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Exploitative Abuses – Contribution from Hungary

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More documentation related to this discussion can be found at: oe.cd/gfc26.

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Hungary

1. Primary purpose of competition law

1. The Hungarian Competition Authority (GVH) conceives the primary purpose of competition law as the protection of the competitive process, which serves as the principal mechanism through which economic efficiency, consumer welfare and well-functioning markets are promoted. This approach finds support in Article M of the Fundamental Law of Hungary, which guarantees the conditions for fair economic competition, explicitly mandates action against the abuse of a dominant position, and protects the rights of consumers.

2. Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act), formally articulates this philosophy in its Preamble. The Preamble emphasizes a tripartite rationale for enforcement: the public interest attached to the maintenance of market competition, the interests of undertakings operating fairly, and the interests of consumers. Consequently, Hungarian competition law does not treat competition as an end, nor does it seek to shield individual competitors from competitive pressure. Rather, the assessment of allegedly abusive conduct focuses on its impact on the competitive process and the public interest, including its effects on consumers.

3. Regarding the correction of harmful market outcomes, the Hungarian regime operates on the premise that protecting the competitive process is generally the most effective method to prevent negative outcomes, such as excessive pricing, reduced quality, or stifled innovation. Nevertheless, Hungarian law also contains mechanisms aimed at addressing harmful market outcomes where effective competitive constraints are absent or insufficient. This is most evident in the GVH's integrated institutional design. Akin to many European peers, the GVH holds a dual mandate: it is the primary enforcer of both antitrust rules and a part of consumer protection laws, specifically concerning unfair commercial practices. The GVH, however, does not handle individual consumer disputes (like warranty claims or defective products). Instead, under Act XLVII of 2008, the Hungarian Unfair Commercial Practices Act (Fttv.), the GVH is strictly tasked with overseeing deceptive B2C conduct that is widespread enough to materially affect economic competition.

4. Strategic documents[1] of the GVH reinforce this dual focus. It emphasizes a consumer-oriented approach and recognizes that market outcomes, such as prices, quality, choice and transparency, are important indicators of a well-functioning market. Hungarian competition law primarily protects the competitive process, while recognizing that this serves broader objectives such as consumer welfare, choice, innovation and economically efficient market outcomes.

2. Intervention against exploitative abuses

5. Exploitative abuses are strictly sanctionable under Hungarian competition law. Section 21(a) of the Competition Act, which conceptually mirrors Article 102(a) of the Treaty on the Functioning of the European Union (TFEU), expressly prohibits a dominant

[1] See GVH's medium-term institutional strategies (Középtávú intézményi stratégia): https://gvh.hu/preview/gvh/strategia/a_gazdasagi_versenyhivatal_strategiaja

undertaking from setting unfair purchase or selling prices or dictating unfair conditions in unjustified ways.

6. The GVH distinguishes exploitative abuse from exclusionary abuse as two distinct types of abuse of a dominant position. Under the general framework of the Competition Act, intervention against traditional exploitative conduct strictly requires demonstrating a dominant position. As defined in Section 22, dominant is the position of an undertaking if it is *"able to pursue their economic activities to a large extent independently of other market participants without the need to substantively take into account the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct"*. Establishing this classical dominance typically necessitates a high market share threshold and the presence of significant structural barriers to entry.

7. However, the Hungarian legislature recognizes that severe exploitative harm frequently occurs below classic dominance thresholds, particularly within vertically imbalanced supply chains. These are discussed below in section 3.

3. Legal instruments to address exploitative conduct

8. The principal framework for addressing exploitative conduct in Hungary is competition law, enforced by the GVH. In addition, certain forms of exploitative conduct are addressed through sector-specific regulatory regimes and special statutory provisions.

9. In the energy sector, the Hungarian Energy and Public Utility Regulatory Authority (MEKH) may initiate significant market power proceedings where competition is hindered.[2] It may impose obligations designed to promote effective competition, including transparency requirements, price caps, cost-based pricing, mandatory offers, and non-discriminatory contractual conditions.[3]

10. In the telecommunications sector, the National Media and Infocommunications Authority (NMHH) may impose ex ante obligations on operators with significant market power in wholesale markets.[4] These obligations include cost-oriented pricing, price regulation, cost-accounting requirements, and equal treatment obligations, ensuring that equivalent services and information are provided to third parties on the same terms as to the operator's own downstream businesses.

11. In the retail sector, exploitative conduct may also be addressed under the Act on Trade[5], which is enforced by the GVH in relation to non-food retail suppliers. The Act on Trade prohibits the abuse of significant market power vis-à-vis suppliers and specifically targets practices such as unjustified discrimination, unfair allocation of business risks, unilateral modification of contractual terms, restrictions on suppliers' commercial freedom, unjustified fees, coercive contractual practices, and below-cost resale in certain circumstances. The GVH may impose fines and behavioral remedies.

[2] Act XL of 2008 - on Natural Gas, Act LXXXVI of 2007 - on Electric Energy

[3] As a result of the integration of specific balancing markets into a wider cross-border framework, the national significant market power regime previously applicable to those markets was phased out in October 2026.

[4] Act C of 2003 - on Electronic Communications

[5] Act CLXIV of 2005 - on Trade

12. For food retail suppliers, a similar regime exists and is enforced by the National Food Chain Safety Office (NÉBIH). The rules prohibit unfair trading practices and the abuse of retailers' bargaining power in supplier relationships.[6]

13. Overall, competition law remains the most important and broadly applicable framework for addressing exploitative conduct. Sector-specific regulation complements it in markets where structural market power concerns are particularly significant. The sectoral regulators must co-operate with the GVH regarding their proceedings.

4. Choice of instruments in case of overlapping legal frameworks

14. The choice of legal instrument is generally not a matter of enforcement discretion but is instead determined by the statutory allocation of jurisdiction and the specific regulatory framework applicable to the conduct concerned.

15. Where the alleged conduct falls within the scope of a sector-specific regime, the authority designated by the relevant legislation will normally have competence to act. Competition law generally applies where the conduct falls within the scope of the Hungarian Competition Act, while sector-specific legislation applies where the legislature has established a dedicated regulatory framework and assigned enforcement powers to a specific authority. At the same time, sector-specific regulation does not necessarily exclude the application of competition law. The sectoral legislation governing significant market power proceedings expressly provides that such proceedings do not affect the statutory competences of the GVH. Accordingly, the allocation of regulatory powers to sectoral authorities does not deprive the GVH of its competition law jurisdiction where the conditions for intervention under the Competition Act are met. Rather, the different regimes coexist, with each authority exercising the powers conferred upon it by the applicable legislation.

16. As a result, overlaps are generally resolved through the statutory allocation of competences rather than through a policy choice between competition law and sectoral regulation.

5. Challenges to address exploitative abuses

17. The Hungarian case law on exploitative abuses is predominantly composed of price-related cases. As a result, Hungary's practical experience regarding exploitative abuses, and the associated evidentiary challenges, relates primarily to excessive pricing assessments, including the determination of competitive benchmarks, the verification of costs and profitability, and the distinction between lawful market power and unlawful exploitation.

18. The principal legal, evidentiary and institutional challenges in addressing exploitative abuses under Hungarian competition law arise from the difficulty of distinguishing lawful market power from unlawful exploitation and from the complexity of establishing a reliable benchmark against which the conduct can be assessed.

19. The first challenge is proving dominance and abuse simultaneously. To establish an exploitative abuse, it is necessary to prove that the undertaking holds a dominant

[6] Act XCV of 2009 - on the Prohibition of Unfair Trading Practices Applied Against Suppliers Relative to the Marketing of Agricultural and Food Products

position. The means and evidentiary difficulties of establishing a dominant position in Hungarian competition law has been discussed in depth in the GVH's previous OECD contribution regarding dominance.[7] However, establishing dominance is not sufficient. In case of price related infringements, the dominant firm's prices will naturally tend to be higher than those that would prevail under effective competition. To demonstrate an abuse, the authority must therefore satisfy a higher evidentiary standard and show a materially greater deviation from the competitive benchmark than what is required merely to establish dominance. Consequently, exploitative abuse cases are among the most demanding abuse of dominance cases.

20. A second challenge concerns the identification of the competitive benchmark, particularly in excessive pricing cases. As noted by the GVH in its previous OECD contribution on excessive pricing,[8] different methods may be used to estimate the competitive price, including cost-based approaches, profitability analysis and various forms of price comparison. However, each method presents methodological difficulties and may produce different results. The GVH has therefore stressed that excessive pricing enforcement should be applied with caution and should not evolve into a form of permanent price regulation.

21. Where a comparative approach is used, Hungarian practice recognizes several important limitations. The benchmark may be based on prices applied:

- in another geographic market during the same period; or
- in the same geographic market during a previous period.

22. However, comparison with prices in another geographic market may be unreliable because cost structures can differ significantly between locations. Differences in wage levels, taxes, infrastructure requirements or geographical conditions may justify price differences. Moreover, the compared undertaking itself may enjoy market power, meaning that its prices cannot automatically be treated as competitive benchmarks.[9] Similarly, comparisons with historical prices require the authority to accurately assess how costs changed between the relevant periods.

23. A further evidentiary challenge is the verification of costs and profitability. This is particularly difficult where an undertaking carries out multiple activities and common overhead costs must be allocated among different products or services. In such circumstances, there may be no objectively determinable and legally enforceable competition-law method for allocating indirect costs.[10]

24. Another challenge concerns the interaction between competition law and sectoral regulation. As mentioned above according to Hungarian decisional practice, the mere existence of a regulatory framework does not automatically exclude competition law enforcement. The decisive question is whether legislation or a regulatory decision leaves

[7] Contribution by Hungary on Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power – DAF/COMP/WP3/WD(2006)37

[8] Contribution by Hungary on Excessive Pricing - DAF/COMP/WP2/WD(2011)62

[9] These issues were highlighted, for example, in case VJ/43/2012 regarding the exploitative abuse of consumers by a regional water company.

[10] This issue arose in case VJ/2/2006, where the GVH terminated the proceeding because a significant share of the undertaking's, a cable television provider, revenue was generated outside the activity under investigation and there was no clear competition-law basis for allocating common costs among the various activities.

any room for the undertaking's independent commercial decision-making. Where regulation influences conduct but leaves discretion to the undertaking, for example regarding the specific level of prices, competition law may still apply.[11] Similarly, the fact that contractual terms or tariffs are notified to, or approved by, a sectoral regulator does not in itself preclude competition law scrutiny. By contrast, the application of a legally mandated price may substantially limit the scope for competition law intervention.

25. Finally, excessive pricing cases often involve complex questions regarding profits and returns. Hungarian case law indicates that it may be sufficient for the authority to demonstrate that the profit earned by the dominant undertaking exceeds normal industry profitability or that the price contains a profit margin exceeding that observed in benchmark prices. The burden then shifts to the undertaking to demonstrate that the higher profitability results from efficiency gains rather than exploitation. In the absence of convincing evidence, calculations and supporting data, the price may be regarded as excessive and unfair.[12]

26. Overall, the principal challenges are: (i) establishing both dominance and a sufficiently serious form of exploitation; (ii) identifying an appropriate competitive benchmark; (iii) verifying costs and profitability, particularly in diversified businesses; (iv) delineating the respective roles of competition law and sectoral regulation; and (v) avoiding the transformation of competition law enforcement into a system of de facto price regulation. These evidentiary burdens are reflected in Hungarian practice, where findings of exploitative abuse have largely been confined to cases involving undertakings with market shares approaching 100 per cent, such as cable television operators, cemetery operators and public utility providers. This demonstrates the difficulty of applying exploitative abuse rules in markets where dominance itself is less clear-cut.

27. A notable feature of Hungarian enforcement is that exploitative abuse proceedings have often been concluded through commitment decisions rather than infringement findings.

28. This has been particularly visible in the banking sector. In several cases concerning significant increases in prepayment and early repayment fees imposed by major banks, the GVH expressed concerns that the fee increases could have both exploitative effects on existing customers and exclusionary effects by raising switching costs and discouraging customers from refinancing with competing lenders. However, instead of adopting infringement decisions, the proceedings were concluded through commitments offered by the undertakings.[13]

[11] Case VJ/100/2002 confirmed that competition law remains applicable where a regulated undertaking retains discretion over its pricing. Although the investigated telecommunications company operated in a regulated sector, it autonomously determined its interconnection charges for business subscribers through commercial agreements.

[12] This approach was confirmed in VJ/93/2003 in which the price increase of a regional cable television company was investigated.

[13] In VJ/12/2006, concerning an increase of prepayment fees for personal loans, the bank undertook to improve customer information, extend notice periods, provide individualized notification and partially refund the revenues generated by the increase. Similarly, in VJ/41/2006, concerning mortgage loan products, a bank committed to reimburse affected customers for part of the additional charges resulting from modified fee structures. Comparable approaches were adopted in VJ/63/2008, VJ/181/2007 and VJ/16/2008 all of which were cases regarding unilateral increase of banking fees and were closed with commitments rather than findings of abuse.

29. These cases illustrate that the complexity of proving dominance, establishing an appropriate benchmark, quantifying exploitative effects and defining an appropriate remedy often makes commitments an attractive enforcement tool. From an institutional perspective, commitment decisions may provide a more efficient means of restoring competitive conditions and addressing consumer harm than lengthy proceedings requiring the authority to establish excessive or unfair pricing to the high evidentiary standard applicable in abuse of dominance cases.

6. Theories of Harm

30. Based on the established case law of the GVH, several distinct theories of harm have been applied depending on the nature of conduct in exploitative abuse cases.

6.1. Excessive pricing

31. While excessive pricing cases have become relatively rare in the GVH's recent enforcement practice, the GVH has developed a framework centred on cost and profitability analysis to assess whether dominant firms charged prices that were unfairly high in relation to the economic value of the service provided.[14] In certain cases, consumers paid a higher price for the service of the dominant undertaking than the price that could have emerged in a competitive market.[15] In other cases, consumers paid a higher price for a service which, in addition to being excessive, had a lower technical content than other comparable services with a higher technical standard,[16] in addition to consumers, trading partners of the dominant undertaking may also be adversely affected by excessive pricing.[17]

32. As noted in section 5, benchmark analyses constituted an important tool in GVH's excessive pricing cases. Depending on the availability of suitable comparators, the GVH relied on comparisons with prices charged by other providers, prices in other geographic areas, regulated prices, or historical prices.

33. In one case GVH as the first step determined the **adjusted net fee**.[18] The TV programme costs of the dominant undertaking were separated from the subscription fee, as they were an objective, externally determined cost element. The second step was the application of an inflation benchmark. Any increase in the adjusted net fee exceeding inflation needs to be specifically justified.

34. In another case, when determining excessive prices, the GVH carried out a comparative analysis of prices and quality. In the geographic area affected by the infringement, GVH compared the prices of the service provided by the dominant undertaking with the prices applied by the same undertaking in other geographic areas. In addition, the benchmarking also extended to the prices of services provided by other undertakings offering similar services.[19]

[14] VJ/175/1998

[15] VJ/5/2005, VJ/43/2013, VJ/99/2011.

[16] VJ/15/2015

[17] VJ/97/2011

[18] VJ/5/2005

[19] VJ/15/2015

35. In the GVH's practice, there are cases in which it was not possible to apply the benchmarking, given that the service provided by the dominant undertaking had no substitute on the market[20] or the benchmarking does not provide a satisfactory answer due to the specific characteristics of the market.[21] In such cases, the GVH carried out an assessment of pricing based on cost analysis.[22] In the course of this assessment, the benchmark consisted of economically justified costs and the level of profit considered "fair", calculated on the basis of a return proportionate to the risks typically associated with the investment in the given profession or sector. This analysis was based on the undertaking's accounting separation statements.[23] In another case, the GVH also carried out a cost analysis, during which it examined those work processes that justifiably formed part of the service concerned by the investigation, as well as those that did not. Following this, the justified costs were assessed. During this assessment, the costs of undertakings carrying out similar activities but operating in other (geographic) markets were also considered as a reference point.[24]

6.2. Unfair Trading Conditions

36. According to GVH's practice, the application of unfair trading conditions by a dominant undertaking may constitute an abuse of dominance under Section 21 of the Competition Act. The fairness of the condition should be assessed from the perspective of the party contracting with the dominant undertaking considering the nature and extent of the disadvantage imposed on that party. In particular, the undertaking's market power may enable it to impose conditions that would be difficult to enforce without the dominance on the market. In establishing the harm, the GVH usually examines the bargaining power or the competitors, information asymmetry, and the restriction of consumers' effective choice options etc.

37. In the GVH's practice, there are cases in which the GVH established the infringement based on a unilateral modification of the contract by the dominant undertaking without consulting consumers.[25] A contractual clause may also constitute an abuse of dominance where it is not agreed upon by the contracting parties but is determined solely by the dominant undertaking, provided that it confers an unjustified advantage on the dominant undertaking.[26] In other cases, the dominant undertaking passed on the costs and administrative burdens associated with the amendment of the contract to consumers which constituted as unfair trading condition.[27]

[20] For instance: VJ/43/2013

[21] In Hungary, drinking water service providers collectively cover the entire territory of the country, while only one water service provider is available in each municipality. The selection of an appropriate benchmark is significantly complicated by the fact that it would essentially require comparing the prices and costs of undertakings that do not compete with one another.

[22] For instance: VJ/43/2013

[23] VJ/57/2013

[24] VJ/42/2013

[25] VJ/50/2004

[26] VJ/66/2004

[27] VJ/106/2000

38. When assessing the application of unfair trading conditions, and in particular unilateral contract modifications, the GVH considered those circumstances that confer an unjustified economic advantage on the dominant undertaking while causing an economic disadvantage to consumers.[28]

6.3. Unfair trading conditions imposed by retailers possessing significant market power

39. In proceedings conducted under the Act on Trade a condition is considered unjustified where the supplier had no opportunity to negotiate its terms, including in relation to the determination of a retrospective rebate. The rebate in question qualified as a distribution condition; however, it did not serve any sales-promoting function, as its rate remained unchanged even in the event of an increase in sales volume.[29]

40. In another case[30] the GVH likewise found an abuse of significant market power in relation to a similar retrospective fee.[31] In both cases, GVH examined the contracts concluded between the undertaking possessing significant market power and its suppliers, as well as the conditions governing the payment of the fee.

7. Remedies

41. In the practice of GVH, commitments accepted in cases concerning exploitative abuse of a dominant position have generally been behavioral rather than structural in nature. Under the Competition Act, the legal instrument of commitments provides the competition authority with a flexible means of intervention for bringing proceedings to an end. While the commitments are offered voluntarily by the undertaking concerned, they become legally binding on that undertaking by virtue of the decision of the competition authority. An important feature of this legal instrument is that it does not entail the finding of infringement. Instead, it enables the competition concerns identified during the proceedings to be addressed through legally binding commitments offered by the undertaking concerned.

42. When assessing whether commitments are appropriate, the GVH examines whether the proposed measures are capable of effectively addressing the identified competition concerns and protecting the public interest in a proportionate manner.

43. A relevant example is a case, in which the GVH examined the method and level of private copying levies in light of a suspected abuse of a dominant position.[32] In assessing the competition concerns raised in the case, relevant considerations included the criteria underlying the determination of the levies, the relationship between the levies and the royalties payable, and how the levies applied in Hungary compared with those in other

[28] VJ/106/2000

[29] VJ/47/2010, VJ/43/2016

[30] VJ/60/2012

[31] The amount of the fee did not depend on the volume of subsequent sales; it remained at the individually determined percentage rate throughout, meaning that the supplier was required to pay it whenever the undertaking possessing significant market power generated sales from the supplier's products.

[32] VJ/15/2014.

countries. The conditions of the discount scheme were also examined, their potential impact on access to discounts for people liable to pay the levies. The case thus raised competition concerns relating to the methodology used to determine the levies, the justification for their level, and the conditions imposed on levy payers.

44. Another practical example is a case in which the GVH examined the possibility of an abuse of a dominant position in a defined geographic area.[33] The proceedings concerned suspected unfair pricing, as the undertaking concerned offered lower-quality internet services at higher subscription fees than in other parts of the country, while a significant number of the municipalities concerned lacked infrastructure-based competitors.

45. The assessment of the competition concerns therefore considered not only the relationship between price and service quality, but also local market conditions, the lack of infrastructure-based competition, and the alternatives available to consumers. These circumstances were relevant to identifying the underlying competition problem, namely the lack of sufficient competitive pressure, and thus to considering measures aimed at improving competitive conditions rather than addressing prices in isolation.

46. In the practice of the GVH, remedies in exploitative abuse cases have generally focused on correcting the underlying source of the competition concern rather than directly regulating prices. Depending on the circumstances of the case, they have addressed both price and non-price parameters of competition, including contractual terms, service quality, consumer information, pricing methodologies and access to alternative services.

47. A central element of the commitments in the case mentioned in paragraph 43. was the introduction of a more robust methodology for determining the private copying levy. Rather than mandating a reduction in the levy itself, the commitments required the use of a representative consumer survey, economic analysis, assessment of changes in consumption patterns, and periodic review of obsolete and emerging storage technologies. The underlying objective was to improve the evidentiary basis of the tariff-setting process and ensure that levy levels more closely reflected actual consumer behavior and market developments.

48. Another important element of the remedy was to enable consumers to claim reimbursement of the private copying levy, together with related consumer information measures. The collective rights management organizations were required to establish rules for handling reimbursement claims, provide information to consumers, and establish a dedicated website and communication campaign.

49. The case demonstrates that, in exploitative abuse proceedings, remedies may focus on improving the decision-making framework that generates prices or fees rather than directly prescribing the outcome of that process.

50. In the case mentioned in paragraph 44., the undertaking concerned, among other things, committed to developing its network in specified municipalities. It also undertook providing the consumers concerned with a specified level of service and pricing, and aligning its prices with nationwide promotional prices or, in the absence of such promotional prices, with the prices applied in the respective areas. A further consumer protection element of the remedy was that consumers bound by a fixed-term contract could, under certain circumstances, switch to the new network without incurring additional costs. This case illustrates that exploitative concerns arising from sustained local market power may sometimes be addressed more effectively through measures increasing service quality and competitive pressure than through direct intervention in pricing.

[33] VJ/15/2015.

51. Overall, Hungarian practice suggests three main lessons regarding remedies in exploitative abuse cases. First, behavioral commitments are often preferred to direct price regulation. Second, effective remedies may target the methodology, transparency and governance processes underlying pricing decisions rather than the price level itself. Third, ongoing monitoring is essential, as the effectiveness and necessity of commitments may evolve over time in response to changing market conditions.