

A Chicago-School Island in the Ordo-liberal Sea? The Hungarian Competition Office's Relaxed Treatment of Abuse of Dominance Cases

by

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Abstract

The paper presents and evaluates the impact of the 'more economic' approach of the Hungarian Competition Office's decisional practice as to predatory pricing, margin squeeze and refusal to deal under Hungarian competition law. It compares the Hungarian practice with the more formalistic approach of the CJEU's jurisprudence. The paper evaluates the Hungarian decisional practice in abuse cases and provides a brief assessment on the consequences of applying diverging standards in EU and national abuse of dominance law.

Résumé

Cet article présente et apprécie l'impact de l'approche plus économique («more economic approach») de l'Autorité hongroise de la concurrence en matière de prix d'éviction, compression des marges et refus de vente en droit hongrois. Il compare

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la pratique hongroise avec l'approche plus formaliste de la jurisprudence de la CJUE. L'article apprécie la pratique hongroise en matière d'abus de position dominante et rend la récapitulation des conséquences de l'application des règles divergentes en droit européen et national en matière d'abus.

Classifications and key words: Article 102 TFEU; dominant position; Hungarian competition law; margin squeeze; predatory pricing; price squeeze; refusal to deal.

I. Introduction

Although the European Commission has endeavoured to infuse the law on the abuse of a dominant position with a 'more economic' approach¹, the CJEU's judicial practice still seems to be dominated by a rather ordoliberal attitude. The enforcement practice of Hungarian competition law clearly differs from this judicial trend. The Hungarian Competition Office (hereafter, HCO) takes a rather relaxed position towards alleged abuse of dominance and has, in fact, imposed no fines between 2007–2010 under Sections 21–22 of the Hungarian Competition Act² (hereafter, HCA), the domestic equivalent of Article 102 TFEU. Combating abuses appears to not have been a priority in Hungarian competition law enforcement. The HCO terminated its proceeding with a commitment order in numerous cases, in other words, the closure occurred in exchange for commitments from the dominant enterprise³.

As a fundamental principle, the HCO has repeatedly stated that although exclusionary practices directly victimise rivals of the dominant undertaking, Hungarian competition law is not meant to shield competitors but to protect competition. This declaration can be found, among other places, in a policy document entitled 'Fundamental principles followed by the HCO concerning the freedom of competition'⁴, which summarizes its enforcement policy. This document clarifies that the purpose of competition law is to protect competition, rather than market operators and competitors, and especially

¹ See e.g. the Guidance on its enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings (hereafter, Guidance on Article 102), OJ [2009] C 45.

² Act LVII of 1996 on unfair market practices and restraints of competition.

³ See C.I. Nagy, 'Commitments as surrogates of civil redress in competition law: the Hungarian perspective' (2012) 33(11) *ECLR*.

⁴ A verseny szabadságával kapcsolatos, a GVH által követett alapelvek (2007), available at http://www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_gvhtanulmanyok_antitrosztpolicy_2007_05.pdf

not specific competitors⁵. It also stresses that exclusionary abuse is not an abuse against actual or potential competitors and direct contracting partners, even if one of them suffers as a result. A given conduct is considered to be abusive from the perspective of final consumers and the general interest criteria⁶.

This paper demonstrates the use by the HCO of a 'more economic' approach in its treatment of predatory pricing, margin squeeze and refusal to deal as well as compares it with the more formalistic approach of the CJEU's jurisprudence. The paper closes with the evaluation of Hungarian decisional practice in abuse cases and a brief assessment on the consequences of applying diverging standards in EU and national abuse of dominance law.

II. Predatory pricing

Predatory pricing has proven one of the most controversial issues in dominant position and monopolisation cases on both sides of the Atlantic⁷. Albeit there are several remarkable divergences between US antitrust and EU competition law, the fact that fundamental differences remain always suggests that the issues at stake are controversial. The treatment of predatory pricing is one of these divergences. Interestingly, Hungarian competition law⁸ is closer to US antitrust in this regard than to the EU legal system. In essence, the prohibition of predatory pricing centres primarily on prices below average variable costs; a legal breach cannot be established if there is no possibility for recoupment. The wording used in the HCO's decisional practice is that no predatory pricing can be established if the market is contestable.

The legal test of predatory pricing centres around five questions⁹:

- relationship between costs and price,
- calculation of costs in case of multi-product firms (how to share the common costs of different products),
- 'recoupment',

⁵ Para. 3.199.

⁶ Para. 3.129.

⁷ For a comparative overview see C.I. Nagy, 'Predatory pricing in Hungary and in Community law' [in:] L. Ficzere, A.E. Kellermann, A. Nikodém (eds), *The perspectives of the legal approximation process in Central and Eastern Europe*, Budapest 2001, p. 147–162.

⁸ On the Hungarian practice on predatory pricing see C.I. Nagy, 'A felfaló ár megítélése a magyar versenyjogban' (2002) 6(3) *Collega*; C.I. Nagy, 'Felfaló árazás Magyarországon és az Európai Unióban' (2000) 10(8) *Versenyfelügyeleti Értesítő* 394.

⁹ On the EU competition law practice on price squeeze see R. Whish, *Competition Law*, Oxford University Press 2009, p. 732–741.

- requirement of anti-competitive foreclosure, and
- objective justification.

A. The relationship between costs and price

Under both EU and Hungarian competition law, two cost concepts have emerged as regards price predation: average total costs (hereafter, ATC) and average variable costs (hereafter, AVC). ATC is the cost element which contains fixed costs (such as: rental fees of premises, management and labour costs, fixed service charges etc.) and variable costs. Average variable costs vary depending on the quantities produced – they are costs incurred by producing one incremental unit (additional costs of raw material, energy etc.).

In the famous *AKZO* judgment¹⁰, the CJEU held that:

‘prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced’¹¹.

The CJEU regarded prices below AVC as automatically predatory, since the undertaking suffers loss with each sale. This approach was later confirmed in *Tetra Pak II*, where the CJEU unequivocally established that:

‘prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking’¹².

In *AKZO*, the CJEU also addressed prices between AVC and ATC, holding that

‘prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive, if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them’¹³.

¹⁰ C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

¹¹ C-62/86 *AKZO Chemie BV v Commission*, para. 71.

¹² C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951, para. 41.

¹³ C-62/86 *AKZO Chemie BV v Commission*, para. 72.

Accordingly, prices between AVC and ATC are not automatically predatory and, hence, are not outright prohibited. It is therefore to be proved that a scrutinised pricing policy was part of a plan that was meant to drive competitors out of the market. Prices above ATC are, as a general rule, not abusive. Still, even prices over ATC can be considered to be predatory in exceptional circumstances¹⁴.

The decisional practice of the HCO primarily uses the concept of direct costs; but the aforementioned classification of expenditures (AVC and ATC) also appears in its decisional practice.

In case Vj-168/2004 *Auchan & Tesco*, the authority held that it is the direct costs that are to be taken into consideration in the predatory pricing test. Direct costs cover all expenditures that are directly related to the sale of the product or provision of the service in question. In this sense, it certainly encompasses variable costs and may cover some, but not all, fixed costs.

The HCO held in this case that it is primarily the direct costs that are to be taken into consideration, while indirect costs are normally to be disregarded. Interestingly, once it was established that the prices were higher than the average direct costs, the HCO 'excluded the presumption of predatory pricing without further inquiry'¹⁵.

The HCO translated the above analysis into AVC and ATC terms also. It used, however, a slightly less interventionist approach than EU jurisprudence. It stated that it is 'very probable' that prices under AVC, if applied permanent in a non-transitory manner, are predatory in nature. Such a conclusion was seen as 'certainly excluded' if the prices were to be higher than ATC. For prices in the region between AVC and ATC, 'additional factors are to be taken into account'¹⁶.

B. Cost tests in respect of multi-product firms

The calculation of relevant costs may be uncertain in the case of a multi-product activity (where certain common fixed costs are shared among different products or services). The Commission applies here the long-run average incremental costs test (hereafter, LRAIC).

¹⁴ See joined cases C-395/96 P and C-396/96 P. *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* [2000] ECR I-01365. On selective price-cutting see R. Whish, *Competition Law*, p. 738-741.

¹⁵ Vj-168/2004 *Auchan & Tesco*, para. 21.

¹⁶ Vj-168/2004 *Auchan & Tesco*, para. 9.

In *Deutsche Post AG*¹⁷, the Commission dealt with an undertaking that held a legal monopoly in one of its markets, while facing competition in another. The authority considered that ‘when establishing whether the incremental costs incurred in providing mail-order parcel services [i.e. the competitive services] are covered, the additional costs of producing that service, incurred solely as a result of providing the service, must be distinguished from the common fixed costs, which are not incurred solely as a result of this service’¹⁸. In order to avoid condemnation, *Deutsche Post AG* was ‘required only to cover the costs attributable to the provision of [the competitive service, meaning that] these operations [were] not burdened with the common fixed cost of providing network capacity that [*Deutsche Post AG*] incur[red] as a result of its statutory universal service obligation’¹⁹. Accordingly, the Commission regarded LRAIC as ‘the additional costs incurred in providing [the new service]’ and took the position that a competition law breach occurs if the incremental revenue, normally the price of the new service, does not cover incremental costs.

In *Wanadoo*²⁰, in margin squeeze case, the Commission confirmed the use of the LRAIC method for the calculation of costs²¹ and gave a definition in this regard:

‘The long run incremental cost of an individual product refers to the product-specific costs associated with the total volume of output of the relevant product. It is the difference between the total costs incurred by the firm when producing all products, including the individual product under analysis, and the total costs of the firm when the output of the individual product is set equal to zero, holding the output of all other products fixed. Such costs include not only all volume sensitive and fixed costs directly attributable to the production of the total volume of output of the product in question but also the increase in the common costs that is attributable to this activity.

Since the long run incremental cost of the individual product also includes the increase in the common costs resulting from the provision of the product in question, the mere fact that one cost is common to different operations does not necessarily imply that the long run incremental cost due to the activity in question is zero for any individual product. One must assess whether such common cost would have been incurred, partially or totally, if the company would have decided not to provide the product in question²².

¹⁷ OJ [2001] L 125/27.

¹⁸ *Deutsche Post* decision, para. 7.

¹⁹ *Deutsche Post* decision, para. 10.

²⁰ Commission decision of 4 July 2007 Case Comp/38.784 – *Wanadoo España vs. Telefónica*.

²¹ *Wanadoo* decision, para. 318.

²² *Wanadoo* decision, paras 319–320.

The above approach is summarized in the European Commission Guidance on Article 102 as follows:

‘A multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

In theory, it would be ideal if the effect of the rebate could be assessed by examining whether the incremental revenue covers the incremental costs for each product in the dominant undertaking’s bundle. (...) [I]n its enforcement practice the Commission will in most situations use the incremental price as a good proxy. If the incremental price that customers pay for each of the dominant undertaking’s products in the bundle remains above the LRAIC of the dominant undertaking from including that product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the incremental price is below the LRAIC²³.

In Hungarian competition law, the HCO seems give more leeway to dominant enterprises by giving them more freedom as to dividing common costs between the various products they associated with. In case Vj-168/2004 *Auchan & Tesco*, the HCO explained that if an undertaking is engaged in different operations, indirect costs cannot be partitioned between these different operations and ‘the undertaking in question can define the principle of division freely²⁴. In case of multi-product undertakings, prices lower than total costs, provided they are higher than average direct costs, do not amount to predatory pricing²⁵.

C. The requirement of recoupment

There is a remarkable difference between EU and Hungarian competition law as to the requirement of recoupment. While recoupment clearly seems not to be a pre-condition under Art. 102 TFEU, predatory pricing can be established under the HCA only if the possibility of recoupment is proved. The HCO has stated in a number of its decisions that predatory pricing cannot be established if the market is contestable²⁶.

²³ *Wanadoo* decision paras 59–60. See Guidance on Article 102, para. 26. The Guidance on Article 102 also gives an explanation on the concept of LRAIC in para. 26. fn 2.

²⁴ Vj-168/2004 *Auchan & Tesco*, para. 15.

²⁵ Vj-168/2004 *Auchan & Tesco*, para. 18.

²⁶ The issue of recoupment has been fiercely debated in EU competition law. See C. Ritter, ‘Does the Law of Predatory Pricing and Cross-subsidisation Need a Radical Rethink?’ (2004) 27(4) *World Competition* 613; M. S. Gal, ‘Below-Cost Price Alignment: Meeting or Beating Competition? The France Télécom Case’ (2007) 28(6) *ECLR* 382, 383; M. Moura e Silva,

In *Tetra Pak II*²⁷, the CJEU held that in order to establish predatory pricing it is not necessary to prove that the dominant undertaking has a real possibility to offset its losses²⁸. Accordingly, recoupment is not a necessary pre-requisite of predatory pricing in EU competition law.

In *Wanadoo*²⁹, the CJEU stressed (while endorsing the *Tetra Pak II* ruling) that the reason behind this approach is that prices below AVC prove predatory intent in themselves. It is thus unnecessary to also prove the possibility of recoupment³⁰. As a result, for prices between AVC and ATC, the issue of recoupment might be a factor in the analysis whether the contested prices are used in the framework of a general strategy to eliminate rivals. This is, however, not yet decided

Contrary to the aforementioned EU jurisprudence and in line with US antitrust law³¹, the requirement of recoupment is part of the Hungarian test on predatory pricing. The HCO repeatedly held that predatory pricing can be established here only if there is a reasonable chance to recoup losses.

In case Vj-159/2003 *MOL and others*, the authority stated that the establishment of predatory pricing presupposes a non-contestable market. If the market is contestable, predatory pricing is excluded by definition.

In cases Vj-94/2000 *Greiner* and Vj-76/1999 *Microsoft Magyarország*, the HCO referred to entry barriers and the perspective of recoupment which were treated as necessary elements of the assessment.

Finally in case Vj-138/2003 *ISOPLUS*, the HCO expressly pointed out that predatory pricing can be established only if there are high entry barriers that thwart re-entry and, thus, recoupment is possible.

'Predatory Pricing Under Article 82 and the Recoupment Test: do not go Gentle into that Good Night' (2009) 30(2) *ECLR* 61; J. Glöckner, Lisa V. Bruttel, 'Predatory Pricing and Recoupment Under EU Competition Law: Per Se Rules, Underlying Assumptions and the Reality: Results of an Experimental Study' (2010) 31(11) *ECLR* 423.

²⁷ C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-05951.

²⁸ C-333/94 P *Tetra Pak II*, para. 44.

²⁹ C-202/07 P *France Télécom SA v Commission* [2009] ECR I-2369, paras 29-38.

³⁰ C-202/07 P *Wanadoo*, para. 110.

³¹ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ('The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. (...) Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers').

D. Anti-competitive foreclosure

The decisional practice of the HCO suggests that allegedly abusive conduct, including predatory pricing, is not subject to an automatic condemnation but the authority intervenes only if that conduct produces negative effects for market competition.

This standpoint is in line with views of the European Commission expressed in Guidance on Article 102 which provides that ‘the Commission will normally intervene under Article 102 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure’³². The Guidance enumerates several factors that are to be taken into account when analysing the existence or non-existence of anti-competitive foreclosure. It refers, among others things, to the position of the dominant undertaking, entry and expansion conditions on the market, the position of the dominant undertaking’s competitors and the extent of the allegedly abusive conduct.

The Guidance seems to make it clear, in the context of predatory pricing, that the analysis of the cost-price relationship is insufficient, in itself, for establishing an abuse, anti-competitive foreclosure has to be investigated also³³. It mentions also, among others, that although recoupment is not a pre-requisite of predatory pricing, it is to be examined with respect as to anti-competitive foreclosure ‘if the undertaking is likely to be in a position to benefit from the sacrifice’ (i.e. losses suffered from the low prices) and ‘can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place’³⁴.

In line with the above, the HCO held in numerous decisions that predatory pricing can be established only if the low-price strategy is applied for a sufficiently long period of time³⁵. It held in case Vj-76/1999 *Microsoft Magyarország* that predatory pricing can be established only if there is a real chance of eliminating one or more competitors. The use of low prices restricted cannot be regarded as predatory if it is limited in terms of time or quantity. All these statements suggest that under Hungarian competition law a conduct, even if involving below-cost sales, can be condemned only if it is capable of eliminating competitors.

³² Guidance on Article 102, para. 20.

³³ Guidance on Article 102, paras 67–68.

³⁴ Guidance on Article 102, paras 70–71.

³⁵ See cases: Vj-168/2004 *Auchan & Tesco*; Vj-159/2003 *MOL and others*; Vj-76/1999 *Microsoft Magyarország*.

E. Objective justification

There is no specific Hungarian decisional practice on objective justification as to predatory pricing. However, it is probable that the HCO would follow the very restrictive approach of the Commission Guidance on Article 102 which provides that ‘in general it is considered unlikely that predatory conduct will create efficiencies. However, (...) the Commission will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale or efficiencies related to expanding the market’³⁶.

III. Refusal to deal

According to Section 21(c) HCA, a situation where an abuse if a dominant enterprise refuses, without objective justification, to establish or maintain a business relationship conformable with the transaction’s characteristics amounts to abuse³⁷. This provision has been applied by the HCO in a number of cases³⁸. According to its decisional practice, the mere fact of a refusal is not sufficient in itself to establish abuse – the refusal must also have a negative impact on competition. In other words, no entity has a normative right to contract or to maintain contractual relations with a dominant undertaking. In other words: noone has a normative right to contract or to maintain contractual relations with a dominant undertaking.

Notwithstanding the ‘more economic’ approach advocated by the Commission in the Guidance on Article 102³⁹, the CJEU’s judicial practice has been rather *ordo-liberal* in refusal to deal and essential facility judgments. The jurisprudence of the CJEU as to refusal to deal will be analysed here in

³⁶ Guidance on Article 102, para. 74.

³⁷ On refusal to deal and essential facilities see C.I. Nagy, ‘Nélkülözhetetlen eszközök koncepciója az amerikai, a közösségi és a magyar versenyjogban’ [in:] M. Király (ed.), *Európai Jogi Tanulmányok*, Budapest 2006, p. 125-156; C.I. Nagy, ‘Refusal to deal and the doctrine of essential facilities in US and EC competitionlaw. A comparative perspective and a proposal for an analytical framework’ (2007) 32(5) *European Law Review* 664.

³⁸ See e.g. cases: VJ-61/1994 *Burial Services*; VJ-39/2002 *UPC Hungary*.

³⁹ Guidance on Article 102, para. 81 (‘The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,
- the refusal is likely to lead to the elimination of effective competition on the downstream market, and
- the refusal is likely to lead to consumer harm’).

general, with the exclusion of issues which are specific to access to intellectual property rights⁴⁰.

In *Commercial Solvents*, the dominant enterprise (Commercial Solvents Corporation; hereafter, CSC) was the single producer of certain primary commodities indispensable for the production of ethambutol, an anti-tuberculosis drug. Until 1970, CSC distributed these materials through its Italian company. The CSC group changed its business policy in 1970 and started producing ethambutol by itself. From then on, it refused to supply the producer of ethambutol in Italy (Zoja). The CJEU held that:

‘an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position’⁴¹.

The same leveraging logic was used in *Télémarketing* where the CJEU interpreted EU abuse provisions in the framework of a preliminary ruling. In 1984, the company running Luxembourgian television refused to transmit advertisements which did not display its agent’s telephone number, thus excluding from the market Centre Belge, who was engaged in the telemarketing business. The CJEU held that:

‘an abuse within the meaning of Article 86 [now 82] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking’⁴².

In *United Brands*, the defendant (United Brands Corporation; hereafter, UBC) had a dominant position in the market of banana production. United Brands stopped supplying a Danish distributor who started favouring the commodities of one of the UBC’s competitors and participated to a lesser

⁴⁰ See e.g. Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039; Commission Decision 2007/53/EC *Microsoft*, OJ [2007] L 32/23; case T-201/04, *Microsoft v Commission* [2007] ECR II-3601.

⁴¹ Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223, paras 24–25.

⁴² Case C-311/84, *Centre belge d’études de marché – Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261. Answer to the second question and para. 27. The same leveraging logic was used in Commission Decisions: 88/518/EEC *Napier Brown/British Sugar*, OJ [1988] L 284/41, para 64; 88/589/EEC *London European-Sabena*, OJ [1988] L 317/47, para. 34 and in case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECR I-5941. paras 18–19.

extent in the ripening and distribution of UBC's bananas. The CJEU ruled that:

'an undertaking in a dominant position for the purpose of marketing a product – which cashes in on the reputation of a brand name known to and valued by customers – cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary'⁴³.

The evaluation of this ruling is debated. Some scholars argue that the Court established here that a dominant undertaking is encumbered with a positive duty to supply, save the refusal is reasonably justifiable⁴⁴. Others argue that the judgment suggests that although a dominant undertaking may have a duty to deal in some cases, there is, however, no general duty to supply. Moreover, it can be read between the lines that supplying a customer or a distributor is a less strict obligation than supplying a competitor⁴⁵. The reason behind this principle is that: refusal to deal with a customer (who is not a competitor) restricts competition and is, thus, abusive only if it results, directly or indirectly, in a situation where the customer is able to purchase only from the dominant undertaking⁴⁶. Without restrictive effects on competition, refusal to deal is not to be regarded as illegal.

However, the CJEU's construction of the case was as follows: first, it established that a dominant undertaking cannot stop supplying a long standing customer; thereafter, it posed the question whether the discontinuation of supplies was justified⁴⁷.

Although the Commission used the term 'essential facilities' for the first time in the two cases concerning the Holyhead harbour⁴⁸, perhaps, the first essential facility case faced by the CJEU was in fact *Magill*. Even though the case concerned intellectual property rights, it also contains rulings of a general nature.

Three Irish broadcasters published their schedules weekly, providing detailed information about their own radio and television programs for the

⁴³ Case 27/76 *United Brands Company and United Brands Continental BV v Commission (Chiquita Bananas)* [1978] ECR 207, paras 182 & 184.

⁴⁴ See e.g. I. Van Bael, J. F. Bellis, *Competition Law of EEC* (2nd ed.), Chicago 1990, p. 410.

⁴⁵ J.T. Lang, 'Defining legitimate competition: companies' duties to supply competitors and access to essential facilities' (1994) 18 *Fordham International Law Journal* 437, 447. See R. Subiotto, R. O'Donoghue, 'Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC' (2003) 24(12) *ECLR* 683, 685–686.

⁴⁶ J.T. Lang, 'Defining legitimate competition...', p. 437, 476.

⁴⁷ Case 27/76 *United Brands*, paras 182. & 184.

⁴⁸ Case IV/34.174 *B&I plc/Sealink Harbours* [1992] 29 CMLR 255; Commission Decision 94/19/EC *Sea Containers/Sealink*, OJ [1994] L 15/8, para. 66.

forthcoming week. These publications were the only sources of information containing scheduling data covering more than a few days in advance. Other publishers, such as daily newspapers, were granted free access to their scheduling information but only on a daily basis (one or two days in advance). An independent publisher planned to offer a comprehensive weekly television guide but the three broadcasters refused to disclose the necessary data, arguing that it was protected by Irish intellectual property law.

The Commission considered this conduct to be abusive. The decision was upheld by the CJEU, which based its decision on the following grounds. First, the three broadcasters were ‘the only sources of the basic information on program scheduling which is the indispensable raw material for compiling a weekly television guide’⁴⁹. Second, they refused to provide access to that information. Third, there was no justification for the refusal. Fourth, the companies ‘reserved to themselves the secondary market of weekly television guides by excluding all competition on that market (...) since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide’⁵⁰.

In *Bronner*, the CJEU re-interpreted *Magill* in a non-IP context. Mediaprint had a dominant position in the market for daily newspapers in Austria operating also a nationwide newspaper home-delivery scheme. No other such scheme existed. Mediaprint refused to grant access to that scheme to a competing current daily newspaper publisher, Oscar Bronner. The latter claimed that it could not create a competing home-delivery system, or find an alternative distribution method, because of the low number of its subscribers. According to the definition delivered by the CJEU in *Bronner*, abuse can be established in a refusal to deal case if three conditions are met: (1) the refusal is likely to exclude all competition in the relevant market, (2) access is essential and indispensable in order to continue the business activity in question, (3) access is refused without any reasonable justification and, thus, it can be designated as arbitrary, discriminative or predatory⁵¹.

There is a tendency in the EU jurisprudence to apply a general refusal to deal test to two-market cases while reserving the essential facility doctrine to one-market situations, albeit this differentiation is far from well-settled⁵². The

⁴⁹ Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-743, paras 53–56.

⁵⁰ C-241/91 P and C-242/91 P, *Radio Telefis Eireann*, para. 56.

⁵¹ L. Ritter, W. David Braun, *European Competition Law. A practitioner's guide* (3rd ed.), the Hague 2005, p. 381.

⁵² C.I. Nagy, ‘Refusal to deal and the doctrine of essential facilities in US and EC competition law. A comparative perspective and a proposal for an analytical framework’ (2007) 32(5) *European Law Review* 664, 680–681.

gist of the refusal to deal concept is that a dominant undertaking is obliged to supply its customers unless there is an objective justification not to do so. Arguably, as a matter of practice, there appears to be a general duty to supply in two-market situations. Despite the CJEU's position that a refusal to supply is not abusive in itself but only if accompanied by additional, aggravating and coexisting circumstances⁵³, these additional elements are in fact usually established.

The legal test formulated by the HCO for refusal to deal cases can be boiled down to four conjunctive conditions. The authority held in Case Vj-10/2002/16 that refusal to deal infringes HCA if

- the undertaking has a dominant position in the relevant market,
- refuses or ceases to do business or binds it to abnormal conditions,
- the conduct has an appreciably negative impact on market competition and its efficiency, beyond breaching the interests of the undertakings concerned,
- the dominant undertaking cannot prove that the conduct has objective and economically reasonable justifications⁵⁴.

Due to the principle that competition law protects competition rather than competitors, refusal to deal is not considered to be abusive if it has no palpable repercussions on consumers. Accordingly, a dominant undertaking does not infringe Hungarian law if it refuses to enter or maintain a contract if such behaviour does not entail a considerable restriction of competition.

In Case Vj-186/2007 *Magyar Posta*, the HCO closed the procedure against the Hungarian Post (*Magyar Posta*), which was accused of preventing a competitor from entering the market. The HCO stated that the investigated entity held a dominant position and refused to deal with a potential new entrant, which was the pre-condition of entering the market of cash-transfer services. If successful in entering the market, the new entrant would have become an actual competitor of the Post. Nevertheless, several enterprises were already present in this market segment and thus the refusal did not restrict competition and, as a consequence, did not infringe the HCA.

The Hungarian Post had a legal monopoly in certain services as well as provided cash-transfer services (delivering cash to addressees named by the client). For initiating such a cash-transfer, a special blank (cash-transfer blank) was needed, the technical details of which were determined by the Post. The production of blanks was liberalized but producers had to obtain a licence from the Post. The corresponding regulation specified that the Post issued the licence once certain technical requirements were met. Licences could relate to two different activities: production of blanks or their personalization (printing

⁵³ P. Treacy, 'Essential facilities – Is the tide turning?' (1998) 19(8) *ECLR* 501, 502.

⁵⁴ Vj-10/2002/16, para. 36; this principle was endorsed in case Vj-98/2003/26, para. 20.

the name and identification of a particular person or undertaking on blanks so they would not have to be filled-out manually).

Between 2004 and 2007, the Post refused to issue a licence for the production of blanks to four undertakings (mainly because of its own business interests) despite the fact that they met the technical requirements. At the same time, the Post issued licences to a number of other undertakings. Several dozens of undertakings were issued personalization licences; some received licences to produce and distribute blanks. However, the Post's business code provided that it would issue production licences only if it did not have sufficient capacity to satisfy demand by itself. Before issuing a production licence, the Post examined therefore the utilization rate of its own production capacity.

The HCO found that although the Post, for business rather than technical reasons, failed to grant a licence in four cases, several enterprises were present in the market already generating intense competition for the Post⁵⁵. According to the HCO, the conduct at stake was not general and did not restrict competition in the market for the production of blanks or any of its other segments. The Post was not the largest operator in the market for personalized blanks.

The authority emphasized that although the behaviour of the incumbent might have impeded market entry of certain operators, it was not systematic and had no restrictive effects on competition and consumers⁵⁶. Those already present in the market had sufficient free capacity. The authority stressed that the HCA does not protect the existence or contracting possibilities of market operators but that of market competition⁵⁷. Since it was not proven that the conduct of the Post endangered competition in the market for the production of blanks or in any other market, it could not be assumed that consumers were harmed. The HCO thus concluded that the procedure was not justified by public interest. Nevertheless, it also stressed that if negative market effects were to be demonstrated, the conduct of the Post would have amounted to a competition law violation.

It is to be noted as a criticism of the *Magyar Posta* decision that while the HCO has based its argumentation on the principle that competition law protects competition rather than competitors, its reluctance to assist the latter seemed to disregard the interests of the former.

First, the decision sends a message that a dominant undertaking's non-strategic (non- arbitrary) raids on rivals and new entrants are automatically pardoned. There is no clear line between anti-competitive conduct with negligible effects and anti-competitive conduct with real market consequences.

⁵⁵ Vj-186/2007 *Magyar Posta*, paras 33–35.

⁵⁶ Vj-186/2007 *Magyar Posta*, para. 33.

⁵⁷ Vj-186/2007 *Magyar Posta*, para. 34.

Dominant undertakings may thus retain some leeway here and build up a reputation of complicating the life of, or even suppressing new entrants. Such behaviour may deter market entry. Second, the decision focused on the market for the personalization of blanks. It is true that the Post had major competitors in the production market, though not as many as in the personalization market. The argument does not seem convincing, however, that a restriction of output (impeding new entrants) makes no difference here because there is already sufficient competition in the production market. New entrants always have the potential of contributing to the intensity of market competition, even if only slightly.

Third, the decision seems to suggest that conduct that might have negative effects on competition, can nevertheless escape antitrust condemnation if such effects do not materialise, even if it has simply no way of producing pro-competitive results. According to the HCO's decisional practice, the requirements against refusal to deal by dominant undertakings are more relaxed if it is one of the distributors that is targeted⁵⁸.

The authority held in Case Vj-6/2005, that a producer has a wide discretion as to how it organizes its distribution system. For consumers, the relevant field of rivalry is inter-producer competition; whether the producer excludes a reseller from the distribution system is of minor importance. The question is whether the exclusion of a trader impairs inter-brand competition. If this is not the case, the restriction or lack of intra-brand competition is not a problem⁵⁹.

Accordingly, no distributor has a normative right to be on the market. The key question in the context of refusal to deal is whether it is detrimental to consumers. Hence, it is not the task of competition law to ensure that a particular distributor can enter or remain on the market, unless it is shown that this would entail benefits to consumers⁶⁰.

A dominant undertaking can prove that its refusal to deal is based on an objective justification. This requirement is met if the refusal is based on objective, economically reasonable grounds. No enterprise can be compelled to act to the prejudice of its own legal interests or to suffer extra-costs⁶¹.

In Case Vj-89/1998/17, a cable television company disconnected some of its customers. Among other things, the HCO examined the operator's motives and assumed that the switch-off had reasonable grounds seeing as a service provider is not interested in excluding customers as this would reduce its

⁵⁸ Vj-105/2001, para. 32; Vj-6/2005, para. 73; Vj7/2005, para. 68.

⁵⁹ Vj-6/2005, paras 71 & 74.

⁶⁰ Vj-105/2001, para. 32; Vj-7/2005, para. 68; Vj-6/2005, para. 73.

⁶¹ Vj-105/2001, para. 32; Vj-98/2003/26, para. 21; Vj-6/2005, para. 73; Vj-7/2005, para. 68; Vj-117/2005, para. 38. This approach was endorsed also in the judicial practice, see: Case FB. 2.K.32366/1993, Case FB. 2.K. 32527/1992.

subscription clientele. It is unlikely that it would exclude consumers that had no arrears. However, the HCO also noted that if this practice was widespread, it might qualify as an abuse..

Overall decisional practice of the HCO appears to give more leeway to dominant enterprises than the legal test applied by the CJEU in cases such as *Commercial Solvents* and *United Brands*.

IV. Price squeeze

There have been only a few price squeeze cases in Hungary so far – the test applied is similar to the approach of EU competition law⁶². Still price squeeze can be established under Hungarian competition law only if considerable entry barriers exist, that is, if the market is not contestable. This element parallels the requirement of recoupment in predatory pricing cases.

The Commission dealt with margin squeeze on a few occasions⁶³.

In *Napier Brown – British Sugar*⁶⁴, the latter had a dominant position in the wholesale market of sugar and was competing with the former in downstream retail. British Sugar (hereafter, BS) was condemned for increasing its wholesale prices and decreasing its retail prices in a way that forced Napier Brown (hereafter, NB) to operate at a loss. The legal test applied by the Commission was the following: assuming that NB matched BS's efficiency, the Commission examined the margin left to NB, or any other retail competitor using industrial sugar purchased from BS. The Commission found that low retail prices made it impossible for competing re-packagers, as efficient as BS, to earn a sufficient margin 'even without trying to make a profit'⁶⁵.

The Commission established that where an undertaking is dominant in the markets for both, the raw material and the derived products, an abuse occurs if the difference between the dominant enterprise's raw material prices and derived product prices is 'insufficient to reflect that dominant company's own costs of transformation'. The gap between the dominant enterprise's wholesale and retail prices has to be compared to its own repackaging costs. Accordingly,

⁶² See: G. Faella, R. Pardolesi, 'Squeezing Price Squeeze Under EC Antitrust Law' (2010) 6(1) *European Competition Journal* 255; L.Y. Hou, 'Some Aspects of Prize Squeeze Within the European Union: a Case Law Analysis' (2011) 32(5) *ECLR* 250; N. Dunne, 'Margin Squeeze: Theory, Practice, Policy-Part II' (2012) 33(2) *ECLR* 61; N. Dunne, 'Margin Squeeze: Theory, Practice, Policy: Part I' (2012) 33(1) *ECLR* 29.

⁶³ For an overview of the EU competition law practice on price squeeze see R. Whish, *Competition Law*, p.745–746.

⁶⁴ Commission Decision 88/518/EEC *Napier Brown – British Sugar*, OJ [1988] L 284/41.

⁶⁵ Commission Decision 88/518/EEC *Napier Brown – British Sugar*, para. 30.

retail costs to be taken into account are those of the dominant undertaking. This is meant to ensure that only those competitors are afforded protection that are at least as efficient as the dominant undertaking. The Commission noted that the above pricing policy, if maintained for a long period of time, was likely to drive competitors out of the retail market⁶⁶.

Nevertheless, entry barriers and the perspective of re-entry were not an issue here. It is to be noted that in this case the profit, calculated on the basis of the above formula, was negative.

In *Deutsche Telekom*⁶⁷, the Commission investigated once again a case where the dominant undertaking left a negative profit to its retail distributor. The Commission placed emphasis on the fact that Deutsche Telekom's (hereafter, DT) retail competitors 'even if they are at least as efficient as DT, can never make a profit, because on top of the wholesale charges they pay to DT they also have other costs such as marketing, billing, debt collection, etc.'⁶⁸. The Commission rephrased therefore the legal test established in *Napier Brown – British Sugar*⁶⁹.

In *Wanadoo España v Telefónica*⁷⁰, the Commission condemned again a price squeeze where the profit left to retail competitors was negative. The margin between wholesale and retail prices was insufficient to cover costs that an operator, at least as efficient as Telefónica would have to incur to provide retail broadband access. The Commission summarized the legal test of price squeeze as follows:

'In accordance with established case law the methodology applied for establishing the existence of a margin squeeze consists in assessing whether Telefónica's downstream arm would operate profitably on the basis of the upstream charges levied by Telefónica's upstream arm'⁷¹.

The HCO's decisional practice largely parallels the aforementioned EU examples.

In Case Vj-100/2002 *Magyar Távközlési Rt.*, prices of telecoms access and those for retail telecoms services set by the incumbent Hungarian telecoms operator (MATÁV, now Magyar Telekom) triggered a 'negative margin'. The HCO stressed that an abuse may be established even if the margin is 'positive', but overly small. It held also that it is to be analysed whether the dominant undertaking's prices on the downstream market cover both its wholesale prices and retail costs. It was emphasised that the dominant undertakings wholesale

⁶⁶ Commission Decision 88/518/EEC *Napier Brown – British Sugar*, para 66.

⁶⁷ Commission Decision 2003/707/EC *Deutsche Telekom AG*, OJ [2003] L 263/9.

⁶⁸ *Deutsche Telekom AG*, para. 102.

⁶⁹ *Deutsche Telekom AG*, paras 106–108.

⁷⁰ Commission Decision in Case COMP/38.784 *WanadooEspaña v Telefónica*.

⁷¹ Summary of Commission Decision in Case COMP/38.784 *WanadooEspaña v Telefónica*.

costs are expected to be equal to those of its competitors. Otherwise, it would be condemned for discrimination. A negative margin implies that competition law is violated. If the margin is positive but relatively small, a detailed cost analysis must be performed. Nevertheless, the HCO added that the above is but one of the prerequisites of price-squeeze – an infringement of the HCA can be established only if the practice lasts for a long period of time and there are considerable entry barriers.

In case Vj-101/2002 *Vivendi Telecom Hungary*, the defendant charged a high price in its (wholesale) ADSL contracts, while pushing down the prices in the retail market for access to ADSL-based Internet. The HCO considered that the retail margin created by this pricing policy was rather small and objectionable. However, it established also that the market was contestable. Partly due to competitive pressure from cable broadband Internet, the defendant could thus not have increased its prices without attracting new entrants⁷².

Essentially the same issues emerged in another telecoms case, Vj-73/2003 *Magyar Távközlési Rt.* The HCO stressed here that the dominant enterprise can include in the final price cost-savings that it managed to achieve through efficiency. The alleged 2002 price squeeze was the result of price regulation which covered both wholesale and retail prices. The margin left to the retail segment in 2003 was considered to be reasonable. Accordingly, no abuse was established.

To sum up, in accordance with EU competition law, the HCO's decisional practice suggests that price squeeze can be established even if the competitor is left with a small margin, provided that margin is not unreasonably low. A practice can be condemned only if it lasts for a long period of time and is capable of driving competitors out of the market. Even in this case (similarly to predatory pricing) competition's potential to self-help has to be taken into account: price squeeze can be established only if considerable entry barriers exist (if the market is not contestable).

V. Evaluation

The adoption of the “more economic” approach is obviously a matter of degree. The HCO appears to follow a rather categorical version of this credo. Notwithstanding its apparent merits (such as reducing false positives), exiling

⁷² The HCO conceptualized the applicable test as follows: whether P is equal or higher than $A + C$, where P is the retail price charged by the dominant undertaking, A is the wholesale input price of the commodity and C is the retail costs (the cost of converting the input into the final product).

all “legalistic” analysis from the law on the abuse of dominance in exchange for a case-by-case economic analysis raises a number of concerns.

First, while it is tempting to condemn only acts that actually have a negative impact on competition, such rather lenient treatment of abuse cases may encourage ‘hit and run’ tactics. Commitments are widely accepted in the HCO’s decisional practice. Putting an end to the contested practice, accompanied by a remedy, is sometimes the reason to close proceedings. Unfortunately, this may reduce the deterrent effect of competition fines in this area⁷³.

Second, using the ‘more economic’ approach reduces predictability and certainty in abuse cases. Competition matters usually involve complex economic issues, the examination of which normally cannot be saved. While an economic analysis is not expected to produce predictable results, legal compliance and legal enforcement do need judicable rules and standards that provide guidance to legal counsels. This was clearly one of the reasons behind introducing automatic condemnation in the field of restrictive agreements (*per se* illegality in US antitrust and agreements anti-competitive by object in EU competition law). In the field of dominant position abuse, it is quite difficult to identify practices that are always, or almost always, anti-competitive without having any redeeming virtues. Still, some clarity could be introduced without increasing the risk of false positive. For instance, in Case Vj-186/2007 *Magyar Posta*, the HCO found that the exclusion of some downstream competitors had no appreciable negative impact on competition because the retail market was competitive. Even accepting that this was factually true, the message here is that dominant undertakings can sometimes exclude downstream operators even without an objective justification. It is to be noted that even if a downstream competitor cannot notably contribute to the intensity of competition in the market, it would certainly not reduce it.

Although competition law has been traditionally resistant to clear-cut rules, its core values and principles do merit such treatment. The principle that competition law should protect competition and not competitors is not being questioned. However, it is submitted here that it is only one of the functions of a competition law investigation (though certainly the most important one) to resolve the case at hand. Its second function is to provide future guidance to the market.

Third, the use of the ‘more economic’ approach, if applied excessively, may distort a competition authority’s enforcement policy. Since an economic analysis is rather expensive, the authority will investigate fewer cases, and focus its resources on ‘cheaper’ matters. This can dilute the rigor of competition law enforcement in the field of dominant position abuse.

⁷³ This was one of the reasons why the Hungarian court quashed the HCO’ commitment order in case Vj-22/2008 *OTP*. See C.I. Nagy, ‘Commitments as Surrogates...’, p. 531, 534–535.

Finally, there is an intrinsic dilemma involved in the application of diverging standards in EU and national competition law.

On the one hand, the national legislator and the domestic competition authority have their own sovereign competences to adopt whatever competition policy they favour. In some areas, departure from EU practice is also justified by clear economic arguments. For instance, one of the core principles of EU competition law is the “single market imperative” (market integration), which results in the prohibition of practices that would be otherwise permitted. The single market imperative has, however, no value domestically. The most remarkable example for the operation of this principle is the treatment of territorial exclusivity in EU competition law. From a competition law point of view, there seems to be no point in following this strict approach in domestic matters.

On the other hand, diverging standards increase costs: the costs of legal analysis, the costs of competition law enforcement and decision-drafting. Moreover, due to the uncertainty as to whether a practice affects trade between EU member State or not, diverging standards may also have spill-over effects. In case of local matters (matters that have a local ‘centre’), it is often extremely difficult to give a clear answer to the question whether the contested conduct affects EU trade. While there are several truly local matters, and some that are sure to have a more *de minimis* impact on interstate trade, the grey zone between these two categories is extremely large. This is mainly due to the principle that a practice may affect trade between EU member States even without a cross-border element⁷⁴, due to its indirect repercussions and spill-over effects. In this grey zone, the most prudent thing to do for a legal counsel is to test the conduct under both regimes and to try to comply with the more rigorous one, taking into account that both might ultimately be applicable.

Regulation 1/2003 addresses this issue providing that if a practice is not prohibited by EU abuse rules, but is condemned under more stringent national provisions, the latter prevail⁷⁵. However, this rule does not work in reverse: more lenient national rules are ‘absorbed’ in the application of EU law on dominant position abuse. Where a national legal system has a more lenient policy towards abuse, there is a risk, therefore, that huge companies will face stricter EU rules, even in the absence of a cross-border element, than companies that are truly local and thus bound by more relaxed national legislation.

⁷⁴ See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ [2004] C 101/81. paras 77 & 93–99.

⁷⁵ Article 3(2).

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