

The Hungarian beer war: the competition authority caught between two fires

In the Hungarian HoReCa sector, the question of how much competition there is in the market for beverage procurement has been on the agenda of the Hungarian competition authority and the political discourse for some time. At the same time, the undoubtedly prevailing situation in the beer market has served as a trigger for legislative trends.

In a nutshell, the situation is as follows:

In the summer of 2020, the public discourse intensified on the difficulty or impossibility for alternative, small breweries to enter the market, because multinational beer producers - using various direct or indirect anti-competitive instruments - have established contractual arrangements with participants in the HoReCa sector that make this task disproportionately difficult. In order to remedy this situation, the legislator has introduced an amendment to the law with the following objectives:

*"The purpose of the proposal is to create the possibility to reduce the exclusive distribution contracts that are common practice in the on-trade (HoReCa) market. In the on-trade market, the large producers tie up the majority of the volume of sales by concluding exclusive agreements with smaller producers. The proposal reduces this restrictive effect on competition to the benefit of smaller market participants (e.g. small breweries). The proposal does not seek to prohibit discounts granted through exclusivity agreements or the provision of free promotional items if these agreements otherwise comply with the legal conditions."*¹

The proposal was finally adopted, and the legislator intends to resolve the legal concerns with the following legislative provision:

"Section 7/B of the Hungarian Trade Act

(1) In connection with the sale of beer, soft drinks and fruit drinks, fruit juices and fruit nectars, and mineral water and sparkling water (soda water), no declaration of rights may be made under which, with respect to the product covered by the declaration of rights, more than 80% of the total purchases of the catering establishment, including sales at a casual event, or accommodation (hereinafter for the purposes of this Section collectively referred to as a catering establishment selling beverages) for a calendar year or for the casual event are from the same manufacturer.

*(2) A catering establishment selling beverages shall ensure the sale of beer, except beer sold on tap, soft drinks, fruit drinks, fruit juices and fruit nectars, mineral water and sparkling water (soda water) from at least two different manufacturers per product."*²

This provision, which prohibits exclusivity clauses expressis verbis, in principle gives small brewers the opportunity to enter market segments previously closed to competition.

The Hungarian Competition Authority - at that time still in parallel with the legislative trend and the objectives set out therein - has set 2020 as the target date for the implementation of the new legislation. In October 2020, the Hungarian Competition Authority imposed a significant fine on Heineken's Hungarian subsidiary when it found that Heineken had not adequately justified its commitments to reduce the volume of beer sold under exclusive contracts, and fined the company HUF 75 million. In 2015, the GVH accepted a commitment (a quasi-competition plea deal) from the three largest Hungarian brewers, Dreher, Borsodi and Heineken, to gradually reduce the volume of beer sold to restaurants under exclusive contracts.³ Of particular relevance to the subject of this article, however, is the fact that the fining was announced in a press release by the competition authority, which published the circumstances of the legal proceedings, and then, on the day after the press release of the fine imposed on Heineken, the competition authority announced (also publicly) that it was conducting an industry inquiry (which it said was to investigate, to what extent and how

¹ Final explanatory memorandum of Act CXL of 2020 - amending Act CLXIV of 2005 on Trade

² Act CLXIV of 2005

³ https://www.gvh.hu/pfile/file?path=/sajtoszoba/sajtokozlemenyek/sajtokozlemenyek/2020-as-sajtokozlemenyek/sk_vj_6_2018_lezart_heineken_uv&inline=true

competition in the sector was distorted) to analyse the purchases of beverages by restaurants, pubs and other catering outlets in Hungary - the HoReCa sector - with the following headline:⁴

"Market trends in recent years suggest that local operators are finding it particularly difficult to open up to new supply partners and to expand the range of beverages on offer. This phenomenon can lead to a reduced choice and higher prices for consumers, which in the longer term can be detrimental to the customer."

"Based on the Competition Authority's knowledge of the HoReCa sector, the industry is pervaded by supplier agreements containing clauses that encourage catering outlets to offer their customers only one or a limited number of companies' products. This phenomenon tends to favour beverage suppliers with a broad portfolio and significant capital strength, while it can also deter new suppliers from entering the market, including smaller hungarian market participants."

Based on the above, the strong intervention of the Competition Authority shows that the economic interest of small brewers and the protection of consumer welfare by the Competition Authority coincided, i.e. that the entry of small brewers into the market increases consumer welfare. The objective of the competition authority's action and that of the amending legislation were therefore congruent.

After an eventful and intense competition authority intervention in 2020 - contrary to expectations - the competition authority remained silent for almost three years.

The draft report on the outcome of the sector inquiry launched in 2020, was published by the Competition Authority in February 2023, inviting interested parties to comment on the draft. Of course, carrying out a sector inquiry is a very complex process, but from the point of view of small breweries, it may raise the question of whether a three-year period for the sector inquiry is compatible with the following legal provision, which provides a framework to ensure the regularity of the Authority's proceedings:

"The results of the sector inquiry and of the accelerated sector inquiry shall be the subject of a report by the Office of Economic Competition within a reasonable period of time."

Market participants may therefore wonder to what extent the three-year period can be considered reasonable if there is a suspicion of distortion of competition in the relevant market sector (as stated in the press release opening the sector inquiry).

The published draft may also raise concerns because it is not in accordance with the Competition Authority's earlier intentions in 2020, which have quasi-underpinned the legislative trends:⁵

"The Competition Authority would make it easier for operators in the hospitality industry

The national competition authority has concluded its sector inquiry, which analysed the beverage procurement system of domestic restaurants, pubs and other catering outlets - the HoReCa sector. The Competition Authority conducted a detailed investigation into the business practices, market conditions and sector specificities related to the procurement of beverages at all levels of the value chain, as well as consumer preferences and sectoral experiences in other EU Member States.

The Competition Authority recommends that the legislator suspend the application of the provisions of Article 7/B(2) of the Trade Act until the end of the state of danger, as in its current form it imposes an excessive burden on already distressed, typically Hungarian-owned, catering establishments, while its expectations are not in line with consumer needs, based on the results of the market research carried out in the sector inquiry."

⁴ <https://gvh.hu/sajtoszoba/sajtokozlomenyek/2020-as-sajtokozlomenyek/az-italbeszerzeseket-is-vizsgalja-a-gvh-->

⁵ <https://gvh.hu/sajtoszoba/sajtokozlomenyek/2023-as-sajtokozlomenyek/konnyitessel-segitene-a-gvh-a-vendeglatoipar-szereploit>

Despite the fact that the sector inquiry puts the market in a complex context and puts forward reasonable arguments (COVID, war in Ukraine, economic crisis) to justify the suspension of the legal provision prohibiting exclusive distribution in the HoReCa sector, the only stated legal support for small breweries is being stripped away by the competition authority. It is not surprising that some major small breweries have issued a joint and open letter in opposition to the Competition Authority's position, arguing at length about the position the draft report would put small brewers in.

Furthermore, if we look at the issue from the perspective that the Authority, at the time of publication of the draft report, requested the suspension of the provision until the end of the state of danger, it raises further concerns for the Authority's position, as the state of danger in Hungary under the rules in force at the time of publication lasted until June 2023. In simple terms, the Authority asked the legislator in a draft non-final report to suspend a legislative provision for a couple of months. In this respect, the proposal in the draft report is therefore not only unreasonable, but also undermines the predictability of the legislation.

Although the situation has changed since then, the state of danger has been extended until 25 November 2023.

While this fact reduces the seriousness of the concerns against the draft report, as the legislator has the possibility to suspend the provision for a longer period, the legislator has not yet acted on this possibility. It is therefore interesting to see whether the legislation in question will be suspended, given that small breweries argue that it would deprive them of an important stepping stone to the market.

Of course, the situation is still not so black and white. The Competition Authority emphasises in the draft that it will take action against exclusive agreements that are likely to distort competition, and it will make this clear publicly, using its press platforms:

"Restriction of competition from one of the largest domestic soft drinks producers

Budapest, 28 February 2023 - The Competition Office has opened an investigation into Maspex Olympos for possibly imposing minimum prices on its partners. The Hungarian subsidiary of the Polish Maspex group may also have breached EU competition rules by fixing prices."

The controversial draft report contains the following relevant findings:

"The Competition Authority is currently in the process of competition proceedings under the new provisions of the amended Trade Act. Following the final conclusion of these proceedings, certain questions of interpretation of the law may crystallise and the practice of law application may evolve. The sector inquiry could only attempt to draw a more general, comprehensive picture of the actual market situation resulting from the amendment and to assess the new legal provisions from a competition policy perspective."⁶

Such investigations are therefore both consistent with the statements published in the report and also soften the tone of the draft report, showing a proactive competition authority stance.

The draft report's approach is therefore basically a welcome one for the HoReCa sector, but it is interesting that the competition authority is taking an otherwise restrictive approach to competition in another sector in order to maintain competition in that market. If we take into account the complexity of market processes, and assume that the competition authority's 180-degree turn is correct in terms of the bigger picture, we are particularly excited to see how the legislator will react in such a situation.

⁶https://www.gvh.hu/dontesek/agazati_vizsgalatok_piacelemzesek/agazati_vizsgalatok/jelentestervezet-az-alkoholos-es-alkoholmentes-italtermekek-magyarorszagi-vendeglatopari-egysegekben-tortenoforgalmazasanak-piacan-lefolytatott-agazati-vizsgalatrol