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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ROUNDTABLE ON COMPETITION ISSUES IN FOOD CHAIN INDUSTRY

-- Note by Hungary --

This note is submitted by Hungary to the Competition Committee FOR DISCUSSION under Item XII at its forthcoming meeting to be held on 30-31 October 2013.

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ROUNDTABLE ON COMPETITION ISSUES IN FOOD CHAIN INDUSTRY

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1. Background - Retail food trends and concerns about the functioning of the food chain

1. Retail trends in recent years have shown a decline in demand due to the early beginning of the economic downturn in Hungary. Until 2006 the GDP rose quite sharply, later stagnated, in 2009 plummeted, and in 2012 it was only 3 per cent higher than in 2004. Real per capita income fell by 14.2% between 2006 and 2010, and in 2011 it was still 5.2% lower than in 2004. (Annex 1)

2. Accordingly, food retail sales set at constant prices declined by 16.7% from 2005 to 2009, and in spite of some recovery, in 2012 they were still 11.7% under the 2005 level. If non-alcoholic drinks, spirits, coffee and tobacco are also taken into account then the difference is smaller (6.9%, Annex 2).

3. Between 2004 and 2012, consumption of all major food products decreased by 2 to 8 per cent; and more drastically in the case of sugar (-14.7%), fruits (-19.5%), and eggs (-24.5%; Annex 3).

4. Consumer habits have changed during the recession. People have started to also economise on their food budgets by purchasing cheaper products (often retailers' own brands), by taking advantage of special offers/discounts, and by switching to stores with lower prices (such as discounters). There has also been an increase in the number of visits consumers have been making to convenience, so called 'corner shops'. This has been to the detriment of shopping centers, as the number of weekly visits by consumers has declined as a result.

5. Food inflation has surpassed general inflation: between 2004 and 2012 retail food prices rose by 65%, while the consumer price index rose by only 48.1%.

6. Agricultural producer prices in Hungary have soared several times in recent years: in 2007 (+22.2% to previous year), in 2010 (+16.9%) and in 2012 (+15.4%; Annex 4). On the retail side, food inflation reached double-digits in 2007 (+11.5%) and in 2008 (+10.2%). Due to depressed domestic demand, commodity price increases were only partly passed through to retail food prices.

7. During the whole period of 2004 to 2012, agricultural producer prices increased by 92.7%, while food retail prices only increased by 65%. The difference is even greater if we take into account food inflation without the effect of consecutive V.A.T. rate increases (50.4%).

8. In recent years, Hungarian governments have appeared to be less concerned about the level of food prices, and more about the level of agricultural incomes.

9. There are other concerns in relation to the soaring food imports. Prior to Hungary's accession to the EU in 2004, the domestic market had been protected by high import tariffs. Following the elimination of these tariffs, imports have increased and this has had a particularly devastating effect on Hungarian food manufacturers, who have lost significant market shares to products imported from other member countries.

While the import boom was an inevitable consequence of accession, it also reflected the weak competitiveness of parts of the food sector in Hungary, in particular processing.

10. Hungarian governments, being concerned about this import expansion, initiated campaigns including the introduction of the "Hungarian Product" logo, which was accompanied by relevant legislation. Another defensive measure included placing the promotion of local markets and local products at the core of its activities.

2. Recent developments in the food chain

11. Following commodity price spikes, from all vertical levels of the food chain, processors seemed to get into the most difficult situation as their margins came under pressure from both sides: from soaring raw material prices and from competing retail chains which were also pressed by shrinking consumer demand.

12. The processing sector, which had been protected from imports prior to EU accession, has been struggling in the past decade. The Hungarian food industry has suffered severe market share losses: its total sales were 14.8% lower in 2009 than in 2004 (at constant prices; Annex 5), and its domestic sales in 2011 were 25% lower than in the year of accession. Reasons for this decline include structural weaknesses e.g. in the meat, dairy and bakery subsectors.

13. The profits of food processors have been constantly depressed, and in 2008 processing made almost no profit at the sector level. Bankruptcies have been quite common, particularly among meat processors.

14. Looking at the role played by foreign firms, by 1996 these dominated food processing in Hungary, holding two thirds of the total equity of the industry in their hands. Their early inroad was, however, partly a consequence of the strong Hungarian protection from imports that was applied until accession to the EU. After the accession in 2004, several multinational firms re-allocated their processing to other Central-East European countries, or scaled down their activities in Hungary. Other reasons for this withdrawal included deteriorating macroeconomic prospects in Hungary, an unfavorable business climate, and frequently changing regulations. As a consequence, the foreign share within the total equity of food processors is now already less than 50%.

15. The presence of foreign firms is also significant in the food retail sector. There are six leading international retailers present in Hungary – Tesco, Spar, Auchan, Lidl, Penny Market and Aldi – with Tengelmann (Plus) leaving the country in 2007 and the Delhaize Group (Cora, Match, Profi) leaving in 2012. The leading chains in domestic hands are CBA, Coop and Reál. The shops of Plus have been taken over by another foreign firm (Spar) and, similarly, Auchan has purchased the Cora hypermarkets (see COM/M.6505/Groupe Auchan/Groupe Magyar Hipermarket), but the units of Match and Profi have been shared between the Hungarian-owned chains CBA and Coop.

16. In 2004 the share of foreign firms within the total turnover of food retail chains was 55%, rising to 59% by 2006 and stagnating since then (Annex 6). With recent takeovers, the share of domestic chains is expected to increase slightly. Hungarian-owned retail chains can hold their positions because they can be flexible thanks to their franchise-model (e.g. by flexibly responding to local market demands) and because some of their shops are not competing directly with foreign outlets (operating in urban areas as convenience shops, or positioned in less populated areas or in smaller villages). They can also benefit from government planning and taxation policies.

17. Within the retail sector structural changes are still ongoing but have slowed down in recent years. The share of modern store formats (hypermarkets, supermarkets and discount stores) within the total

FMCG sales was increasing until 2007, and has been stagnating just below 60 per cent since then. (Annex 7)

18. From all store types, hypermarkets had the highest share with 26% of total sales in 2011, followed by supermarkets (17%) and discount chains (16%). Traditional formats like small shops being organized in chains (15%), and independent small shops (12%) are also significant. Until 2005, hypermarkets had been sharply increasing their market share, but this has stabilized in recent years. The share of supermarkets had been stagnating until 2007 at around 15% but has since slightly increased due to the transformation of several former Plus and Profi discount stores into supermarkets after the takeovers.

19. As regards discounters, data is contradictory. According to GfK[1] shop surveys, after a gradual increase from 15 to 18% by 2008, their share fell back again to 16%. Based on retail chain revenue data published by Nielsen (Annex 6), however, the share of discount chains has increased in recent years. Discounters are in keen competition with hypermarkets (primarily on prices), but first of all with each other. Late starters Lidl (opening its first shops in 2004) and Aldi (arriving in 2008) seem to be the winners in the fight for market shares. Penny Market has also been quite successful, while Plus and Profi have left Hungary in recent years.

20. Within the discounter category, there are considerable productivity differences. With similar shop sizes in terms of sales area, Lidl achieved a revenue of 1865 million HUF (6.4 million EUR) per outlet in 2012, compared to only 801 million for Penny Market and 798 million (2.8 million EUR) for Aldi (Nielsen).

21. Hungarian-owned franchise chains, consisting primarily of small shops, are holding out but the share of independent small shops fell drastically from 17% in 2004 to 12% in 2011.

22. The number of store openings was much lower in 2012 than in former years: only the discount segment was able to expand by opening 21 new stores, with the number of supermarkets falling by 7. Nowadays it is probably the supermarket segment that is suffering the most because they depend on the more affluent shoppers.

23. Looking at store size categories (in terms of selling space), the great transformation seems to have ended by 2008: the share of large area food shops (above 400 m^2) rose from 53.7 in 2004 to 61 per cent in 2008 within total FMCG sales, while the share of smaller food shops fell from 41.4 to 33.9%. (GfK, Annex 8)

24. For the years 2008 to 2013, the data only refers to food sales (sales of 90 major food product categories recorded by Nielsen). The data reflects slowing structural changes since only the shop category 400 to 2500 m^2, comprising mainly of supermarkets and discount stores, was able to increase its share from 32% in 2008 to 36% in 2013 by acquiring a small amount of shares from all other, bigger and smaller size categories. Large store formats (above 400m^2) were altogether able to increase their share from 63 to 66% in this period, which is much less than the increase before 2008.

25. The total number of general food stores fell drastically from 24 thousand in 2004 to 19.9 thousand in 2008 (Annex 10). This decline has continued but at a much slower pace, with 19.2 thousand stores still remaining in 2012.

26. The number of big stores with a sales area of more than 400m^2 rose sharply until 2008, increased slightly until 2011 and stagnated after 2011. This stagnation cannot yet be attributed to the planning policy

1 GfK Hungária market research firm

restrictions which were introduced in 2012 (see below). Shop numbers in the mid-small size category (200 to 400m^2) were stagnating until 2011.

27. The number of the smallest shops (less than 50m^2) fell between 2004 and 2008 by one quarter but has been stagnating since then as convenience stores have become more popular in the years of depression.

28. In spite of the structural adjustment, in international comparison the store structure in Hungary is not concentrated yet: the number of food shops per 10 thousand inhabitants is 19 in Hungary, 15 in the Czech Republic and 7 in Austria.

29. However, regarding selling space per inhabitant, Hungary is within the highest category of 400 to 600 m^2 per thousand inhabitants, together with only Austria, Germany, Denmark and Sweden in Europe. (Planet Retail)

30. The retail market structure shows stability as far as the leading players are concerned: rankings on the top list of FMCG retailers have been unchanged since 2008 with Tesco as the market leader, followed by CBA, Coop, Spar and Reál. (Annex 6)

31. In the hypermarket segment, Tesco has been able to increase store numbers and sales continually, supplementing its network with Tesco Express supermarkets in recent years. Auchan has shown less dynamism but with the takeover of Cora hypermarkets in 2012 its prospects for expansion are better. (Annex 11)

32. Hungarian chains CBA, Coop and Reál, consisting of smaller shops and supermarkets, have only been able to nominally increase their sales since 2008. Spar has shown more dynamism – partly due to the takeover of Plus shops from Tengelmann in 2008.

33. The most dynamic players are within the discounter segment: in terms of growth rates, Aldi and especially Lidl have been very successful. In both cases their expansion policies were based almost exclusively on greenfield investments. Penny Market has been growing at a slower pace.

34. While contradicting data makes it more difficult to measure retail concentration, the trend is clear: the leading four retail chains were able increase their combined market shares even after 2008, as were the next four (rankings 5 to 8); i.e. C4, C(5-8) and C8 increased at the same time, even though at a slower pace than before 2008. Nevertheless, in international comparison, retail concentration rates are not high yet in Hungary. Even the market leader Tesco is well under the 20% market share.

35. As in the food processing sector, the food retail sector also has profitability problems. Its Return on Assets Ratio (ROA) declined from 2% before 2008 to -4% in 2010. Returns on Sales (ROS) show the same: the ratio was low even prior to 2008 (well under 1%) and fell to -2.2% by 2010. (Annex 12)

36. Foreign chains fared worst: their combined ROS data fell between -2.5 and -3.1% in the years 2010 to 2012. Only Tesco and Penny Market were able to maintain (moderate) profitability while others made huge losses: Spar -33.9 bn HUF (-120 million EUR) in 2011, Auchan -10.1 bn HUF (-35 million EUR) in 2012, and even Lidl -7.7 bn HUF (-27 million EUR) in 2012.[2]

2 Source: e-beszamolo.hu

37. At least one of the reasons behind this decline in profitability was over-investment, based on an over-optimistic anticipation of demand.[3]

3. Competition in the food chain

38. As the Gazdasági Versenyhivatal (Hungarian Competition Authority GVH) continuously monitors different sectors, it carried out and ordered several market studies in the grocery retail sector some years ago.[4]

39. In 2007, the GVH ordered a market study on the relationship between large retail chains and their suppliers (hereby referred to as "the 2007 Study")[5], as a preparatory step prior to conducting a broader market study. The emergence of big retail chains has led to higher concentration in the vertical chain of the retail sector, and has altered the bargaining positions of different market players in the vertical chain. To address this issue the Hungarian legislator introduced the Trade Act (in effect as of 1 January 2006) with the aim of protecting suppliers from the conducts of large retail chains. The GVH conducted the 2007 Study in order to assess the effects of the Trade Act on the food retail sector and the concept of buyer power.

40. The study aimed to discover the important features of the situation of suppliers in the food-chain, such as market position of the suppliers. In addition, the study examined the effects of the Trade Act (suppliers' awareness of the new law, application of the law in businesses, etc.). The Study pointed out the vulnerability of suppliers vis-à-vis large retail chains having and sometimes abusing significant market power. Abusive conducts may include the following: various fees and conditions that serve as a "tax" that suppliers have to pay to the buyers in order to access the market; breach of contractual terms (such as deadlines for payment), threatening to terminate contracts, etc.

41. The 2007 Study concluded that the larger (in size) a retail chain became the more its conducts tended to resemble the above-mentioned patterns. The study also indicated that bigger suppliers were more likely to suffer from these practices than smaller competitors, resulting from the fact that they needed access to the market in order to grow. Many companies did not respond to the questionnaires; therefore, it is possible that the most vulnerable companies were afraid of providing data for the study. The Study also suggested that the high standards applied by the retail chains affect the competitiveness of the suppliers positively: in order to comply with those standards, the suppliers have to improve and invest in their activities.

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3 The productivity and profitability of the food retail sector (Research Institute of Agricultural Economics, Budapest, 2012)

4 Apart from the market studies that are analysed here, two other market studies must to be mentioned. Unfortunately no english translations are available for these two studies, since they were carried out by private research firms on behalf of the GVH.

The effects of the supplier protection rules from the perspective of the agricultural suppliers. http://www.gvh.hu/domain2/files/modules/module25/179022F8460EB1B13.pdf (in Hungarian)

Experiences on the effects of the supplier protection provisions in the Act on Trade and in the Act on the Regulation of Agriculture.

http://www.gvh.hu/domain2/files/modules/module25/179022F8460EB1B13.pdf (in Hungarian)

5 See: http://www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_gvhtanulmanyok_beszallitok_2007.pdf (in Hungarian)

42. In September 2008, the Agricultural Committee of the Hungarian Parliament called upon the GVH to analyse the buying processes of agricultural products in 2008. The GVH was asked to do so because the buying processes of four agricultural markets were in line with its top enforcement priority in 2008. The low prices paid by retail chains to producers of sour-cherries, melons and apples caused serious tensions, and the European milk market crisis also hit the Hungarian market players. Subsequent to these events the GVH increased its attention to these products and markets in the course of its competition supervision activity. However, no proceedings under the Competition Act were initiated by the GVH, since it could not have been proven that buyers or merchants had formed cartels or abused their market dominance.

43. In September 2009, the GVH published its market study (hereby referred to as "the 2009 Study") in which it analyzed the buying processes of agricultural products in 2008, a year that was very turbulent for various reasons in the sectors concerned. The main topics of the 2009 Study were the sour-cheery, melon, apple and milk sectors, together with a general investigation into the relationship in the vertical chain of the grocery production and retail sectors.

44. The main conclusions of the 2009 Study were the following:

- Legislative actions altering the legal environment of the activities of the market players were not sufficient to solve the deep-rooted problems that producers have faced (e.g. asymmetry in the level of concentration in the vertical chain, low efficiency).

- Competition law and the specific rules could not resolve the issues arising from illegal market (the so called 'black market') activities, such as breaches of tax obligations.

- Small and medium enterprises need to become more "market-oriented", and more adaptive to the changing economic environment and competitive challenges.

- Legislative and enforcement activities needed to be systematic in order to achieve the substantial changes that took place in the sectors concerned.

45. Based on these findings of the 2009 Study, the GVH concluded that it would be neither desirable nor legally defensible to exempt the agricultural sector from competition law as this would preserve the poor competitiveness of the producers.

4. Enforcement

46. As the "call for contributions" letter of the Chairman suggested in his question for consideration, the trend these days for national competition authorities is to increase the enforcement efforts in the food sector due to the soaring prices of food and the increasing bargaining power of big retail chains vis á vis suppliers of agricultural products. However, these general trends do not apply to the GVH, due to the increasing intervention of the legislator throughout the whole food supply chain.

47. First of all, the legislator has introduced specific legislation to be applied to food suppliers. This legislation regulates the suppliers' relations with large scale retail chains (see details later). Since 2012, these provisions have not been enforced by the GVH, but by another governmental body, the National Food Chain Safety Office (in Hungarian: Nemzeti Élelmiszerlánc-Biztonsági Hivatal; hereinafter referred to as: the "NÉBIH"). This has reduced the ability of the GVH to engage in enforcement action in the food retail sector (it is possible still to conduct an investigation if a retail chain possesses a dominant position, however it is unlikely, since the downstream food-retail market is highly competitive in Hungary).

Secondly, during the autumn of 2012 the amendment of the Interbranch Organisations Act (see details later) provided for a wide exemption for agreements between players of the agricultural sector.

5. The regulation of buyer power in Hungary

48. Act No. LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition (the "Competition Act") contains no specific rules with regard to the grocery sector. As a general rule, the provisions of the Competition Act are applicable to all companies carrying out economic activities in Hungary, unless otherwise specified by a relevant Act. Thus, as a general rule, the behaviour of companies operating in the grocery sector is governed by the Competition Act.

49. The Competition Act does not define buying power (or dependency). Thus abuse of buying power is not per se prohibited by the Competition Act, whereas the abuse of a dominant position (including dominant buying power) is prohibited in general. Due to the market structure in Hungary, the activities of large retail chains are not likely to be currently investigated based on Article 102 TFEU (or the equivalent provision [Article 21]) of the Competition Act), in spite of the fact that certain conducts may be regarded as abusive if dominance is proved. The Hungarian legislator assumed that the concentration of the retail sector and the expansion of large (often worldwide) retail chains may have a negative effect on the relationship of retailers with suppliers and may be a source of various abuses and unfair practices. Therefore, a different concept of 'significant market power' was introduced relatively early by the legislator in the retail sector (primarily within agricultural retail) in Hungary.

50. Besides the Competition Act, there are other laws in force that specifically govern the activities carried out in the retail market. Act No. CLXIV of 2005 on Trade (hereinafter: the "Trade Act") sets out provisions applicable to traders having significant market power (SMP). The Trade Act defines the notion of SMP – as the Hungarian equivalent for "buying power".

51. According to the definition set out in Article 2 of the Trade Act "the term "significant market power" refers to a market situation as a consequence of which the dealer becomes or has become a contracting partner for the supplier which the latter is unable to reasonably evade at forwarding its goods and services to the customers and which is able, due to the size of its share in the turnover, to influence regionally or all over the country market access of a product or a group of products".

52. According to Paragraphs (3) and (4) of Article 7 of the Trade Act "significant buyer power vis-à-vis suppliers exists where the consolidated net turnover derived from the commercial activities of the group of undertakings in question, including all the parent companies and subsidiaries under Act C of 2000 on Accounting, or in the case of joint purchasing, all the undertakings establishing the purchasing association in the previous year was higher than 100 billion HUF" (approximately 332 million EUR). Moreover, the significant market power of a dealer also exists when a commercial undertaking or a group of undertakings or a purchasing association is in, or acquires – based on the structure of the market, the existence of entry barriers, the market share and the financial strength of the undertaking and its other resources, the size of its trading network, the size and location of its outlets and all of its trading and other activities – a one-sidedly favourable bargaining position vis-à-vis its suppliers.

53. The Trade Act stipulates that companies falling under the scope of the Trade Act shall not abuse their significant market power towards their suppliers. The Trade Act provides for a non-exhaustive list of unfair business conducts which qualify as abuses of significant market power in Article 7, Paragraph (2).

According to the Trade Act, the following in particular amount to abuses of significant market power:

- unjustifiably discriminating against suppliers;
- unjustifiably restricting suppliers access to sales opportunities;
- imposing unfair conditions on suppliers;
- unjustifiably altering contractual terms to the detriment of suppliers;
- subjecting the future business relations of the dealer with the suppliers to conditions;
- charging fees one-sidedly to suppliers;
- threatening with delisting;
- unjustifiably forcing suppliers to avail themselves of third persons as suppliers or of an own service provider of the dealer;
- applying sales prices which are lower than the invoice prices determined in its contracts in cases in which the dealer is not the owner of the goods.

54. It must be highlighted, however, that the Trade Act did not introduce a definition for small or medium sized suppliers, although it is in favour of all of them, regardless of their size or bargaining power. It is also important to note that all of the big retail chains in Hungary are above the SMP threshold mentioned earlier, since their yearly net turnovers are substantially above 100 billion HUF. On this basis, all of them have significant market power. According to the Trade Act, the GVH is vested with the competence to conduct proceedings against retailers with significant market power for any case of abuse defined in the Trade Act. Since the 1 August 2012 (due to an amendment), only non-food products have fallen under the scope of the Trade Act and for this reason only non-food product suppliers are protected by this law against the practices of retail chains with significant market power. These provisions are still enforced by the GVH.

55. In 2009, after an unsuccessful attempt to force a non-binding code of conduct on the big retail chains, the government decided to pass another Act in order to support suppliers in Hungary. As a consequence, Act No. XCV of 2009 on the Prohibition of Unfair Distributional Practices Applied Towards Suppliers with regard to Agricultural and Food Products (hereinafter: the "Unfair Distributional Practices Act") entered into force on 1 January 2010. The above mentioned piece of legislation differs from the Trade Act because it covers not only retailers with significant market power but all types of retailers, for example, small convenience stores. In addition, it protects all types of food and agricultural product suppliers regardless of their size or bargaining power. However, such rules are only applicable to unfair distribution practices involving agricultural and food products.

56. The Unfair Distributional Practices Act contains agricultural and food industry specific provisions prohibiting unfair distribution practices from being applied by traders on suppliers.

57. According to its preamble, the Unfair Distributional Practices Act aims to ensure that traders of agricultural and food products conduct themselves fairly in their business relations with their suppliers by listing prohibited unfair distribution practices.

58. Under the Unfair Distributional Practices Act, unfair distribution practices include (among others)

- one-sided risk sharing to the detriment of suppliers;
- the application of contractual provisions which place a repurchase obligations on suppliers;
- cost externalisation towards suppliers;
- applying shelf prices, listing charges and extra charges for services not rendered;
- provisions containing payment deadlines exceeding 30 days;
- excluding interest for late payment, or penalty payment;
- a requirement regarding exclusive supply of suppliers without proportionate payment;
- an unjustified unilateral contract amendment by the trader;
- below cost pricing by the trader;
- applying discriminative customer prices with regard to equivalent products depending on the country of origin.

59. The Unfair Distributional Practices Act places additional requirements on traders whose annual net sales revenues exceeded 20 billion HUF (approximately 67.1 million EUR) in the preceding business year. Such larger traders are obliged to prepare and publish their business rules and submit them to the NÉBIH. The rules must cover the services offered by the trader; the terms and conditions governing the provision of the services; the maximum prices that may be charged for the services; the calculation method used to set the prices; and the conditions of inclusion in and exclusion from the trader's suppliers list.

60. Since the introduction of the Unfair Distributional Practices Act in 2010 it has been enforced by the NÉBIH. The NÉBIH may initiate proceedings at request or ex officio. Prior to August 2012, the NÉBIH had to suspend its proceedings when the GVH was conducting an investigation related to the same subject matter on the basis of Article 7 of the Trade Act or on the basis of the abuse of dominance provision of the Competition Act. From 1 August 2012, the GVH only has competence to conduct investigations based on Article 7 of the Trade Act (abuse of SMP) in relation to "non-food" products and the NÉBIH enforces the Unfair Distributional Practices Act in relation to food and agricultural products. If the GVH conducts investigations in accordance with the abuse of dominance provision of the Competition Act, the NÉBIH still has to suspend its proceedings which are related to the same conduct.

61. It must be emphasized that the Trade Act's provisions regarding the prohibition of abuse of significant market power are applicable to all traders having significant market power, whereas the Unfair Distributional Practices Act's provisions are only applicable to traders active in the agricultural and food industry, regardless of the market power of an undertaking. If an unfair business conduct falls under the Unfair Distributional Practices Act, the Trade Act shall not be applied.

6. Exemption of the food supply sector from competition law

62. As a general rule the retail grocery sector is not exempted from competition law, but the *de minimis* rule, Article 101 (3) of TFEU (exemption under certain conditions) and its national equivalent are

applicable, furthermore the block exemption possibility exists. By contrast, there are sector specific regulations which provide exemptions under certain circumstances.

63. Act No. CXXVIII of 2012 regulating the Conduct of Interbranch Organizations in the Agricultural Sector (hereinafter the "Interbranch Organizations Act") introduced new rules which aim to create better market conditions for farmers by taking into account the special features of the agricultural sector. The Act also introduces an exemption from the prohibition of anticompetitive agreements and concerted practices in the field of agricultural products.

64. The Interbranch Organizations Act was created as a special Hungarian version of Council Regulation 1234/2007/EC (Single CMO[6] Regulation). The Interbranch Organizations Act contains some narrow exemptions from competition law. These rules provide exemptions for interbranch organizations. The Act states that agreements of interbranch organizations falling under the general prohibition of anticompetitive agreements of the Competition Act shall not be prohibited when they carry out the activities listed in paragraphs (3) point c) and (4) point c) of Article 123 of the Single CMO Regulation[7] if they

1. do not affect the organization of markets in a harmful manner;
2. do not lead to – by any means – the sharing of Hungarian markets;
3. do not lead to a restriction of competition which exceeds the extent necessary to attain the goals of the interbranch organization;
4. do not lead to price fixing of any form and;
5. do not lead to discrimination and the complete elimination of competition in respect of a substantial part of the product markets concerned.

65. Interbranch Organizations have to notify these agreements to the agricultural minister. The exemption is only available if – within two months from the notification – the minister and the GVH both approve the agreement concerned.

66. Pursuant to the Interbranch Organizations Act, interbranch organizations representing suppliers of big retails chains can co-ordinate the conduct of their members if the economic and social benefits from such co-operation exceed the disadvantages from the restriction of competition.

7. The special regulation related to the grocery retail sector

67. There are legal provisions in Hungary which affect the establishment of new large grocery retail stores. The relevant provisions of Act No. LXXVIII of 1997 on the Formation and Protection of the Built Environment (hereinafter: the "Built Environment Act") are aimed at minimizing the number of newly created large retail stores and shopping centres (retail stores and shopping stores are collectively referred to as: "Commercial Buildings"). The Built Environment Act prohibits (i) the establishment of Commercial Buildings with floor areas which exceed 300 m^2 and (ii) the enlargement of existing Commercial Buildings which would result in their floor areas exceeding 300 m^2. Such large Commercial Buildings cannot be built, unless the relevant minister exceptionally approves.

6 CMO - Common Market Organisation

7 Activites in the fruit and vegetable sector and activities of other producer's organizations

68. The moratorium was introduced in January 2012 and is due to expire in December 2014. Until late 2012 only half of the received requests were approved and all foreign firms were rejected. Thus, Lidl and Aldi had to change their expansion policies which had been based on greenfield investments and started to open shops on purchased premises also in city centres. Functioning practically also as convenience shops, these will compete directly with Hungarian chains.

69. Another policy measure which affected the functioning of the food supply chain and competition was the introduction of the "crisis tax". Retail chains with high sales revenues had to pay approximately 30 bn HUF (107 million EUR) in 2010. Tesco, Spar and Auchan were hit hard while other chains, due to their different organisational (franchise) structure, escaped with lower payments.

8. Food supply chain policies

70. The Hungarian government has changed its general attitude towards the food sector, especially the food retail sector in many ways in recent years. The most important change has been the government's ban on the construction of retail stores bigger than $300m^2$ (so called "plaza/shopping centre-stop" - discussed earlier). This measure has resulted in the opening of smaller cash&carry stores in larger cities and smaller stores in smaller settlements. The overall market structure, however, did not change.

71. There has been evidence of a shift in the attitude of the government concerning the above-mentioned issue. These days, more than ever, politicians in Hungary (both from the governing party and the opposition) are stressing the importance of assisting producers. A good example of this shift in policy in Hungary can be seen in the "watermelon-case".

72. The GVH started an investigation in August 2012 against six big retailers and two inter-branch organisations for fixing the selling price of watermelons at 99 HUF per kg (approximately 35 cents in euros). This agreement between the market players was initiated by the Ministry of Rural Development. According to the announcement of the Ministry this agreement ensured a fair price for melon farmers – and this was the original aim of the whole deal. After the initiation of the proceeding a Member of the Parliament – who was also a large-scale melon farmer – submitted a draft amendment of the Act on Interbranch Organizations and certain issues regulating agricultural markets in order to exempt the sector in some way from the general prohibition of competition law. The GVH took immediate advocacy steps and drew the attention of the policy-makers to the anti-competitive features of the draft amendment. The GVH stressed that the draft may be contrary to certain provisions of Council Regulation 1/2003/EC since – among other problems – it impedes the GVH's decision making power related to Article 101 TFEU. The GVH further indicated that the amendment would contradict general competition policy principles.

73. Regardless of the concerns of the GVH, Act No. CLXXVI of 2012, which amended the Interbranch Organizations Act, was adopted in November 2012.The aim of the legislator – according to the reasoning of the new legislation – was to relax the rigor of competition rules in the agricultural sector taking into account the special characteristics of this market, including security and seasonality of supply, unpredictable weather changes and most of all to guarantee a fair income for farmers.

74. Paragraph (1) of the new Article 18/A of the Act provides that '[t]he infringement of Article 11[8] of the Competition Act cannot be established in case of agricultural products if the distortion, restriction or prevention of competition resulting from an agreement according to Article 11 of the Competition Act does not exceed what is necessary for an economically justified, fair income, provided that the actors of the market affected by the agreement are not debarred from benefiting from such income and that Article 101 TFEU was not applied.' According to paragraph (2), 'the fulfilment of the conditions of exemption

8 Prohibition of anticompetitive agreements

provided for in paragraph (1) shall be established by the agricultural minister.' Paragraph (3) provides that the GVH shall obtain and adhere to the resolution of the minister if it conducts an investigation into agricultural products based on Article 11 of the Competition Act. The GVH must suspend its procedure while awaiting the minister's resolution, which must be made within 60 days of receipt of the request by the GVH.

75. Paragraph (4) obliges the Competition Council[9] to suspend the imposition of fines if an agreement according to Article 11 of the Competition Act or an agreement or concerted practice between competitors according to Article 101 (1) TFEU relates to agricultural products. Instead, the Competition Council shall set a time limit for the parties involved in the agreement or concerted practice to reconcile their behaviour with the provisions of the acts. Should the parties fail to comply with this, the Competition Council must impose fines.

76. Since the scope of the Act also covers the processing stage of the product chain, even wholesalers, multinational retail chains and food processors may benefit from the exemption.

77. As a consequence, the GVH closed the investigation as it was no longer possible to effectively safeguard the public interest as a result of the new legislation.

9. Advocacy

78. The GVH did not play a pro-active role during the adoption of the Trade Act and the Unfair Distributional Practices Act. However, since there is a statutory obligation to ask for the GVH's opinion on legislative proposals which could affect the tasks of the GVH, the GVH attempted to fully exercise its advocacy powers during the drafting procedure and provided several studies, papers, opinions etc. to the legislator. The objectives of the GVH were clear: to promote fair competition in the sector and to highlight to the legislator that unnecessary exemptions from competition rules do not help suppliers to achieve higher efficiency and as a result increase their success on the market.

79. Furthermore, the GVH is of the opinion that the existing regulation (Article 18/A) in the Interbranch Organisations Act gives rise to serious concerns as it causes legal uncertainty in the evaluation of cartel activities concerning agricultural products.

80. As the current situation shows, in this particular case the advocacy actions of the GVH have not been very successful. As long as the amendments of the Act on Interbranch Organizations are in force the GVH cannot effectively exercise its powers that are set out in Council Regulation 1/2003/EC in its fight against cartels. Moreover, these provisions allow not only farmers, but also big retail chains and other market players to violate competition law, and conduct unlawful cartel agreements, to the serious detriment of consumers in Hungary (and competitors in other Member States).

9 The Competition Council is the decision-making body of the GVH.

STATISTICAL ANNEXES

Annex 1

GDP and per capita real income indices for Hungary 2004 - 2012

	2004	2005	2006	2007	2008	2009	2010	2011	2012
GDP (2004=100)	100.0	104.1	108.1	108.1	109.2	101.6	103.0	104.6	103.0
per capita real income (2004=100)	100.0	103.7	105.2	100.4	98.9	95.1	90.3	94.8	n.a.

Source: Central Statistical Office (KSH)

Annex 2

Retail food, drink and tobacco sales in Hungary 2004-2012

	2004	2005	2006	2007	2008	2009	2010	2011	2012
food, drink and tobacco sales									
at current prices bn HUF	1 952	2 084	2 089	2 241	2 435	2473	2 545	2 777	3 097
at constant 2004 prices bn HUF	1 952	2 029	1 904	1 854	1849	1 783	1 754	1 826	1 890
volume indices (2004 = 100)	100.0	103.9	97.5	95.0	94.7	91.3	89.9	93.5	96.8
food sales									
at current prices bn HUF	1 372	1 493	1 457	1 587	1688	1 717	1 790	1 921	2 124
at constant 2004 prices bn HUF	1 372	1 457	1 320	1 289	1245	1 213	1 225	1 233	1 287
volume indices (2004 = 100)	100.0	106.0	96.2	94.0	90.7	88.4	89.3	89.9	93.8

Source: Central Statistical Office (KSH)

Annex 3

Per capita food consumption in Hungary 2004 – 2011

	2004	2005	2006	2007	2008	2009	2010	2011
meat and meat products	60.9	63.5	65.9	63.2	61.5	61.7	56.7	55.8
milk and dairy products	155.2	166.8	163.1	163.5	158.2	155.9	156.8	152.3
eggs	16.7	16.0	15.6	15.4	14.9	14.4	13.7	12.6
fats	36.0	36.5	37.7	37.4	36.8	36.6	34.6	34.4
cereals	89.4	97.3	92.0	88.3	88.9	88.4	88.2	84.9
potato	68.0	66.8	61.8	59.7	65.5	60.8	60.5	63.5
sugar	32.7	31.2	32.3	31.2	31.9	29.8	28.7	27.9
vegetables	117.7	112.1	119.9	117.6	120.2	116.9	105.3	111.7
fruits	93.7	82.7	90.7	76.5	88.7	92.4	84.7	66.2

kg/head/year
Source: Central Statistical Office (KSH)

Annex 4

Agricultural producer and food retail price indices 2004 – 2012

	2004	2005	2006	2007	2008	2009	2010	2011	2012
agricultural producer prices (2004=100)	100.0	100.7	111.4	136.1	132.4	119.8	140.0	167.0	192.7
food retail prices (2004=100)	100.0	102.5	110.4	123.1	135.6	141.6	146.1	155.8	165.0
food retail prices without V.A.T. (2004=100)	100.0	102.5	105.8	118.0	130.0	133.2	135.2	144.1	150.4

Source: Central Statistical Office (KSH)

Annex 5

Sales and financial data of the Hungarian food industry 2004 – 2012

	2004	2005	2006	2007	2008	2009	2010	2011	2012
total sales, volume indices (2004=100)	100.0	97.1	95.9	93.0	86.9	85.2	85.8	86.1	90.1
domestic sales, volume indices (2004=100)	100.0	95.7	94.8	90.0	82.5	78.7	77.0	75.0	76.0
foreign share within total equity (%)	52.4	49.3	47.1	48.4	48.3	n.a.	n.a.	n.a.	n.a.
pre-tax profit (bn HUF)	35.4	38.3	46.0	20.8	9.6	52.8	59.2	n.a.	n.a.
total sales revenue (bn HUF)	2 326	2 270	2 316	2 418	2 854	2 754	2 690	n.a.	n.a.

Source: Central Statistical Office (KSH) and National Tax and Customs Office (NAV)

Annex 6

Revenues of retail chains 2004 – 2012

	2004	2005	2006	2007	2008	2009	2010	2011	2012
Tesco	415	470	544	555	602	638	667	705	709
CBA	495	525	538	525	545	548	555	565	579
Coop	358	375	400	440	500	510	510	510	530
Spar	184	202	246	285	374	397	318	390	421
Reál	240	282	312	331	348	358	360	367	370
Auchan	182	187	201	212	222	226	225	230	258
Lidl		50	89	124	165	191	221	235	291
Metro	264	254	250	232	262	219	210	184	n.a.
Penny Market	130	127	132	145	162	162	161	169	188
Aldi					20	49	53	69	85
Plus	90	102	102	107					
Honiker	118	58							
Cora	127	123	128	119	105	104	97	86	
Match	57	55	58	54	54	55	42	41	33
Profi	38	40	40	33	33	29	25	28	26
total	2 694	2 843	3 035	3 162	3 392	3 486	3 444	3 579	3 660
of which Hungarian chains	1 211	1 240	1 250	1 296	1 393	1 416	1 425	1 442	1 479
share of Hungarian chains from the total revenue (%)	45.0	43.6	41.2	41.0	41.1	40.6	41.4	40.3	40.4

Source: AC Nielsen
billion HUF

Annex 7

Shares of different store types from total FMCG retail sales in Hungary 2004 - 2011

	2004	2005	2006	2007	2008	2009	2010	2011
hypermarkets	22	24	24	25	23	23	26	26
supermarkets	15	14	15	15	17	20	17	17
discounters	15	17	17	18	18	16	15	16
C+C units	4	3	3	3	3	2	2	2
small shop chains	16	15	15	14	14	13	15	15
independent small shops	17	16	15	15	14	13	13	12
others	11	12	11	11	11	13	11	12
total	100	100	100	100	100	100	100	100
modern store types together	52	55	56	58	58	59	58	59

Source: GfK Hungária

Annex 8

Shares of different store size categories from total FMCG sales in Hungary 2004 – 2008 (%)

sales area in m^2	2004	2005	2006	2007	2008
above 2500	29.4	30.3	30.6	32.0	32.0
between 400 and 2500	24.3	25.7	26.7	28.1	29.0
between 200 and 400	9.5	9.6	9.4	7.8	8.1
between 50 and 200	18.9	18.5	17.7	16.9	16.1
less than 50	13,0	11.6	11.0	10.4	9.7
perfumeries	4.7	4.1	4.3	4.6	4.8
drugstores	0.2	0.2	0.3	0.2	0.2
total	100.0	100.0	100.0	100.0	100.0

Source: AC Nielsen

Annex 9

Shares of the different store size categories from total food sales in Hungary 2008 – 2013 (%)

selling area in m^2	2008	2009	2010	2011	2012	2013 first half
more than 2500	31	31	31	31	29	30
between 400 and 2500	32	33	33	34	36	36
between 200 and 400	9	9	9	8	8	8
between 50 and 200	18	18	18	18	18	17
less than 50	10	9	9	9	9	9
total	100	100	100	100	100	100

Source: AC Nielsen (for the 90 food categories recorded by Nielsen, in value terms)

Annex 10

Number of general food stores by size categories in Hungary 2004 – 2012

sales area in m^2	2004	2005	2006	2007	2008	2009	2010	2011	2012
more than 2500	77	92	109	123	137	152	166	170	171
between 400 and 600	753	814	868	943	1 007	1 071	1 103	1 121	1 104
between 200 and 400	879	851	852	853	805	801	834	848	768
between 50 and 200	6 936	6 914	6 894	6 888	6 593	6 426	6 355	6 294	6 421
less than 50	15 310	14 415	13 237	12 533	11 393	11 451	11 111	11 111	10 785
total	23 955	23 086	21 960	21 340	19 935	19 901	19 569	19 544	19 249

Source: AC Nielsen (on December 31)

Annex 11

Number and types of the stores of food retail chains in Hungary 2004 - 2012

retail chain	typical store type	2004	2005	2006	2007	2008	2009	2010	2011	2012
Tesco	hypermarket (supermarket)	69	89	99	122	148	176	205	212	216
CBA	small shop, supermarket	2 836	3 000	3 182	2 924	3 038	3 054	3 072	3 077	3 225
Coop	small shop, supermarket	4 487	4 963	5 286	5 283	5 250	5 250	5 250	5 225	5 459
Spar	supermarket, hypermarket	153	168	189	204	391	398	399	389	391
Reál	small shop, supermarket	1 840	2 290	2 310	2 310	2 310	2 320	2 320	2 140	2 300
Lidl	discounter		51	68	90	105	122	135	148	156
Auchan	hypermarket	9	10	10	10	11	12	12	12	19
Penny Market	discounter	142	148	155	163	169	178	186	189	191
Aldi	discounter					45	58	73	78	86
Match	supermarket	132	132	125	124	124	123	123	121	63
Profi	discounter	67	73	73	73	73	73	73	73	73
Cora	hypermarket	7	7	7	7	7	7	7	7	7
Héliker	small shop	61	57	54	53	53				
Metro	C + C	13	13	13	13	13	13	13	13	13
Plus	discounter	157	165	165	172					
Interfruct	C + C	22	22	22	23					

Source: AC Nielsen

Annex 12

Profitability of food retailing in Hungary 2005 – 2010

	2005	2006	2007	2008	2009	2010
Return on Assets (ROA, %)	0.0	2.0	2.0	0.0	-1.0	-4.0
Return on Sales (ROS, %)	0.0	0.8	0.9	-0.1	-0.7	-2.2

Source: The productivity and profitability of the food retail sector (Research Institute of Agricultural Economics, Budapest, 2012)