ This fee is paid by the producer, retailer or distributor of empty video and audio carrier media (DVD, DVD-recorder, tablet, smartphone, etc.) to compensate authors of music, film, etc. for consumers duplicating their copyrighted media.

⁶⁸ Case No. Vj-15/2014.

⁶⁹ Section 7 (1) c) of the Trade Act.

⁷⁰ I. Graef et al., *Fairness and enforcement: bridging competition, data protection, and consumer law*, *International Data Privacy Law*, 2018, Vol. 8, No. 3, pp. 200-223.

⁷¹ For example, the Facebook case in Germany.

company's market share, financial strength and other resources, or the magnitude of the company's commercial network, the size and location of its commercial establishments.

- [77] A detailed list of prohibited practices is provided by the Trade Act, amongst others, a retailer with significant market power must not apply any undue discrimination, restriction of access to market channels, charging for services serving the retailer's interests, unjustified amendments of contractual conditions to the detriment of the supplier, nor charge for listing, stocking, or selling below costs against the supplier.
- [78] In the case of infringement of the above rules by a retailer holding significant market power, the HCA is entitled to initiate proceedings by applying the rules of the Competition Act generally applicable to abuse of dominance cases.
- [79] Furthermore, pursuant to the Trade Act, any retailer whose turnover realised in the previous financial year exceeds HUF 100 billion (approx. EUR 310 million) generated from retail of daily food consumer goods is automatically deemed to be in a dominant position on the retail food market. This irrefutable presumption of dominance is applied by the HCA in abuse of dominance cases under the Competition Act involving food retail chains. Apart from the fact that this antitrust rule is misplaced in the Trade Act, it has significant deficiencies compared to the traditional dominance test applicable to all other undertakings: the turnover threshold is set randomly, the question of dominance is thereby not in the discretion of the HCA, but automatic, and the test disregards all market circumstances (for example, it precludes the HCA from taking into consideration countervailing market power of suppliers).
- [80] The above two regimes exist in parallel as the application of the irrefutable presumption of dominance is limited to retail chains distributing daily food consumer products.
- [81] Even if the regulation of the Trade Act follows the structure of a classic abuse of dominance test, i.e. establishment of a significant market power and assessment of any potential abuse or discriminatory practice of such significant market power, the application of these rules is rather restricted compared to general competition law rules as they only apply to retailers in relation to their contractual relationship with suppliers. The reason for increased protection levels provided to suppliers is mainly due to the asymmetric position and negotiating power of the parties, and that such unfair practices could lead to detrimental consequences for the suppliers. It should also be noted that the relevant products, mainly daily consumer products, are purchased and used by basically all customers, so these measures aim to protect the general interests of the consumer as well.
- [82] The HCA applied the above rules in the *Auchan case*⁷² and imposed a heavy fine on Auchan (more than HUF 1 billion, approx. EUR 3.1 million) for infringing the rules of the Trade Act by demanding after sale price discounts from its suppliers in order for the suppliers' products to be stocked, or continue to be stocked. This decision of the HCA followed a similar procedure initiated by the HCA on the basis of the Trade Act against another retail food chain, SPAR. In the SPAR case,⁷³ a fine was also imposed for unfair practices in relation to a performance-based bonus system applied towards suppliers.
- [83] Another example of prohibition of unilateral unfair practices is the set of rules provided by the Agricultural and Food Product Retailer Act regulating the relationship between suppliers and retailers in the agricultural and food sector. The Agricultural and Food Product Retailer Act sets out a similar regulation as the Trade Act but it applies exclusively to the sale of agricultural and food products. A detailed and exhaustive list of unfair practices by retailers are provided by the Agricultural and Food Product Retailer Act which are prohibited irrespective of the market position of the concerned retailer. A specific authority, the NFCSA, has the competence to investigate the infringement of the specific unfair conducts specified in the Agricultural and Food Product Retailer Act instead of the HCA.
- [84] Any collision between the HCA and the NFCSA or the application of the different laws can, however, be avoided as the HCA investigate the retailers based on the Competition Act (abuse of dominant position) or the Trade Act (unfair practices by significant market players), while the NFCSA can initiate proceedings against retailers in the agricultural and food product sector pursuant to the Agricultural and Food Product Retailer Act. It is to be noted that if the HCA initiates proceedings against a retailer for the same behaviour on the basis of the Competition Act (as the Trade Act is only applicable to non-food products), the NFCSA must suspend its own procedure. If the HCA adopts a decision in the same matter, the NFCSA must terminate its procedure or revoke its decision if already adopted.

⁷² Case No. Vj-60/2012.

⁷³ Case No. Vj-47/2010.

5.2. Regulatory measures: sectoral ex ante regulations

- [85] Based on EU law principles, specific sectoral regulations historically were applied in order to create more competitive market structures and operations leading to the liberalisation and re-regulation of certain markets previously characterised by the presence of monopolistic structures, such as telecommunications. Rules allowing the regulator to review and assess the markets and intervene by imposing obligations to restore the effective competition on the market for the future still exist under Hungarian law in relation to the regulated markets of telecommunications and energy.
- [86] Under both the Natural Gas Act and the Electricity Act, the regulator, the HEPURA, may initiate a market analysis procedure to assess whether there is any market player which has or may have a dominant position in the future that could enable such a market player to perform a conduct resulting in the prevention, restriction or disorientation of competition (significant market power). In such a market analysis the regulator cooperates with the HCA. If, based on the outcome of the procedure, a market player is identified with having significant market power, the regulator may impose an obligation to enhance and promote effective and sustainable competition which may include the following: to sell in an open and transparent way, apply price caps, apply cost-based pricing mechanisms, to make offers and apply non-discriminatory contract terms. In the case the obligations imposed by the HEPURA on a significant market player are not respected, the regulator may impose fines and, if the breach persists, withdraw the authorisation of the significant market player.
- [87] Similarly to the above, in the telecommunications sector pursuant to the Telecommunications Act, the NMIA is required to conduct periodic market analyses to determine, based on the relevant decisions of the European Commission and in line with conventional competition law principles, whether a certain market is effectively competitive and, if not, to designate operators with significant market player status and impose obligations to enhance competition (transparency, equal treatment, unbundling of accounts, accessibility, cost-based price mechanism, functional unbundling). The NMIA can therefore prevent any potential hindering of effective competition by significant market players by imposing one of the obligations mentioned above.
- [88] As we see under Hungarian law, the regulators on network based regulated markets have the required tools to intervene if structural problems exist in order to open up markets to competition, giving potential new entrants legal certainty and encouraging them to invest.
- [89] It should be emphasised that sector regulation and competition policy should be complementary, since one cannot really substitute the other. As presented above, even if the two sets of rules (ex post rules and ex ante regulations) have the same objectives of protecting and enhancing competition, they cover different aspects: the creation of effective and sustainable competition by the regulator, and efficient competition enforcement ensuring the consumers' welfare by the HCA.

6. FUTURE OF THE PROHIBITION OF DISCRIMINATORY PRACTICES ON A COMPETITION LAW PERSPECTIVE

- [90] As explained in more detail above, there has been no clear-cut “primary line discrimination” cases before the HCA as the HCA qualifies the relevant issues as abuses other than discrimination [Section 21 g) of the Competition Act]. Meanwhile “secondary line discrimination” are of minor significance in the case-law of the HCA, since only two such cases were investigated in the past few years. Based on the trends of the new investigations, currently the evolution or increase of the “secondary line discrimination” cases is not visible. Nonetheless, the rapidly growing digital economy could trigger discrimination cases in the future.
- [91] The HCA has already reacted to this development by adopting a mid-term digital strategy expressly focuses on the digital economy on a consumer protection perspective. More importantly the HCA already conducted several consumer protection investigation against the big silicon valley US tech firms (such as Apple, Google, Airbnb, PayPal and the ongoing Facebook case). The HCA has not yet applied its investigation toolkit in antitrust matters, most likely because it is harder to detect a cartel or abusive behaviour with the traditional techniques. The aim of the HCA seems straightforward. they want to follow the digital market trends as much as possible, which is clearly evidenced by the fact that the HCA has been recently launched a market analysis procedure to assess the operation of digital comparison tools.⁷⁴ Nevertheless, there is a big debate in the Hungarian competition law community whether the regulatory tools or the applicable competition law regime is more suited to deal with the antitrust issues (e.g. discriminatory conducts) in the digital sector. Although competition rules are flexible, they are not

⁷⁴ The English language press release is available at

http://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the_gvh_will_assess_the_operation_of_digital_compa.html

exactly suitable for enforcing general legal principles (e.g. non-discriminatory obligations imposed on market players involved in certain digital sectors).

- [92] It seems that the adoption of the EU geo-blocking regulation⁷⁵ is a significant and timely step for fighting against discriminatory practices in the European e-commerce industry, the real importance of this regulatory action will however depend on the enforcement activity of the competent national authorities. It is worth mentioning that in Hungary not the HCA, but the a consumer protection body was appointed for the application of the geo-blocking regulation, which further illustrates that it is not yet decided who should take the lead in the competition vs. regulation debate regarding the supervision of the digital economy.

⁷⁵ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I , 2.3.2018, p. 1–15