

NEW COMPETITION TOOLS PROPOSED IN HUNGARY

On 2 April 2024 the Hungarian government submitted a draft bill to Parliament, which contains two “new competition tools” to be introduced into the Hungarian Competition Act:

1. relating to companies of paramount significance for competition across markets and
2. new remedy powers for the Hungarian Competition Authority in sector inquiries with respect to companies contributing to competition distortion.

The planned provisions appear to be inspired by the 11th amendment of the German Competition Act in November 2023.

The proposal has raised concerns with legal practitioners and companies due to vague provisions allowing great discretion for the HCA during enforcement.

It remains to be seen how comments received during the public consultation will be reflected in any amendment proposals to the bill.

COMPANIES OF PARAMOUNT SIGNIFICANCE FOR COMPETITION ACROSS MARKETS (NEW DRAFT SECTION 22/A COMPETITION ACT)

The HCA would have the prospective powers to **establish that a company has paramount significance for competition across markets** from the perspective of competition and consumers. The existence of such paramount significance would need to be established in a formal investigation, based on the following factors:

- market share
- financial strength or access to other resources
- vertical integration or other cross-markets activity
- access to relevant data in competition
- the substantial importance of products and services provided by them, from the perspective of consumers or the economy, and
- all activities that are significant from the perspective of consumers or third parties in order to have access to input markets, which allows such company to influence the business of third parties.

The HCA would have the prospective powers to impose the following **measures** in a formal decision:

- prohibit the company from self-preferencing its offers versus business partners’ offers;
- prohibit the company the use data collected by business partners without their express consent;
- prohibit the company to combine own data with data from other sources which are relevant for competition, without the express consent of the data subjects;
- prohibit the company to obstruct the possibilities for inter-operation of services or products or data portability
- require the company to provide information with respect to the performance, quality or success of services rendered to third parties
- if the company cannot continue operation or is at risk direct risk to perform its obligations, impose structural obligations to ensure the security of supply, including obligation on the owners to sell, transfer operations to a dedicated service provider with costs reimbursement, nomination of board member, suspend voting rights, sell ownership interests to other owners, oblige the board to convene the general meeting and set the agenda.



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The HCA would have the prospective powers to **check the performance of the above measures** in a follow-up investigation, where non-compliance can be established in a formal decision. Non-compliance would be subject to enforcement measures and general competition fine (currently the fine cap is 13% of the global turnover of the company group).

The HCA would **periodically review its decision establishing paramount significance**, in a follow-up investigation launched ex-officio every 3 years or upon the company's request one year after the decision at the earliest. It would also be possible to seek the lifting of the measures in an interim injunction process if the conditions substantiating such measures no longer apply.

INVESTIGATIONS AGAINST COMPANIES CONTRIBUTING TO COMPETITION DISTORTION (NEW DRAFT SECTION 43/F (2) COMPETITION ACT)

The HCA is already empowered to conduct sector inquiry if it detects distortion or limitations in competition on any market. The HCA is already empowered to conduct accelerated sectoral inquiries, if urgent intervention is needed. So far, as a result of such inquiries, the HCA's powers have extended to making recommendations to the Hungarian parliament, the market players, and to initiate legislation.

The draft would additionally empower the HCA to launch **formal investigation against a company operating in a market under sector inquiry**, if 1. the HCA establishes that competition is significantly and continuously distorted or limited on the market under sector inquiry, and 2. it is **probable that the company's conduct contributes to the significant and continuous distortion or limitation**. Distortion and limitation is significant and continuous if (a) it had been in place at least 3 years prior to the launch of the sector inquiry or (b) it re-occurred during 3 years prior to the launch of the sector inquiry.

As a result of the formal investigation, the HCA would have powers to **establish the company's contribution to the significant and continuous distortion or limitation**.

In such case the HCA would also impose proportionate **remedies** necessary to terminate the distortion, for example (but not limited to) **behavioural or structural remedies**, provided that it is probable that the distortion or limitation would not cease in the next 2 years without such remedies. Importantly, such powers would not require to establish any competition law infringement.

CONTROVERSIES

Market players and commentators are concerned that the draft law is too vague as to the scope of companies to whom the new rules can be applied, the measures that can be imposed and the conditions for the application of the new rules. Accordingly, the draft law would give too much discretion to the HCA during these aspects of the enforcement, based on the political needs of the Hungarian Government.

The HCA states that the new provisions for were modelled after similar provisions of the German Competition Act (Sections 19.a and 32f GWB). However, it is apparent that there are significant differences between the German model and the draft Hungarian law. To say the least, the draft Hungarian law is much less elaborate with respect to the scope of markets concerned, the validity period of a decision establishing paramount significant and the imposable remedies.