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Competition in the Circular Economy – Note by Hungary

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/competition-in-the-circular-economy.htm>

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1. This contribution analyses the interplay between circular economy objectives and competition law by giving an overview into Hungary's circular economy, the most recent developments, the national competition law framework and relevant sectoral legislation.

1. Background

2. This section discusses Hungary's country profile in terms of circular economy and provides an introduction into the latest developments in this regard.

1.1. Hungary's circular economy at a glance

3. In 2023, the OECD published a report on the circular economy of Hungary, which summarizes some of the key elements of the future Hungarian National Circular Economy Strategy and Action Plan. The report highlights that Hungary has made notable progress in achieving circular economy objectives. However, despite these positive trends, several challenges remain.¹

4. It is outlined in this regard that economic growth and increasing consumption will drive Hungary's demand for raw materials, which is expected to generate negative environmental impacts.² This is precisely why it is of crucial importance, according to the OECD, to identify circular economy opportunities that are deemed critical to the Hungarian circular economy transition. These are identified as follows: (i) biomass and food, (ii) construction, and (iii) plastics with a special emphasis on design, production, (re)use, and end-of-life stages.³

5. As regards biomass and food, it is highlighted that "the value added in Hungary's agricultural sector already outperforms that of the rest of the EU, while the industrial processing and distribution of food products, beverages and tobacco represents the third largest sector of Hungary's economy. However, the current policy framework does not sufficiently encourage circular approaches."⁴

6. With regards to construction, it is pointed out that "the construction sector offers a large untapped opportunity for Hungary's transition to a circular economy. More than half of all raw materials consumed by the Hungarian economy were used within built environment, while construction is also responsible for about one-third of Hungary's waste generation. Nevertheless, the current Hungarian construction policy framework has a

¹ OECD publication, Towards a National Circular Economy Strategy for Hungary, 2023, page 3 https://www.oecd.org/env/waste/Highlights-Towards-a-National-Circular-Economy-Strategy-for-Hungary_EN.pdf

² *Ibid*, pages 4-6

³ *Ibid*, page 7

⁴ *Ibid*, page 10

strong focus on the end-of-life phase, while measures are missing upstream in the value chain.”⁵

7. As for plastics, they have “a high strategic importance for Hungary, as well as a significant circularity potential. They provide a key input to several sectors in Hungary’s economy, most importantly regarding packaging, construction and transportation. While plastic packaging currently makes up one-quarter of total packaging used in Hungary, only about one-third of plastic packaging waste is recycled.”⁶

8. The analysis concludes that Hungary has the potential to become a more competitive and sustainable economy if it puts greater emphasis on integrating circularity into its production and consumption patterns as well as its waste management. Education and digital technologies will also be critical to create green jobs and resource-efficient value chains.⁷

1.2. Most recent developments

9. In March 2023, the Circular Economy Technology Platform was developed in Hungary in order to accelerate the circular economy transition by enhancing cooperation between companies, academic groups, civil interest groups as well as governmental organisations.

10. The platform was established with the aim to bring together the representatives of those sectors that may have relevant knowledge regarding circular economy objectives, regardless, whether this “know-how” can be attributed to undertakings, governmental or non-governmental actors. This is why the members of the platform include undertakings from various sectors (such as construction, telecommunication, energy, agriculture), governmental institutions (e.g. National Research, Development and Innovation Office) and several interest groups (e.g. Hungarian Chamber of Commerce and Industry).⁸

2. Competition law framework

11. This section discusses the role of circular economy within the Hungarian competition law framework on the basis of the Hungarian Competition Act, the findings of relevant accelerated sector inquiries, some market analyses and that of a case study.

2.1. Hungarian Competition Act

12. While the Hungarian Competition Act⁹ does not explicitly include a reference to circular economy, it nevertheless provides a rather flexible framework for such an

⁵ *Ibid*, page 12

⁶ *Ibid*, page 14

⁷ *Ibid*, page 9

⁸ For a more detailed English description, please visit the website of the National Research, Development and Innovation Office: <https://nkfih.gov.hu/english/online/we-are-among-the-leaders>

⁹ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Hungarian Competition Act)

interpretation through its provisions. This flexibility is provided by broad exemption clauses, which may allow for circular economy considerations, such as the notions of

1. “protection of the environment” in case of anti-competitive agreements, and
2. “public interest” with regard to merger control.

13. An agreement that is proven, among other factors, to contribute to the “protection of the environment” is exempted from the general prohibition of anti-competitive agreements since 1996. The Hungarian Competition Act provides that “An agreement is exempted from the prohibition pursuant to Article 11 provided that (a) it contributes to a more reasonable organisation of production or distribution, the promotion of technical or economic progress, or the improvement of competitiveness or of the *protection of the environment*; (b) it allows trading parties not participating in the agreement a fair share of the resulting benefit; (c) the concomitant restriction or exclusion of competition does not exceed the extent necessary to attain economically justified common goals; and (d) it does not enable the exclusion of competition in respect of a substantial proportion of the goods concerned.”¹⁰

14. A merger that is declared to be of “public interest” by the Hungarian Government does not need to be notified to the competition authority and is, thus, exempted from the merger review proceedings. The Hungarian Competition Act states that “The Government may, in the *public interest*, in particular to preserve jobs and to assure the security of supply, declare a concentration of undertakings to be of strategic importance at the national level. Such concentrations shall not be subject to notification to the Hungarian Competition Authority.”¹¹

15. As can be seen from both examples, Hungarian competition law does not directly allow circular economy objectives to be considered. First of all, the concept of circular economy is linked only to two areas of competition law: anti-competitive agreements and mergers. Second, even in these areas, this link is an indirect one. Circular economy considerations may be taken into account only through environmental protection and public interest exemptions when analysing cases. However, since both of these concepts are rather broad, they may touch upon any competition law-related issues that can be brought in connection with the circular economy.

16. This means in practice that an agreement may not be regarded as anti-competitive when it is proven, among other factors, to “protect the environment” by contributing to cycling back waste into the economy after the end of the product’s life cycle for instance. Similarly, a merger may be excluded from merger control if it is declared to be of “public interest” on the grounds of integrating those production methods that make it possible to stretch the lifetime of a product and extend its future use for example.

2.2. Accelerated sector inquiries

17. Competition law issues regarding the circular economy may also be brought in connection with relevant accelerated sector inquiries conducted by the Hungarian Competition Authority.

18. As a first remark, it should be noted that accelerated sector inquiries have to be distinguished from sector inquiries. The possibility to conduct accelerated sector inquiries

¹⁰ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, Article 17

¹¹ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, Article 24/A

was introduced in 2021 into the Hungarian legal system and provides a new mechanism for the Hungarian Competition Authority. It makes possible for the competition authority to carry out investigations in cases when the specificities of a sector deems it necessary and urgent action is required to identify and address market problems.¹² However, the objective of an accelerated sector inquiry is the same as that of sector inquiries that are commonly used in the competition policy of the EU¹³ as well as in several national jurisdictions, the Hungarian one included: to gain a reliable overview into the conditions of a certain sector (energy, media, construction, agriculture etc.) if competition is likely to be restricted or distorted in the market concerned.¹⁴

19. In 2022, the Hungarian Competition Authority launched an accelerated sector inquiry into the Hungarian market of insulation materials. The findings of the inquiry revealed that the undertakings in the sector concerned take sustainability considerations into account but there is room for improvement. Therefore, the competition authority suggested, *inter alia*, that manufacturers should pay more attention to integrate waste into their production systems in order to achieve circularity and to reduce costs at the earliest stages of the supply chain.¹⁵ Although circular economy objectives are not directly linked to competition law in the report, they can nevertheless be brought in connection with each other. Since the competition authority highlights the importance of circularity regarding using waste as a resource in terms of producing insulation materials, this can have a strong relevance for undertakings active in the insulation sector and more broadly for all those undertakings that are represented in the construction sector. This could also mean that an agreement or a merger that achieves the objective of integrating waste into a production system may be exempted from the prohibitions laid down in the Hungarian Competition Act through the “protection of the environment” exemption clause (in case of anti-competitive agreements) or through the “public interest” exception (in case of mergers), provided that all other required conditions are fulfilled in both cases.

20. Another example concerns the accelerated sector inquiry conducted on the wood market, which is also connected closely to the construction sector. This accelerated sector inquiry was launched in 2022 and targeted the Hungarian market of construction wood materials.¹⁶ The findings of the inquiry revealed that wood is an important natural resource, which can only be extracted in alignment with strict quantitative limits and under the supervision of public authorities in order to ensure sustainability and to prevent the exploitation of this resource. Therefore, it was found that supply and demand may be in conflict with each other when it comes to wood materials since immediate demand from

¹² Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, Section 43/D, Section 1a

¹³ See: official website of the European Commission https://competition-policy.ec.europa.eu/antitrust/sector-inquiries_en

¹⁴ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, Article 43/D, Section 1

¹⁵ Report on the Accelerated Sector Inquiry on the Hungarian Market of Insulation Materials, 2022. https://www.gvh.hu/pfile/file?path=/dontesek/agazati_vizsgalatok_piacelemzesek/agazati_vizsgalatok/Vegleges_jelentes_a_hozigetelo_anyagok_hazai_piacan_lefolytatott_gyorsított_agazati_vizsgalatrol_220826.pdf1&inline=true

¹⁶ Report on the Accelerated Sector Inquiry on the Hungarian Market of Construction Wood Materials, 2022. https://www.gvh.hu/pfile/file?path=/dontesek/agazati_vizsgalatok_piacelemzesek/agazati_vizsgalatok/Fa_epitoanyagok_gyorsított_agazati_vizsgalat_vegleges_jelentes_220112.pdf1&inline=true

any sector (whether construction or any other) may not be satisfied due to the above-mentioned restraints. All this could mean – when taking into account circular economy considerations – is that an agreement or a merger that restricts the excessive extraction of wood materials, for instance, may be brought into a different light from a competition law perspective since the agreement may be cleared on the basis of “environmental protection” and the merger may not need to be notified on the basis of “public interest,” provided of course that all other requirements are met in both cases.

2.3. Market analyses

21. Market analyses can also contribute to integrating competition law issues with circular economy objectives.

22. In 2022, the Hungarian Competition Authority launched a market analysis in connection with “green advertising” in order to find out any potential contradictions that may exist between what is indicated by green advertising messages and the way they are actually perceived by consumers. The results of the analysis show that undertakings tend to communicate sustainability in a very broad and unsystematic way. While concepts, such as “green,” “environmentally friendly” are commonly used in the marketing of companies as well as through their “green” logos, they are seldom backed up by evidence or even if they are justified to some extent, they are done in an unspecific and indirect way.^{17 18}

23. Although circularity and competition law were not directly brought in connection with each other by the market study, its findings may nevertheless contribute to establishing a link between the two for the following reasons. Identifying those areas, where sustainability concepts (such as “green,” “environmentally friendly,” “sustainable” etc.) have been abused in the past, may draw attention to potential dangers in the context of circular economy as well when it comes to analysing competition law abuses and clearing them on the basis of circular economy considerations. The findings, therefore, may contribute to raising an awareness to all those potential dangers that may be used to exploit and unnecessarily broaden the interpretation of those exemption clauses in the Hungarian Competition Act that can be brought in connection with circular economy objectives. In particular, the “protection of the environment” exemption in case of anti-competitive agreements and the “public interest” exception regarding mergers.

24. These challenges are illustrated by a case below from the year of 2015.

2.4. Case study

25. A notable case that relates to the “protection of the environment” exemption concerns the waste management of batteries. The Hungarian Competition Authority found that four undertakings active in the battery sector, namely, ENERGIZER Magyarország, Procter&Gamble Magyarország, Spectrum Brands Hungaria and ENERGIZER Group Polska infringed the relevant provisions of the Hungarian Competition Act as well as

¹⁷ See: Official Website of the Hungarian Competition Authority https://www.gvh.hu/en/press_room/press_releases/press-releases-2023/green-advertising-messages-are-often-confusing---the-gvh-draws-attention-to-this

¹⁸ In 2022, another market study was launched with the same objectives as that of green advertising, which shows the high relevance of circular economy objectives. The findings of the study are expected to be published in July 2023.

Article 101 (a) and (c) of the Treaty on the Function of the European Union (TFEU) by coordinating their practises for a period of 10 years through price fixing and market sharing.

26. The anti-competitive practice concerned the coordinated practises of the undertakings in order to levy the waste management fees of batteries on consumers. The producers argued that the coordination between them was in furtherance of environmental protection, which defence, however, was found unsubstantiated by the Hungarian Competition Authority since no evidence was provided by the undertakings to justify the exemption: they merely referred to the exemption clause without providing any evidence in that regard. Nevertheless, since the undertakings concerned acknowledged the infringement by submitting a leniency application and by providing the required supporting evidence, the competition authority significantly reduced the amount of the fines that it could have lawfully imposed.¹⁹

3. Sectoral legislation

27. Sectoral legislation can provide additional inputs for bringing circular economy considerations in connection with competition law-related issues. Sectoral legislative acts can be especially useful for providing a sector-specific understanding in all those issues that may relate to the circular economy, and for providing a broader basis for interpreting those two exemption clauses in the Hungarian Competition Act, which can be brought in connection with circular economy objectives, that is, the “protection of the environment” exemption in case of anti-competitive practises and the “public interest” exception in case of mergers.

3.1. Circular economy = end-of-life cycle (waste management only)

28. The concept of circularity in sectoral legislative acts has changed a lot since the first legislations on environmental and sustainability-related issues. In the past, circular economy was brought almost exclusively in connection with waste management, that is, in connection with the end-of-life cycle of products and materials, which is also represented by the objectives of such legislations in the past.

29. The first legislation on waste management (from the year of 2000) focuses on the “reduce, reuse, recycle” principle (for example, by mitigating environmental impacts and reducing the quantity and the hazardousness of waste) and sets sustainability as the main objective. Circular economy has a rather small role to play since circularity is not stated as an achievable goal of the legislative act but is used only in one context, namely, in balancing supply and demand.²⁰

30. By contrast, the most recent legislation on waste (from the year of 2012) has a much broader scope. Achieving the circular economy transition is set there as one of the core priorities. Moreover, it is brought in connection with reducing the impact of the use of

¹⁹ Case No. Vj/43/2015. For the Hungarian version of the case, see:

https://www.gvh.hu/pfile/file?path=/dontesek/versenyhivatali_dontesek/versenyhivatali_dontesek/dontesek_2015/Vj043_2015_m&inline=true

For the English summary of the case, see: https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the_gvh_imposes_fines_on_battery_producers_for_th

²⁰ Act XLIII of 2000 on Waste Management, Article 1

resources, improving the efficiency of the use of resources, enhancing competitiveness in the long term, and extending circular economy considerations to the whole value chain of supply and demand.²¹ As can be seen, there is huge change in terms of making circular economy a priority and also in establishing a link between circular economy and competitiveness, which is also reflected by the latest legislative developments.

3.2. Circular economy = whole life cycle (from production to waste management)

31. In 2021, another major shift has taken place regarding sectoral legislation on circular economy. In order to comply with EU objectives on the circular economy action plan, Hungary introduced amendments to existing legislative acts of different sectors.²² The amendments can be regarded as a milestone regarding circular economy objectives since they no longer focus exclusively on waste management when it comes to circularity (as opposed to previous legislations) but extend circularity to the whole life cycle of a product – including product design, manufacturing, supply and distribution.

32. Most notably, the concept of circular economy was included in the consumer protection act²³ by extending the responsibility of manufacturers and consumers to prevent the production of waste through production, sales, consumption, disposal and recycling.²⁴ Another novelty is that as of 1 July 2023 the system of extended producer responsibility is going to be introduced regarding certain products (the so-called “circular products”) that include the following: packaging, single-use and other plastic products, electrical and electronic equipment, (re-chargeable) batteries, vehicles, tyres, office paper, advertisement paper, cooking oil and fat, textile products, wooden furniture.²⁵ The aim of the legislation is to place a special emphasis on producers by making them financially responsible for the whole life cycle of the so-called “circular products.”

33. Circular economy objectives were broadened regarding the end-of-life cycle of products as well. The term “circular economy” was introduced in connection with environmental protection²⁶ in the context of waste management²⁷ and many novel amendments were added to the legislation on waste itself. The first amendment introduced the concept of social undertaking,²⁸ which is defined as an undertaking employing disadvantaged or disabled people in alignment with the objectives of the circular

²¹ Act CLXXXV of 2012 on Waste, preamble

²² Act II of 2021 on the Amendment of Certain Energy- and Waste-related Acts

²³ Act CLV of 1997 on Consumer Protection, Article 16, Sections 5 and 6

²⁴ Act II of 2021 on the Amendment of Certain Energy- and Waste-related Acts, Article 5, Section 1

²⁵ Decree No. 80 of 2023 (III. 14.) of the Government on the Rules of Extended Producer Responsibility, Appendix No. 1

²⁶ Act LIII of 1995 on the General Rules of Environmental Protection, Article 3, Section 1, Point m

²⁷ Act II of 2021 on the Amendment of Certain Energy- and Waste-related Acts, Article 4, Section 5

²⁸ Act II of 2021 on the Amendment of Certain Energy- and Waste-related Acts, Article 29, Section 16

economy.²⁹ Another amendment³⁰ concerns extending circular economy considerations to preserving natural resources by putting a special emphasis on keeping products longer in the value chain.³¹ Circular economy considerations were also added to the legislation on chemical safety³² in connection with the prevention, reduction, and neutralization of hazardous materials and substances.³³

34. What all these mean in the context of competition law is that the range of economic activities that can be brought in alignment with circular objectives has also become much broader. In the past, the “protection of the environment” exemption clause in case of anti-competitive agreements may have only covered waste management, while as of recently, it may include a whole range of economic activities from production to sales. The same is true for the “public interest” exception in case of mergers. While the term public interest may have been restricted to waste management only when it came to circular economy considerations in the past, now it is extended to all those economic activities that concern the whole life-cycle of a product.

4. Challenges

35. Circular economy considerations bring up several challenges when it comes to aligning it with competition law. There is a strong fear that circular economy objectives may go contrary to the very aim of competition law, that is, to prevent the distortion and the restriction of competition in a market concerned. This is illustrated by one of the latest developments in Hungary.

36. Most recently, the MOL Group – a leading Central and Eastern European oil and gas corporation, also active in the chemical industry, headquartered in Budapest, Hungary with operations in over 30 countries³⁴ – received a concession for 35 years on the market of waste management, starting from the 1st of July 2023. The concession is regarded as a huge step towards achieving the circular economy transition since it is going to centralise waste management of several types of wastes by enabling only one undertaking (MOL) to take charge of such activities. Therefore, it is believed that utilising resources and reducing environmental impacts will be achieved at the most efficient way possible, which in turn, also contributes to meeting EU as well as national requirements on circularity.

37. However, even though the concession is considered to be in full alignment with circular economy objectives, several issues remain. The most significant one concerns the market of waste management, out of which a significant share will be concentrated and brought under the supervision of one vertically integrated undertaking to whom the ownership of waste will be also transferred. This, in turn, also means that undertakings that were able to conduct economic activities independently in certain segments of the waste

²⁹ Act CLXXXV of 2012 on Waste, Article 2, Section 1, Point 41a

³⁰ Act II of 2021 on the Amendment of Certain Energy- and Waste-related Acts, Article 30, Section 3

³¹ Act CLXXXV of 2012 on Waste, Article 3, Sections 3 and 4

³² Act XXV of 2000 on Chemical Safety, Chapter III

³³ Act II of 2021 on the Amendment of Certain Energy- and Waste-related Acts, Article 6, Section 1

³⁴ See: official website of the MOL Group, <https://molgroup.info/en/about-mol-group/company-overview>

market will have to operate as third-party service providers of the Concessor (MOL) as of 1 July 2023.