

DISSERTATIONES

THE MOST FREQUENTED UNFAIR PRACTICES IN THE BEER MARKET IN THE EU AND HUNGARY

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1. Introduction

Present article intends to inform the reader about the unfair practices of the companies in the beer industry that do not comply with the competition law in the European Union. By legal cases it shows what the most typical or infamous techniques are in that sector and how some companies would like to violate the rules of the competition. Additionally, it is worth mentioning the Hungarian national competition authority's investigations regarding the beer market, especially with respect to the new provisions of the Hungarian Act on Trade.

First the relevance of the competition law will be presented shortly, and the characters of the beer market, after the concentrations and the unfair practices at the level of the European Union, furthermore some legal cases will be detailed from Hungary.

The article does not want to enumerate all legal cases from Europe. The aim is to show the reader a review of the most typical unfair practices, to call upon the attention of the actors in the market how they could avoid becoming victim or part of such practices, or what they can do against it.

2. The competition law and its relevance

The competition can have a direct effect on the markets. In market economies it intends to achieve a higher openness where all of the actors, like the consumers and the competitors or other companies can enjoy the benefits in a fair way. The competition policies can help to reach that. Without rules and control, the markets could be a place where only a few actors would prevail. There are different goals to be realized. The countries with the regulations try to provide the consumer and social welfare, as well as to be competitive the market, to support higher employment rate, protection of jobs and strategic sectors. Furthermore, eg. in the EU it can be a tool

to improve the economic and social cohesion as well as to assure competitiveness in EU and international level, moreover, to help economically disadvantaged areas, but mostly it is a tool to maintain the internal market to work well. Recently the sustainable development also can be one of the goals.

It is also important to be assured an environment where the innovation is relevant. In this case the competitors are forced to create new techniques and to try to function in a more effective and economical way, as well as to use the limited resources better. Thereby it is possible to stimulate the development and science. (Eg. the companies need to find alternative solutions instead of gasoline, or they need to invent more environmentally friendly proceedings due to the regulations). By that way it is also possible to contribute to the fight against the global warming that concerned all countries.

In the world more and more markets of the countries integrate, and as a result the different economic processes are intertwined with each other. Nowadays the economical actors are not active just in one domestic markets, but in a regional, continental or global level as well. In such circumstances the unfair competition law practices can impact not only one country, but more, thereby the damages inflicted on the consumers or competitors are higher too. Consequently, the competition authorities' role obtains bigger significance, and the international cooperation and the harmonization of the rules are stronger every day.

Such authorities' duty is that to be the guardians of the markets. They must stop the bigger undertakings to exploit the consumers or other actors who are in a weaker position. There are lots of different conducts that can violate the competition law. Not just in the EU, but most of the countries all around the world, it is against the law for instance, if the competitors agree to form cartels¹ in order to prevent, restrict or distort the competition in the market. The consumers cannot benefit from the cheaper prices resulting from the competition because of the cartels. "The advantages of lower prices resulting from competition cannot be passed on to consumers. Even if a higher price for an input product can be absorbed by a manufacturer before he sells on the final product, this can still ultimately create a detriment to the consumer – for example, if it results in other services being cut or less money being available for innovation and the development of future, better products. Although the amounts of price increases may be small (sic!)², when combined these increases can impact on large investments in innovation, products or services. In turn, the benefits of competition are lost and, hence, overall welfare suffers."³ In the EU, the European Commission (hereinafter: Commission) is entitled to supervise the infringements of the internal market. Eg. the Commission issued a fine with the amount of EUR 115 million on eight manufacturers

¹ The present article applies the definition of cartels like the article 101 of The Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012., 1–390. (hereinafter TFEU).

² The correct sentence should have been, "Although the increase in prices may be small".

³ *Report on competition policy 2008*. European Commission, Directorate-General for Competition, Publications Office, 2009. 3. <https://tinyurl.com/2p98jk99>

and two distributors of retail food packaging trays, because they participated at least one of the revealed five cartels.⁴

It is also unlawful if a strong economical actor commits an abuse⁵ by its dominant position that may have similar result like a cartel. Further important objective to prohibit the mergers and acquisitions⁶ that may endanger or inflict damages on the market.

Additionally, in the EU it is against the internal market's function and the competition that the member states distort them by unreasonable state aids.⁷ By such instruments the stronger countries would be able to achieve unfair benefits against the less competitive ones. That does not mean that all state aids are against the EU rules. Eg., the Commission approved one in Portugal in order to reduce excise duty for locally produced beer in Madeira, because the aid scheme fulfilled the conditions to be compatible with the common market.⁸

All of the aforementioned conducts may jeopardize the markets, therefore it is important to comply with the competition law and it to be enforced effectively.

3. The beer market of the EU

Before the relevant cases, it is useful to show the beer market of the EU in general in order to understand better the possible harmful impact of the unfair practices on the economy.

In the EU in 2020 about 32 billion litres of beer with alcohol, and 1.4 billion litres of beer with less than 0.5% alcohol or without alcohol were produced. There was reduction by 8% in the production regarding to the alcohol content beers compared with 2019, but the production of non-alcoholic beer has not changed.⁹ In addition, "the EU's total beer production was equivalent to around 74 litres per inhabitant."¹⁰

In 2020 Germany was the top beer producer in the internal market with 7.5 billion litres that is the 24% of the entire EU production, therefore every four alcoholic beer comes from Germany. The rank list is followed by Poland with 3.8 billion litres (12% in the EU), Spain with 3.3 billion litres (10%), the Netherlands with 2.5 billion litres (8%), France with 2.1 billion litres (7%), Czech Republic with 1.8 billion (6%) and Romania with 1.7 billion litres (5%).¹¹

⁴ Case No. AT.39563. (Retail Food Packaging), 14. 06. 2015. It has not been published in the OJ, but available: <https://tinyurl.com/2tjvue3u>

⁵ The present article applies the definition of the abuse like the article 102 of the TFEU.

⁶ Mergers and acquisitions may result a concentration when they would achieve some relevant market power by the transaction. The article applies the definition of concentration like the article 3 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004., 1–22.

⁷ The present article means the state aids as the Article 107 of the TFEU.

⁸ Case No. SA.23346. (Reduced excise duty to beer produced and consumed in Madeira), OJ C 308., 19. 12. 2007., 11.

⁹ Happy International Beer Day!, Eurostat, 05 January 2021. <https://tinyurl.com/4axmcu9c>

¹⁰ Ibid.

¹¹ Ibid.

The top exporter was the Netherlands with the amount of 1.9 billion litres alcoholic beers (21% of the export in the EU). Thereafter Belgium exported the most (1.7 billion litres, 19%), followed by Germany (1.5 billion litres, 17%), France and Czech Republic (both 0.5 billion litres; 6%) and Ireland with Poland (both 0.4 billion litres; 5%). The main destinations were the United States with 895 million litres (22% of the entire extra-EU beer export) and the United Kingdom with 881 million litres (21%).¹²

France was the top importer in the market of beers containing alcohol with 0.8 billion litres (16% of the entire EU beer imports), followed by Germany with 0.7 billion litres (13%), Italy with 0.6 billion litres (12%) and the Netherlands with 0.6 billion litres (11%), and Spain with 0.5 billion litres (10%). Most of the imported beers were from United Kingdom with 268 million litres that is the 51% of the EU beer imports, and the Mexican beers with 95 million litres (18%).¹³

With the aforementioned data it is possible to get a picture about the beer market in the EU. Additionally, the food supply chain is related to three main sectors of the EU economy: agricultural production, food processing, and distribution (wholesale and retail). They are relevant in the economic, political, and social life of the EU furthermore contribute to EU added value, trade, as well as employment, particularly in rural areas. In this sector it is common that the consumer food price changes, the prices are volatile, mostly producer prices for food commodities.¹⁴ These are relevant in the beer market as well.

In order for the market to function well, the products or services need to compete with each other thereby the consumers can purchase cheaper. The high prices depend on many factors, such as increasing commodity prices that can be recognized in the whole chain resulting in more expensive consumer prices.¹⁵ The situation is the worst, if the prices rise too because of collusive agreements. All of these may influence i. a. the trade and the profits. If the unlawful practices are not revealed, the abovementioned data may change. Therefore, a lot of supervision and decision have been done by the national competition authorities and the Commission in order to find the illegal practices.

4. Mergers & acquisitions in the beer market

With respect to the beer market, it is possible to differ two parts depending on where the sale is realized: on the one hand there is the so-called on-trade segment (i.e. pubs, hotels, restaurants, café bars), also known as horeca¹⁶ sector, and on the other hand the so-

¹² Ibid.

¹³ Ibid.

¹⁴ *Report on competition policy 2011*. European Commission, Directorate-General for Competition, Publications Office, 2013, 17–18. <https://data.europa.eu/doi/10.2763/90258>

¹⁵ Ibid.

¹⁶ Horeca is an abbreviation and term of hotels, restaurants and cafés.

called off-trade segment (other retail outlets).¹⁷ Sometimes the two markets are involved together¹⁸ by the transaction, therefore the horizontal and vertical concentrations might be typical in this industry. The beer market in Europe often has oligopolistic structure, and if a competitor disappears, that can make tacit price coordination easier, mostly at national level. That means if the market leader initiates to rise prices, it is expected that the competitors will follow, and if will not, the rivals may take actions to retaliate such company that does not increase.¹⁹ If there arises any competition concern deriving from the planned transaction, the most common to undertake commitments in order to solve the problems by the parties. Without adequate remedy, it would not be possible to clear the transaction.

This happened for example in the *case of AB InBev/SabMiller*,²⁰ where AB Inbev, the largest brewer wanted to acquire SABMiller, the second biggest brewer on the world in 2016. The Commission approved the transaction only with conditions, therefore AB InBev had to sell the whole European SABMiller beer business. In the beginning, the buyer's intention was to divest just in France, Italy, the Netherlands, and UK, however to dissolve all doubts of the Commission, they decided to do the same in Czech Republic, Hungary, Poland, Romania and Slovakia as well.²¹ Practically, ABInBev had to sell every European businesses of SABMiller that originally planned to obtain.

Regarding such commitments, the European Commission in the *case of Asahi/AB InBev CEE Divestment Business*²² approved of Asashi to acquire AB InBev's Central and Eastern European businesses.

There are different technics for the competition authorities to clear a merger. Definitely, the Commission prefers between structural and behavior remedies more the first one relating to the beer market, such as in its Merger Guidelines²³:

“Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns. Other structural commitments may be suitable to resolve all types of concerns if

¹⁷ See Case No. COMP/M.3032. (Interbrew/Brauergilde), OJ C 13., 18. 01. 2003., 13.; Case No. M.2569. (Interbrew/Becks), OJ 320., 15. 11. 2001., 18., Case No. M.2877. (Karlsberg/Brauholding International/JV), OJ 216., 12. 09. 2002., 2.;

Case No. M.2387. (Heineken/Bayerische Brauholding/JV), OJ C 327., 22. 11. 2001., 17.; Case No. M.2152. (Scottish & Newcastle/Centralcer), OJ C 357., 13. 12. 2000., 5.; Case No. C-234/89. Delimitis kontra Henninger Bräu [ECLI:EU:C:1991:91].

¹⁸ See Case No. M.9921. (Heineken/Carlsberg/InnsERVE), 21. 12. 2020. It has not been published in the OJ, but available: <https://tinyurl.com/dnsjspww>

¹⁹ Mergers: Commission approves AB InBev's acquisition of SABMiller, subject to conditions, Press release, Brussels, 24 May 2016. <https://tinyurl.com/bdh886uy>

²⁰ Case No. M.7881. (AB InBev/Sabmiller), OJ C 198., 22. 06. 2017., 1..

²¹ Mergers: Commission approves AB InBev's acquisition of SABMiller, subject to conditions, Press release, Brussels, 24 May 2016. <https://tinyurl.com/bdh886uy>

²² Case No. M.8357. (Asahi/AB InBev CEE Divestment Business), OJ C 205., 29. 06. 2017., 1.

²³ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008., 1–27.

those remedies are equivalent to divestitures in their effects [...]. Commitments relating to the future behavior of the merged entity may be acceptable only exceptionally in very specific circumstances. In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring [...], and if they do not risk leading to distorting effects on competition”²⁴

Besides, it is also possible to use so-called hybrid commitments that involve both types of remedies.

The most European competition authorities like to adopt divestiture remedies too in order to disperse the concerns, nevertheless the national authorities are more open to accept behavioral remedies, than the Commission. The possible explanation could be that it is more difficult to find a proper acquirer at national level, that may jeopardize the efficiency of the structural remedy.²⁵ Furthermore,

“the use of behavioral remedies may reveal two other weakness of merger control enforcement at national level: the risk of over and under-enforcement. Indeed, the adoption of behavioral remedies may be unnecessary in some cases, or insufficient to resolve competition concerns in other scenarios. Over-intervention raises the question of inefficiencies that may result: behavioral remedies may chill competition instead of safeguarding it. This is particularly the case of remedies related to output restrictions. On the other hand, under-intervention bears the risk of allowing market concentration that would favor either tacit collusion, or the use of increased market power to distort competition.”²⁶

Due to the remedies, there is not really possible to find any example relating to the beer market in the practice of the Commission, where a transaction has been rejected. By structural remedies, and mostly by business divestiture, the competition concerns may be dispersed.

In addition, it frequently has happened in the European beer market that although the transaction had have a Union dimension within the meaning of Article 1 (2) of the Merger Regulation,²⁷ but it has been still better to be examined by the competent authorities of

²⁴ Ibid. section (17).

²⁵ Pranvera KÉLLEZI – Christophe RAPIN: Merger Remedies and Competition Law: An Overview of EU and National Case Law. *e- Competitions National Competition Laws Bulletin*, No. 43382. (2012) 7. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014636

²⁶ Ibid.

²⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004., 1–22.

a Member State in accordance with Article 4 (4) of the Merger Regulation.²⁸ Moreover, in this market, it has not been rare to decide in simplified procedure.²⁹

5. Unfair practices in the level of EU

In the Belgian beer market there was a cartel regarding to the sector of hotels, restaurants and cafés, as well as to the retail sector of supermarkets and other food shops, involving the sale of private label revealed by the Commission, and in 2001 it imposed more than EUR 91 000 000 total on the Interbrew NV, Brouwerijen Alken-Maes NV, Groupe Danone SA, NV Brouwerij Haacht, and NV Brouwerij Martens.³⁰ The parties committed infringements by different ways such as: market sharing, price fixing, as well as they exchanged information. Regarding the case Competition Commissioner Mario Monti said:

“This is the first Commission prohibition decision in a series of cartel cases in the beer sector. It involves major market players. One of the extraordinary features of this case is the personal involvement of Interbrew’s, Alken Maes’ and Danone’s top managers at the time. This is a very serious matter. I also take Danone’s recidivism very seriously. The Commission’s fining policy aims at deterring companies from committing blatant infringements of our competition rules. I hope the companies involved got the message.”³¹

By the reason of the appeal against the decision the amount of the fine a little bit was changed in favor of *Danone*,³² but the others were rejected.³³

²⁸ See Case No. COMP/M.5560. (Carlsberg Deutschland/Nordmann/JV Nordic Getränke), 07. 09. 2009. It has not been published in the OJ, but available: <https://tinyurl.com/528dv2un>
Case No. M.9860. (Carlsberg/Marston’s/JV), 17. 08. 2020. It has not been published in the OJ, but available: https://ec.europa.eu/competition/mergers/cases1/202047/m9860_159_5.pdf
Case No. M.8322. (Heineken Uk/Punch Taverns Securitisation), 15. 02. 2017. It has not been published in the OJ, but available: <https://tinyurl.com/4w3u9n6w>
Case No. M.9921. (Heineken/Carlsberg/Innserve), 21. 12. 2020. It has not been published in the OJ, but available: https://ec.europa.eu/competition/mergers/cases1/202126/m9921_157_3.pdf
Case No. M.4999. (Heineken/Scottish & Newcastle assets regarding the acquisition of Irish assets), 03. 04. 2008. It has not been published in the OJ, but available: <https://tinyurl.com/24wn8km7>
Case No. M.1555. (Heineken/Cruzcampo), 17. 08. 1999. It has not been published in the OJ, but available: https://ec.europa.eu/competition/mergers/cases/decisions/m1555_es.pdf

²⁹ See Case No. COMP/M.3763. (Carlsberg/DLG/Sejet JV), OJ C 173., 13. 07. 2005., 8., Case No. COMP/M.3176. (Diageo/Heineken/Olfiltra/JV), OJ C 199., 18. 08. 2003., 15. and Case No. COMP/M.4230. (KPN/Heineken/ON), OJ C 155., 04. 07. 2006., 11.

³⁰ Case No. IV/AT.37.614 F3 PO. (Interbrew and Alken-Maes), HL L 200., 07. 08. 2003., 1–58.

³¹ The Commission fines brewers in market sharing and price fixing cartels on the Belgian market, *Press release*, Brussels, 5 December 2001, IP/01/1739. <https://tinyurl.com/bdfaevt3>

³² Case No. T-38/02. *Groupe Danone v Commission* [ECLI:EU:T:2005:367].

³³ See Case No. T-48/02. *Brouwerij Haacht v Commission* [ECLI:EU:T:2005:436] and Case No. C-3/06 P. *Groupe Danone v Commission* [ECLI:EU:C:2007:88].

In 2001 the Commission imposed total EUR 448 000 on the Luxembourg brewers, namely Brasserie Nationale-Bofferding, Brasserie de Wiltz and Brasserie Battin.³⁴ The fourth company, Brasserie de Luxembourg, delivered relevant information about the cartel, therefore it has managed to avoid being sanctioned.

“The brewers agreed to guarantee each other’s exclusive purchasing arrangements with horeca customers and took steps to restrict penetration of the Luxembourg horeca sector by foreign brewers. The cartel lasted from October 1985 to February 2000. The cartel consisted of a written agreement signed in 1985 by which the parties agreed not to supply beer to any horeca customer (hotels, cafés, restaurants and beer wholesalers) which was tied to another party by an exclusive purchasing agreement or »beer tie«. This beer tie guarantee extended to beer ties which were invalid or unenforceable by law, as well as to supply arrangements where a brewer simply invested in a drinks outlet but did not sign an exclusive purchasing contract. It therefore served to protect each party’s clientele. The beer tie guarantee was reinforced by a consultation mechanism, obliging the parties to check with each other about the presence of a beer tie before supplying new customers, as well as by financial penalties for non-compliance.”³⁵

Their agreement also involved a provision that tried to keep foreign brewers out of the Luxembourg market.³⁶ The Court of First Instance of the European Communities³⁷ upheld the decision.³⁸

In 2004 the Commission fined the two main brewery groups in France, namely Groupe Danone/Brasseries Kronenbourg S.A with EUR 1 500 000 and Heineken N.V./Heineken France S.A with EUR 1 000 000, because in 1996 they accepted ‘amistice’ agreement regarding to the sector of horeca.³⁹ One revealed internal note from 1996 clearly confirmed their intentions to restrict the competition: “Yesterday we have reached agreement with Danone to put an end to the stupid and costly acquisition war. We share the objective that between our two groups equilibrium must exist according to a general rule that none of the two is dominant in the Horeca market...”⁴⁰ They accepted especially: “(1) a temporary acquisition stop (prohibition to proceed with

³⁴ Case No. COMP/37.800/F3. (Luxembourg Brewers), OJ L 253., 21. 09. 2002., 21–41.

³⁵ Commission fines Luxembourg brewers in market sharing cartel, *Press release*, Brussels, 5 December 2001, IP/01/1740. <https://tinyurl.com/3hnte3dh>

³⁶ *Ibid.*

³⁷ The name of the Court of First Instance of the European Communities changed to the General Court in 2009.

³⁸ Case No. T-51/02. (Joined Cases T-49/02., T-50/02., T-51/02.) *Brasserie Battin v Commission* [ECLI:EU:T:2005:298].

³⁹ Case No. COMP/C.37.750/B2. (Brasseries Kronenbourg, Brasseries Heineken), OJ L 184., 15. 07. 2005., 57–59.

⁴⁰ Cartel fine in the French beer market, *Press release*, Brussels, 29 September 2004, IP/04/1153. https://ec.europa.eu/commission/presscorner/detail/en/IP_04_1153

acquisitions of wholesalers outside an agreed list), (2) the balancing of the total volume of beer distributed through the integrated network of each party and (3) the balancing of the volume of beer brands distributed by each party on behalf of the other party.⁴¹

In 2007 the Commission imposed totally EUR 273 783 000 fine on the Dutch brewers Heineken, Grolsch and Bavaria, because they concluded a cartel on the Dutch beer market.⁴² The InBev group also participated in the restrictive business practice, but because it revealed the cartel, it did not get any sanction. Between 1996 and 1999 they held unofficial meetings to coordinate prices, as well as price increases. Neelie Kroes Competition Commissioner in charge of competition policy said: “It is unacceptable that the major beer suppliers colluded to hike up prices and carve up the market between themselves. The highest management of these companies knew very well that their behavior was illegal, but they went ahead anyway and tried to cover their tracks.”⁴³ The parties appealed against the decision, and the General Court of the European Union (hereinafter: General Court) in its judgement⁴⁴, in case of Bavaria, partly annulled it “in so far as the European Commission found in it that Bavaria NV had participated in an infringement consisting in occasional coordination of commercial conditions, other than prices, offered to individual consumers in the on-trade sector in the Netherlands”⁴⁵, furthermore decreased the amount of fine imposed on Bavaria.⁴⁶ The new appeal was rejected.⁴⁷ Furthermore the General Court annulled the Commission’s decision to the extent to Grolsch.⁴⁸

Besides it annulled the decision “in so far as the European Commission found in it that Heineken NV and Heineken Nederland BV had participated in an infringement consisting in occasional coordination of commercial conditions, other than prices, offered to individual consumers in the ontrade sector in the Netherlands.”⁴⁹ As a result the General Court decreased the fine of Heineken as well.⁵⁰

After the cartels it is worth mentioning an abuse by dominant position in the beer market: in 2019 the Commission fined AB InBev EUR 200 409 000, because from 2009 until 31 October 2016 it infringed EU competition law.⁵¹ Competition Commissioner Margrethe Vestager said: “Consumers in Belgium have been paying more for their

⁴¹ Ibid.

⁴² Case No. COMP/B/37.766. (Dutch beer market), 08. 04. 2007. It has not been published in the OJ, but available: <https://tinyurl.com/2njhfzjz>

⁴³ Competition: Commission fines members of beer cartel in The Netherlands over €273 million, *Press Release*, Brussels, 18 April 2007, IP/07/509. <https://tinyurl.com/muafshst>

⁴⁴ Case No. T235/07. *Bavaria v Commission* [CLI:EU:T:2011:283].

⁴⁵ Ibid section (347).

⁴⁶ Ibid.

⁴⁷ Case No. C-445/11 P. *Bavaria v Commission* [ECLI:EU:C:2012:828].

⁴⁸ Case No. T-234/07. *Koninklijke Grolsch v Commission* [ECLI:EU:T:2011:476].

⁴⁹ Case No. T-240/07. *Heineken Nederland and Heineken v Commission* [ECLI:EU:T:2011:284], section (438).

⁵⁰ Ibid.

⁵¹ Case No. AT.40134. (AB InBev Beer Trade Restrictions), 13. 05. 2019. It has not been published in the OJ, but available: <https://tinyurl.com/4fufezep>

favorite beer because of AB InBev's deliberate strategy to restrict cross border sales between the Netherlands and Belgium. Attempts by dominant companies to carve up the Single Market to maintain high prices are illegal. Therefore we have fined AB InBev € 200 million for breaching our antitrust rules."⁵²

AB InBev is the biggest beer brewer in the world, and sells its beer brands all over the world, in more than 100 countries.⁵³ The company's most popular beer brand is Jupiter in Belgium. This brand represents about 40% of the total Belgian beer market. The product is also available in the whole EU, but eg. in the Dutch market AB InBev sold Jupiter lower prices than in Belgian market, because of the stronger competitive circumstances.⁵⁴ The intention of the company was to restrict imports of its beer production into Belgium, in order to keep higher prices and profits in that country.⁵⁵

The breach of the antitrust rules was implemented in four practices:

- “(a) limiting the volumes of beer products supplied to a wholesaler in the Netherlands to restrict imports of these products into Belgium;
- (b) implementing changes in the packaging of beer products supplied to off-trade customers in the Netherlands to restrict imports of these products into Belgium;
- (c) making the supplies to a retailer in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other beer products also available in the Netherlands; and
- (d) making promotions for beer products offered to a retailer in the Netherlands conditional upon not offering the promotions in Belgium.”⁵⁶

It is not a surprise that most of the violation in EU level happened in the strongest beer trader countries. It is also possible to state that to form a cartel is more frequently than the abuse in this market.

6. Unfair practices in Hungary

In Hungary the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: Tptv.) contains the relevant provisions regarding to the competition law. It involves antitrust issues, with the unfair competition and consumer

⁵² Antitrust: Commission fines AB InBev €200 million for restricting cross-border sales of beer, *Press Release*, Brussels, 13 May 2019. <https://tinyurl.com/4h2zt42k>

⁵³ Summary of Commission Decision of 13 May 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.40134 — AB InBev Beer Trade Restrictions), OJ C 407, 3.12.2019. 6–8., article (1).

⁵⁴ Antitrust: Commission fines AB InBev €200 million for restricting cross-border sales of beer, *Press Release*, Brussels, 13 May 2019. <https://tinyurl.com/4h2zt42k>

⁵⁵ Summary of Commission Decision of 13 May 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.40134 — AB InBev Beer Trade Restrictions), OJ C 407, 3.12.2019. 6–8., article (2).

⁵⁶ *Ibid.* article (10).

protection provisions. Furthermore, for example the Tptv.'s Chapter III Prohibition of Unfair Manipulation of Business Decisions, the section 8 (1) says "it shall be prohibited to deceive trading parties in economic competition"⁵⁷. As it will be shown, in Hungary the unfair practices in the beer sector appear in different methods from the EU level, and mostly in deception or psychological pressure cases, however the abuse by dominant position and restrictive agreements may occur as well.

In 2005 the Hungarian Competition Authority (hereinafter: GVH) found that Cora hypermarket chain committed undue influence in its commercials when it advertised beers with discount, meanwhile in many of its chains those products had not been available before the advertising. By that conduct the company false alleged especially advantageous purchase.⁵⁸

In 2011 the GVH fined Auchan company because in its advertisements it published products with slogans that could make the consumers to think they are fully Hungarian products and its ingredients as well. However, in many cases the ingredients were from other countries. In those commercial materials two beer companies were mentioned too, namely Borsodi and Soproni. With such conduct it is appropriate to deceive the consumers.⁵⁹

In 2008 the Hungarian competition authority accepted Festipay's commitment to cease its tipping system practice. It undertook to let the consumers decide whether they intend to give tips or not when they are paying for their beverages. The company ensures cashless payment services in a lot of Hungarian events and festivals. In its service there are five different tipping possibilities, and the company highlighted the 10% rate. The consumers can choose which tip rate they would like to give, if they give any, but the circumstances (big line, crowd etc.) may force the people to provide 10% rate tips, that gives a psychological pressure that makes unfair the commercial practice.⁶⁰

Similar 10% rate tips were applied by the HelloPay, and the GVH fined it HUF 20 000 000.⁶¹ However, later the authority investigated both companies and found that HelloPay still did the unfair practice highlighting 10% rate tips,⁶² and FestiPay had not fulfilled its committed obligations (like information) entirely.⁶³

Besides, it is worth mentioning the abuse with relevant market power in Hungary. In line with section 7 of Act CLXIV of 2005 on Trade (hereinafter: Kertv.) such abuses that can be especially unreasonable distinctions, unreasonable restriction to access to the products, unproportional costs, threat to terminate the contract in order to enforce the one-sided contract terms, to enforce resorting to a third party in service

⁵⁷ Section 8 of the Tptv.

⁵⁸ Cora fined HUF 1 million for unfair manipulation of consumer choice, *Press releases*, Budapest, 14 December 2005. <https://tinyurl.com/ma7hphwk>

⁵⁹ Case No. Vj-17/2011/71., 02. 08. 2012.

⁶⁰ Case No. VJ/37/2018/102., 17. 04. 2020.

⁶¹ Case No. Vj-64/2017/121., 20. 11. 2019.

⁶² Case No. Vj-31/2020/83., 07. 11. 2021.

⁶³ Case No. Vj-15/2021/27., 08. 11. 2021.

or supply, to change contractual terms in retrospect, or apply unreasonable terms etc.⁶⁴ Furthermore, according to the Kertv. the catering units need to extend their beverage offers nowadays.⁶⁵

With respect to restrictive agreements, in 2015 the GVH accepted the commitments of the three biggest beer companies (Heineken, Dreher, and Borsodi) in Hungary: they undertook to decrease the number of the exclusive contracts with the smaller catering units, (where the latter are limited to sell beers of other producers) therefore the GVH did not fine them. By such decision the big actors had to decrease 20 % percentage of such contracts.⁶⁶ Before that small enterprises could not gain market owing to the fact that the five biggest market actors (Heineken, Dreher, Borsodi, Carlsberg and Pécsi) ruled the market, and their market share together were more than 90 %, and they could maintain it firmly.⁶⁷

For comparison, in Greece there were problems by the duopoly of Heineken (its subsidiary is Athenian Brewery) and Carlsberg (owning Mythos and Fix brands), because with their dominant positions they ruled more than 85% of the market in 2004. In order to maintain their status, they tried to use different tactics that drew the attention of the Hellenic Competition Commission too. By their practice small breweries were forced to offer relevant discounts and concessions in order to try to be present in mainstream retail channels. However, there arose concerns over the effectiveness of the national authority.⁶⁸

The mentioned agreements of Heineken, Dreher, and Borsodi were restrictive in three ways: a) they provided full exclusivity to have beer from one certain producer at the horeca units, b) the horeca units had to sell a certain quantity of beer from one producer annually, c) the horeca units had to provide a certain percentage (for example 60%) of their total sale for one producer exclusively.⁶⁹ Furthermore, the restrictive agreements could contain the mix of these techniques too,⁷⁰ and generally the contracts were in effect for a 3-5 period.⁷¹ For such reasons the Hungarian competition authority found that the three companies are responsible for an anti-competitive cumulative effect and it can only be attributed to them,⁷² moreover, they do not have right to have exemption, therefore they violated the antitrust rules of section 11 (1) of Tptv. and article 101 (1) of TFEU,⁷³ but by the commitments undertaken by the undertakings it is

⁶⁴ Section 7 (1) of Kertv.

⁶⁵ Ibid. section 7/B.

⁶⁶ Case No. Vj/49/2011/362., 22. 07. 2015.

⁶⁷ Ibid. section (487).

⁶⁸ Sarantis MICHALOPOULOS: Greek beer market investigation exposes EU competition weaknesses. *Euractive*, 17 November 2015. <https://tinyurl.com/bdehfr54>

⁶⁹ Ibid. section (101).

⁷⁰ Ibid. section (102).

⁷¹ Ibid. section (104).

⁷² Ibid. section (533).

⁷³ Ibid. section (535–538).

possible to reduce the negative effects⁷⁴ in accordance with the Guidelines on Vertical Restraints.⁷⁵

By the decision the GVH intervened into the market structure in a direct way. However, in October of 2020 the competition authority found that Heineken has not complied with its commitments and imposed HUF 75 000 000 fine.⁷⁶

Additionally, the decision regarding Heineken, Dreher, and Borsodi issued in 2015 by the GVH can be regarded as a landmark in the Hungarian legal evolution in the field of competition law. Obviously, the goal of the competition authority was to open (or at least increase) the market for small breweries as well, and to make more brands available for the consumers. Such thought was followed by the legislators too, because after the fine of Heineken in the following month, namely November of 2020, an amendment⁷⁷ of Kertv. was proposed to the Hungarian Parliament, wherein the draft legislation was contained i. a. a) with respect to the sale of beer, soft- and fruit drink, fruit juice and fruit nectar, mineral water and soda-water (hereinafter together: beverages) it is not possible to declare that the horeca units shall procure more than 80 % their products per year from the same manufacturer, b) the horeca units shall be obliged to provide such beverages – except the draught beer – at least from two different manufacturers, c) with respect to the sale of draught beer, the declaration described in section a) may be possible, if the horeca unit shall supply permanent products from at least one small independent brewery⁷⁸ as draught beer.

Apparently, the intention of the amendment was to support small breweries and the wider range of various beverages in the horeca sector. However, it did not try to stop the promotional activities, for example discounts, or other assets for free provided by such restrictive agreements, if they complied with the law.⁷⁹ Also, in the general debate of the amendment, the parliamentary representative, who submitted the draft, said the goal is to let small breweries enter the market, and to stop big companies from driving out the competitors from the relevant market by administrative or legal technics, because in Hungary it was widespread that such undertakings claimed exclusivity for themselves, in exchange for certain presumed benefits.⁸⁰ Nevertheless, consumers paid such benefits eventually, and the price of the beverages was higher than in the neighbouring countries. Further purpose was to let the local beers (from local breweries) appear, like in the Netherlands or Germany.⁸¹ Another parliamentary representative highlighted the importance of tourism and gastronomy, where the beer

⁷⁴ Ibid. section (539).

⁷⁵ Commission Guidelines on Vertical Restraints (2010/C 130/01), OJ C 130, 19.05.2010., 1–46.

⁷⁶ VJ/6/2018/118, GVH decision of 22 December 2020.

⁷⁷ A kereskedelemről szóló 2005. évi CLXIV. törvény módosításáról, 2020.11.10., T/13653.
<https://www.parlament.hu/irom41/13653/13653.pdf>

⁷⁸ See section 7/B (3) of Kertv.

⁷⁹ A kereskedelemről szóló 2005. évi CLXIV. törvény módosításáról, 2020.11.10., T/13653., 4.
<https://www.parlament.hu/irom41/13653/13653.pdf>

⁸⁰ Such benefits could be for instance the free supply of glasses, beach umbrella, tap for draught beer or one-time financial support.

⁸¹ <https://tinyurl.com/36ya523w>

of small breweries would contribute to the local traditions as well as culture, in a similar way as wine in Hungary.⁸² In addition, the most important goal is the public interest to save, maintain and to support the small and medium-sized enterprises.⁸³

After the amendment came into force, the GVH have found that many undertakings still have not complied with the new rules, for example: Amrest Kft. (KFC restaurants in Hungary) regarding mineral and soda water,⁸⁴ as well as Fusion Befektetési Zrt. (Burger King restaurants in Hungary) with respect to fruit juice and fruit nectar.⁸⁵

Currently, there are proceedings against Dreher, Borsodi and Heineken, because the GVH suspects they “have exclusive contracts with certain catering units, which means that these units procure their entire beer supply from one of the major producers. At the same time, it is likely that certain catering units fail to meet the general requirement to include the products of at least two different breweries on the beverage list.”⁸⁶ These proceedings are interesting, because such companies undertook commitments in 2015 to cease their restrictive agreements. That means they have not fulfilled them properly, or at least not in the way the Kertv. after the amendment in 2020 requires. If it is true, they can assume probably fine like what was imposed on Heineken in 2020, or graver, because once it has been found that their practices were unlawful based on similar facts. By contrast, Amrest Kft. and Fusion Befektetési Zrt. have not received fines, because the GVH found that there are no other decisions yet from the past regarding the application of the amendment of the Kertv., and the existence of the unlawful practice have continued for a short period.⁸⁷ However, if a condemning decision will be issued in the case of the three beer companies, the GVH will have already legal practices regarding the new rules,⁸⁸ and as it was mentioned before, earlier they have already had problems with their restrictive agreements in this sector.

The suspect of the wrongful act of these companies might be confirmed by the GVH’s draft report too regarding the recent investigation of beverages procurement practice of domestic horeca units.⁸⁹ According to the document, 80% of the horeca units have had no idea about the amendment of the Kertv., and just 15% of them have thought to change their practices, because their suppliers have informed most of them that they do not need to do anything.⁹⁰ Moreover, the report says the small breweries could not obtain better market position by the new rules.⁹¹

⁸² <https://tinyurl.com/bdh7y7j9>

⁸³ Case No. VJ/52-58/2021., 07. 12. 2022.section (155).

⁸⁴ Ibid.

⁸⁵ Case No. VJ/49-38/2021., 07. 12. 2022.

⁸⁶ The GVH started the new year with 5 proceedings at a time – increased supervision over the procurement of beverages in the catering sector, *Press releases*, Budapest, 06. January 2022. <https://tinyurl.com/t3vc5a2j>

⁸⁷ See Case No. VJ/49-38/2021., 07. 12. 2022., section 93, and Case No. VJ/52-58/2021., 07. 12. 2022., section (216).

⁸⁸ At least there will be the two decisions regarding Amrest Kft. and Fusion Befektetési Zrt.

⁸⁹ <https://tinyurl.com/2v2byb3u>

⁹⁰ Ibid. 77.

⁹¹ Ibid. 88.

Based on the aforementioned examples, there are various methods to commit unfair practices. However, they are not just limited to the competition law. It is also possible that a strong company intends to threaten or intimidate a smaller and weaker rival referring to infringements of its trademark rights. Such powerful market actors may call upon the little ones in written to cease and desist to use of the trademark with regard to real or presumed violation of their rights. Nevertheless, it may be just a trick or bluff to dissuade from applying similar brands, because generally they have less legal knowledge, they may not be able to pay the litigation process and to hire a competent lawyer, therefore they may accept it and abandon the brand or change it.⁹²

It looks like in Hungary the most frequented violations of the competition law are the false advertisements or the consumer deceiving practices. The beer cartels are not typical like at the EU level, but practices can be found regarding restrictive agreements. It is also important to highlight that the Hungarian legislators are committed to fight against the abuse of dominant powers, that show the new provisions of the Kertv.

7. Conclusions

At EU level the most typical violations of the competition law regarding to the beer sector are the cartels. It means the competition authorities', and mostly the Commission's biggest challenge is to find such guilty companies. The cartels may cause serious damages to the market, such as higher prices or limited accessibility of products. By these artificial methods the consumers are the most vulnerable group. As a reason in 2013 was adopted by the Commission a directive⁹³ in order to help the consumers and the companies to claim compensations, if their rights were violated by practices against the competition law. Furthermore, the well working leniency programs⁹⁴ also may be useful solutions for the companies that are involved in a cartel. If the first member of such illegal cooperation shares information with the competition authorities, then that company may get immunity from fines or at least reduction of it. It may be good tool to reveal the cartels and to be more effective the competition law enforcement. If the competition can function well on the market that automatically makes the rivals to compete with each other by the better products and services that generates quality, innovation and cheaper prices. In order to achieve those goals, an effective competition law system and enforcement are required.

It would be important to have more actors on the market. In the four biggest beer companies currently are involved AB InBev, Heineken, China Resources Snow

⁹² See more: Leah CHAN GRINVALD: Shaming Trademark Bullies. *Wisconsin Law Review*, Vol. 2011, No. 3, 2011., Saint Louis U. Legal Studies Research Paper No. 2011-01. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739008

⁹³ Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Strasbourg, 11. June 2013, COM(2013) 404 final. <https://tinyurl.com/mwyxt769>

⁹⁴ See more about the leniency program of the EU: Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006., 17–22.

Breweries and Carlsberg.⁹⁵ The global oligopoly, where are a few companies, may has an easy ground for collusive practices. Therefore, the Commission and the national competition authorities need to cooperate with each other on more and more cases, because nowadays the companies work on a worldwide scope. Moreover, it may be thought-provoking to avoid future mergers and acquisitions of such big companies in order to prevent the situation of the global market of carbonated soft drinks, namely the duopoly of Coca-Cola and Pepsi, that can generate fewer choices and higher prices.⁹⁶ With such market power the abuse by dominant position is not difficult either. However, it looks like they used to approve such concentrations of business divestures in the EU.

In Hungary in the beer sector not the cartels cause problems, but the dominant actors. It may be advisable to apply such regulations like in Hungary, where the legislators enrolled such a provision that makes it obligatory to offer products of at least two different producers for the consumers. By that the competition can be stronger.

Besides, there are other illegal or closely illegal practices that may have an impact on the competition. Eg., the marketing communications influence the consumers in order to choose a brand. People will decide in favor of a better quality perceived by themselves and that may give the possibility for the company to raise the price, because they will be inclined to pay it. Therefore the advertisements can increase the market share and the profitability also.⁹⁷ Furthermore, the intellectual property rights including trademarks and patents have relevant roles in competition as well.

However, if a company breaches the law by unfair practices, or does not breach, but its technique may be immoral, the consumers would be able to react, eg. with boycotts that may cause more losses than profits that derive from the violation of the law, and may force them to stop or change their way of working.

Furthermore, to keep the competition safe and the other actors from the violation of the market or different abuses, not just the competition law, but other tools may be necessary, such as food safety, consumer and data protection, preventative rules to protect the climate and the environment. Therefore, the all-time legislators need to follow such market changes, and if it is necessary, to take the adequate measures. To achieve these, it is necessary to accept and enforce such instruments, that is suitable to prevent the harmful and restricting conducts.

⁹⁵ Ty HAQQI: 11 Largest Beer Companies in The World in 2020, 5 September 2020. <https://finance.yahoo.com/news/11-largest-beer-companies-world-150541894.html>

⁹⁶ Philip H. HOWARD: Too Big to Ale? Globalization and Consolidation in the Beer Industry, May 22, 2013. 12. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268705

⁹⁷ See more: José G. VARGAS-HERNANDEZ: Business Strategy in Mexican Beer Industry: A Case Applying Game Theory, October 23, 2012. 6–7. <https://ssrn.com/abstract=2165759>