The relevance of general terms and conditions applied in consumer contracts in consumer protection rules of civil law and competition law – connections and distinctions in EU and Hungarian law

- theses of PhD dissertation -

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Foundations, objective of the dissertation, its examined fields and methods

Reasons and background for standardized contracts (GTCs)

At its creation, i.e. at the time of liberal capitalism at the end of 18th and the beginning of the 19th century, contractual laws of European countries were fundamentally based on two pillars: the principle of freedom of contract and the thesis of equality of the parties. The enforcement of these two principles required such a market environment, where perfect competition exists: numerous purchaser and seller is active on the market (i.e. they have similar economic power), objects of trade (products, services) are homogenous, contractual parties conclude their contracts in the possession of full information – thus, their decisions are rational –, no barriers of market entry and exit exist. Thus, the state did not interfere with the content of their contracts, the conviction of their legislators was that in contracts concluded in this contractual environment ensure the balance of interests of the contractual parties and creates contractual justice.

With economic development – end of the 19th century – the market environment changed fundamentally: mass production unfolded as a result of technical developments, products and services offered to more and more purchasers, resources concentrated in less and less hands. With the development of production – and as a result, economic relations – it became necessary to rationalize contractual relations, there was neither time, nor way to determine the content of the contract of the parties section-by-section each and every time. Economic rationality, thus, required that similar type of contractual relations are stipulated in uniform contracts (blanket contract; standard contract; contracts applying general terms and conditions).

Contracts concluded with general terms and conditions are used at a mass scale in today's market economy. Contracts concluded this way, can be characterized as follows: clauses are created mostly by the party offering the products or services (producer, distributor) and used in their business relations; these type of contracts are created so the party using them can use them towards any person, with whom it intends to conclude the transaction; the GTC using party does this for the purpose of rationalizing the transactional costs of its mass transactions. Clearly, general terms and conditions are mostly, but not exclusively used in consumer contracts, as in these cases one of the parties (the undertaking) typically concludes contracts with the same content on a mass scale.


Furthermore, it is characteristic for this type of transactions, that the party using the GTC prepares the contract in advance and the party intending to accept – with the exception of some individual details (e.g.: name, etc.) – does not have a say with respect to the content of the clauses thereof – thus, it can accept them or not conclude the contract (with frequently used terminology: „take it or leave it!”). However, GTCs are not necessarily unilateral, nevertheless it is clear that the party preparing them tends to take into consideration its own interests while creating them.

GTCs are usually formulated in a terminology that is difficult to understand for a "layman". Nonetheless, we can experience in more and more countries proposals from the state to formulate contracts of everyday life – e.g. bank account contract – in a clear language, which can be understood by a person without a law degree. However, it is clear that due to the requirement of rule of law, the use of precise and legally clear *terminus technicus* is indispensable.

It can be stated about contracts applying GTCs in general that economic actors are more and more withdrawing these relationships – as a result of the special rules in general terms and conditions – from the dispositive statutory rules and thereby they are creating a *quasi* independent system "entrenched" with own rules: in German literature in the 1930s, this was called – very pertinently – as *selbstgeschaffenes Recht der Wirtschaft* (self-created law of the economy). It was due to this tendency that in recent years we can see in several countries – including Hungary – a stronger state intervention with respect to the control of form and content of general terms and conditions applied in consumer and other contracts.

**Economic and legal advantages and disadvantages of standardized contracts**

The rationalization of concluding contracts as set forth above has several advantages: reducing cost, saving time, decreasing legal uncertainty and several other risk factors. These advantages do not only appear on the side of the party using the general terms and conditions (hereinafter: "GTC"), because the cost reduction at the company due to the use of standardized contracts clearly leads to a price reduction\(^4\), which appears on the side of the consumer as a positive, moreover, this tendency is beneficial to competition as well. As a result of their characteristics, GTCs served as a tool for increasing efficiency and improving competitiveness – and they still do –, and are indispensable for the operation of modern market economy.

Apart form its advantages mentioned above, we need to consider the negative effects too, which may result from the use of GTCs. It is clear that in case of contract between a consumer and a company using GTCs, the consumer is in a weaker position, as the consumer generally has no opportunity to become aware of the content of the GTCs and if the consumer reads them, it is not in a position to achieve the amendment of the GTC unfavorable to the consumer. Therefore, the companies can use their benefit to insert contractual conditions to their GTCs, which by infringing the principle of good faith and fairness upsets the balances of contractual rights and obligations. The consumer is even more vulnerable in markets, where only one market player is active (monopoly), or where a company has a dominant position, because such an undertaking due to its market power has the possibility to create such GTCs.

\(^4\) This presumption only applies in case of a competitive situation. A monopoly has enough market power not to pass-on to consumers the surplus due to improvement of efficiency.
for consumers, which seriously violate the interests of the other party. It is also possible that the undertakings active in the market – within or outside their professional association – coordinate, concert their GTCs, eliminating competition among each other.

**Legislator’s response to anomalies of standardized contracts**

The legislator gave various responses to manage the above-mentioned disadvantages: it ordered the application of consumer protection rules of civil law (e.g. regulation in the civil code) on the one hand, and competition law tools on the other hand, to repress eventual abuses created or planned to be created through GTCs.

The consumer protection rules of civil law on general terms and conditions reflect basically the approach that the information provided by the undertakings to consumers is the most important cornerstone of the consumer making an adequate decision about the purchase of goods or the use of services. For this purpose, the rules ensure that the consumer can actually choose from alternatives (e.g.: information obligation of undertakings, requirement of intelligible language). However, the objective of "perfect decision" of the consumer is not realistically achievable in every case, because, on the one hand, the consumer encountering a contract containing GTCs does not have time to review all GTCs, which the consumer readily receives at the time of concluding the contract; on the other hand, even if the consumer would do this, the consumer would probably not be in a bargaining position to dispute these. Thus, it is not sufficient to prescribe that the undertaking must provide adequate amount of information in adequate quality to the consumer. Therefore, the legislator adopting consumer protection rules of civil law introduces material control over already concluded contracts by introducing the definition of unfair general terms and conditions and the respective legal sanctions. With respect to this, material control – i.e. the examination of fairness – provides additional assurances intended to balance the circumstance that the consumer is probably not in the possession of all information in order to compare all alternative available in the market.5

The rules of competition law on the prohibition of agreements restricting competition intend to hinder that undertakings artificially reduce the options available to consumers on the market (since if the undertakings for a cartel, the consumer has no actual choice of given products / services). These rules achieve their aim by rendering agreements, concerted practices and decisions of associations of undertakings unlawful, the objective, actual or potential effect of which is the reduce the number of GTC alternatives available to consumers or reducing thereof to a single one (e.g.: prohibiting competitors to agree to only apply general terms and conditions unified according to their agreement in their contracts with third parties (consumers)).

In a market, where only a single undertaking is active (monopoly), or in a market, where one of the undertakings is in a dominant position, the rules of competition law prohibiting abuse of dominance confines the undertaking in such a market position by imposing a

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special responsibility on them compared to competing undertakings on the market in connection with the use of GTCs.

The above-described rules of two branches of law can be categorized as follows:

— The cartel rules of competition law facilitate that consumer have alternatives on the market at all (including the prohibition of competition law, which for example prevents the decision of association of undertakings to make a binding proposal to its members model GTCs applied towards third parties (consumers), which practice also decreases or narrows the decision alternatives available to the consumer on the market).

— The consumer protection rules of civil law facilitate consumers to have an actual decision on these alternatives (e.g. warning obligation of party creating standard clauses, if the given GTC deviates from customary contractual practice).

— The consumer protection rules of civil law on the unfairness of GTCs provide additional assurances to consumers: they should not suffer unlawful disadvantages even if they have already decided on a GTC alternative.

— The competition law rules on dominance intend to prevent undertakings to exploit consumers by their GTCs on markets where only narrow alternatives (dominant market position) or just one available product or service (market situation controlled by a monopolist) is available.

Summary of the research objective and legitimacy of the questions examined in the dissertation

It is apparent from the above that the two branches of law – consumer protection rules of civil law and competition law – "act" in a complementary way in eliminating the problems connected to general terms and conditions. Thus, the objective of the dissertation is the following:

- **first** the analysis of Hungarian consumer protection rules of civil law, which are largely influenced by the EU Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts\(^6\), regulating general terms and conditions in light of EU legislation and case-law;

- **second** the examination of in which cases general terms and conditions play a role in competition law (prohibition of anticompetitive agreements, prohibition of abuse of dominance);

- **third** the consideration of the areas, where competition law could connect to consumer protection rules of civil law;

- **fourth** the analysis of whether competition law decision-making can rely on consumer protection rules of civil law, and if yes, how.

The examination to be carried out in this paper has legitimacy in my view, because both consumer protection rules of civil law on GTCs and competition law rules have at their actual center the protection of the consumer and consumer welfare. Although the rules of these two branches of law are applied through different instruments (consumer protection rules of (civil) law is basically on the border of public law and private law, because it contains both civil law

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and administrative law components\(^7\), while competition law prohibitions can be considered to have public law nature), the objective of the rules of both branches of law examined in this dissertation is to prevent that undertakings gain unearned advantages to the detriment of consumers.

It can be stated that both consumer protection and competition law facilitate that consumers can make real decisions – and not just "pretense decisions".\(^8\) ("Perfect consumers", in the possession of all information, maximally rational and with above-average intelligence are probably not affected by unfair GTCs, because they would know and immediately recognize the unlawful clauses of the contractual partner. However, not even such a consumer would be protected from competition law infringements. As this depends on external factors. Even the "perfect consumer" must often purchase goods or use services from cartelist undertakings.\(^9\).

Competition law basically intends to impact the circumstances external to consumers (e.g. by the prohibition of cartels of undertakings, which leads to competitive price, innovation, etc.), while certain consumer protection rules of civil law applicable to GTCs protect the decision of the internal consumer (e.g.: certain information on the content of the GTC must be provided to the consumers, etc.), and also sanctions the unfairness of the GTC. Prima facie it seems that consumer protection rules of civil law limiting the application of GTCs lead to the protection of consumers in a more direct way than competition law, however, the competition supervision procedures, which establish the infringement of competition law by the use of GTCs, also serve the protection of consumers directly.

Nonetheless, it is apparent that the consumer protection rules of (civil) law are significantly more far-reaching than competition law rules, because while competition law rules intend to facilitate the avoidance of market failure and distortion, the consumer protection rules of (civil) law consist of several parts (e.g.: unfair GTCs, distance contracts, rules on consumer credit, etc.)\(^10\). In addition, while the effects of competition law encompass entire markets, consumer protection rules of (civil) law tackles micro level problems mostly\(^11\).

In connection with the above, it is important to emphasize the enforcement of the two branches of law. Both the consumer protection rules of civil law applicable to GTCs and competition law rules can be enforced via private law and public law instruments. In case of competition law, the prohibitions thereof are enforced by state bodies (competition authorities of the Member States and the European Commission), however, it must be emphasized that competition law requirements can be enforced also via private enforcement of competition law. With respect to consumer protection rules of civil law, the possibility of public interest

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\(^7\) See FAZEKAS Judit, Fogyasztóvédelmi jog, Complex, Budapest, 2007, p. 75.


\(^9\) AVERITT / LANDE raise an interesting example: even if the "perfect consumer" would expect that on some markets the undertakings form a cartel or a monopoly arises, it is unsure if the consumer could satisfy its needs in advance – before these events arise. The difficulty thereof is illustrated by the Microsoft case: even if the "perfect consumer" would have known that Microsoft would obtain a monopoly position later, it would not have been easy to devise a strategy, due to which - later - the required product could have been acquired at a competitive market price. See Neil W. AVERITT / Robert H. LANDE, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, 65 Antitrust Law Journal 713 (1997), p. 716.

\(^10\) In connection with this, see The Interface between Competition and Consumer Policies, OECD, 2008, p. 17.

litigation must be noted as a public law instrument. It is also important to mention that under certain circumstances – as discussed in detail below – invalidity of GTCs must be taken into consideration by the judge of the Member State ex officio.

Finally, it must be emphasized that the consumer protection rules of civil law and competition law rules being subject to the analysis of this dissertation – as presented in detail in this research – is heavily determined by EU law and both legal systems are important building blocks of the internal market of the EU.

**Brief description of the dissertation's method of research**

With respect to the research method, the thorough analysis of case-law was an important aspect during both the analysis of consumer protection rules of civil law and competition law. I assess the implementation of Council Directive 93/13/EEC („Directive”)\(^\text{12}\) by the Member States – giving an overview – with a comparative method. After the transposition of the Directive to national law, the courts of the Member States addressed numerous questions to the Court of Justice of the European Union (there, Hungarian decision-making for a were very active, as the dissertation presents), asking for the legal explanation of the latter with respect to the invoked directive. The given legal guidance of the CJEU are extremely important for the legal development of the Member States, thus, I lay great emphasis on analyzing the findings of the judgments important for the subject of the dissertation. Taking into consideration that the Hungarian and EU rules containing the competition law prohibitions consist only of a few sentences, thus, the enforcement bodies provide for their interpretation. Since the accession of Hungary to the European Union, the Hungarian administrative bodies and judicial organs must take into consideration for the application of competition law the EU competition law case-law, therefore, beyond the analysis of the domestic case-law, the assessment of the legal interpretation by the EU enforcement bodies has an important role in the paper. Therefore, I took into consideration the case-law of the CJEU and the General Court and – where relevant – the advocate general' opinion, as well as the case-law of the European Commission. In addition – by using an analytic method – I carried out the critical assessment of the statements made in literature about the interpretation of the law. At the end of each chapter, I summarize the research results and conclusions for the given chapter.

**Research structure of the dissertation**

In accordance with the above, my dissertation follows the following research structure.

First, in my research I analyze in detail, broken down to each legal institution (determination of consumer and consumer contract; GTCs becoming contractual content; unfairness of contractual clause; consequences of unfairness, etc.), how Hungarian consumer protection rules of civil law regulating general terms and conditions were created and I will pay great attention to the analysis of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as well as, the respective EU case-law.

After this, I examine how case-law on the prohibition of anticompetitive agreement (agreement, concerted practice, decision of association of undertakings) manages cases, where

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GTCs are involved: during which I will assess – starting from the case-law analyzed in detail –, for the investigation under Art. 101 (1) TFEU and Section 11 (1) of the Competition Act, as well as, with respect to exemption, under Art. 103 (1) TFEU and Section 17 of the Competition Act, of an agreement (decision of association of undertakings) with the subject of a model GTC containing the contractual conditions to the enforced towards third parties (consumers), what competition law aspect must be taken into consideration.

Then, I analyze the case-law on the prohibition of abuse of dominance (Art. 102 TFEU; Section 21 of the Competition Act): in the course of this, I am researching how an undertaking having a dominant position in the framework of a contractual relationship created by general terms and conditions applied in consumer contracts in relation to the "unjustified stipulation of benefits" or the "coercion of acceptance of detrimental conditions" can commit an abuse by using GTCs.

At the same time – with respect to both the prohibition of anticompetitive agreements and the prohibition of abuse of dominance – I assess, which are the fields, where competition law decision-making connects to consumer protection rules of civil law and whether competition law decision-making can rely on consumer protection rules of civil law and related case-law, and if yes, where.

**Summary of the research results**

Below, I am summarizing the most important conclusions and research results of the dissertation.

1. According to the Civil Code currently in force, public interest lawsuit can be brought – even by the Hungarian Competition Authority – against unfair GTCs created and published for concluding contracts with consumers, the application of which is proposed publicly (e.g.: association of undertakings). As shown in the dissertation, both Section 11 (1) of the Competition Act and Art. 101 (1) TFEU include decisions of associations of undertakings into their material scope, in case of which the anticompetitive objective or effect, or – in respect of Section 11 (1) of the Competition Act – the capability thereof can be examined.\(^{13}\) This means that proposing unfair GTCs can have competition law implications. However, we must see – as presented in the dissertation – that a certain level of impact on competition, or capability thereof is necessary for competition law to apply: this is the purpose of the rules on de minimis agreements in Hungarian and EU law (in case of association of undertakings, for example, this can be decided on the proportion of the members to other professional conglomerations). This means that a situation is possible, when a lawsuit can be brought on the basis of consumer protection rules of civil law and competition law at the same time against unfair GTCs. The finding of unfairness can be provide

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\(^{13}\) In addition, for the enforcement of EU competition law – as presented in the dissertation – it is necessary that the given decision of the association is capable of influencing trade between Member States (see Case 56 and 58/64 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH kontra Bizottság [ECR 1966., p. 299]; see furthermore Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07).)
important support for the body applying competition law in deciding what the effects the given decision of association of undertakings has on consumers.\textsuperscript{14}

2. The rule of the Civil Code previously in force, which made it mandatory to publish the GTCs on the (internet) website, could have an incentive effect on competition by increasing the comparability of the GTCs applied in the market. However, such transparency may even jeopardize competition. In markets, where only a few market players are active (e.g.: oligopolistic market) this may facilitate collusion – relevant from a competition law viewpoint (Section 11 of the Competition Act; Art. 101 TFEU) – among them. The reason for this is that the entities active on the market – because of the relatively simple monitoring of competitors' GTCs – could easily create a signaling system aimed at competition distorting effects, i.e. they tacitly agree on a restriction of competition.

3. At several instances, I criticize the rules of the Civil Code of 2009, which contained rules on dominant undertakings – the Civil Code currently in force does not contain these, however, from a historical point of view, they analysis thereof seems relevant.

- According to the Civil Code of 2009 unfair general terms and conditions are null and void, if the party applies the GTC by abusing its dominant position. I explained in relation to this that according to my opinion the use of the word "apply" can be problematic, as this can include the interpretation that the undertaking having a dominant position must actually apply the challenged contractual terms in order to find it null and void under the cited rule of the Civil Code of 2009. This interpretation would be contrary to the established competition law decision-making, which enables the finding of an infringement if the challenged clause was not actually used by the undertaking in a dominant position, but it has the possibility – from the perspective of law of obligations – to do so. I suggested in relation to this that it would have been more correct if the Civil Code of 2009 would have left out the reference to "application" and it would have only referred to the existence of a dominant position.\textsuperscript{15}

- In the Civil Code of 2009, the rule seemed redundant, which empowers the Hungarian Competition Authority to bring a public interest lawsuit in case of general terms and conditions applied by undertaking in a dominant position. This was made possible – a few paragraphs before – by the Civil Code, as well as by the Competition Act.

- The Civil Code of 2009 defined dominant position similarly to the definition of the Competition Act, however, it did not refer to – according to my opinion incorrectly – those factors set out in the Competition Act on the basis of which a dominant position can be established, furthermore, it did not set out, and did not even make a reference to the Competition Act, the definition of the relevant market, although this definition was used by the Civil Code of 2009 itself for the definition of dominant position.

\textsuperscript{14} The body applying competition law has the opportunity to do this when applying Section 17 of the Competition Act and Art. 101 (3) TFEU.

\textsuperscript{15} For example, as follows: „Unfair general terms and conditions are null and void, if the party is in a dominant position.”
4. In my paper, I have identified the following cartel situations (Section 11 of the Competition Act; Art. 101 TFEU), where general terms and conditions are relevant, and these form parts of the detailed analysis of case-law:

- decision of association of undertakings, making a recommendation to its members on what kind of general terms and conditions should be applied towards third parties (consumers);
- horizontal agreements of undertakings, which relate to the general terms and conditions enforced by the parties to the agreement towards third parties (consumers);

5. GTCs created by the interest groups of undertakings, which undertakings apply in their contracts with third parties (consumers) are not in themselves condemnable. These organizations have the necessary expertise and internet channeling capability to create standard contracts that ultimately have specific advantages for consumers. This is particularly significant on markets, where contracts are concluded with complex general terms and conditions requiring serious expertise (e.g. insurance market, financial services market). However, this "contract standardization" cannot lead to the complete disposal of the undertakings possibility to create alternative GTCs or deviate from the content of the recommended GTC in any way. This would clearly affect consumer welfare, because it would eliminate competition itself. This is the reason why rules of associations of undertakings, which require the members to conclude contracts with third parties (consumers) by using exclusively the general terms and conditions with the content recommended by the association are likely capable of having competition distorting effects.

In addition, the recommended GTCs created by a professional body cannot serve as an instrument to undertakings tacitly agreeing on unification of prices or certain discounts. In such case, the negative, distorting effects on competition and consumer welfare are clear and thus, these are clearly unlawful.

As I have referred to in the dissertation, restrictions of competition by GTCs under certain circumstances – in addition to price coordination, in support thereof – can be considered as very severe, because competition of competitors' GTCs is important particularly, but not exclusively in oligopolistic markets, i.e. consisting of a few market players only. The reason for this is that in such a market structure, the possibility of price reduction is limited and offering more favorable general terms and conditions to consumer becomes very significant (e.g.: free-of-charge delivery, favorable contractual conditions for repair services, etc.).

In the dissertation I have also presented that the unification of GTCs applied towards third parties (consumers) often serves the enforcement of price fixing. The reason for this is that the pricing of undertakings deviating from the price agreement can be monitored most easily if meanwhile the other conditions (e.g. the GTCs applied towards third parties (consumers)) remain unchanged. As it was apparent in several cases, such a monitoring system is often operated in the framework of a professional association.

6. Examining case-law, we can come to the conclusion that the number of procedures in relation to general terms and conditions is significantly higher in case of association of undertakings as in case of horizontal agreements. I saw the reason for this during my research in the circumstance that fixing general terms and conditions applied towards third parties (consumers) can be implemented more efficiently by a professional
association, because it is easier to implement the monitoring and sanctioning of undertakings using a model GTC.

The distinction of concerted practices unlawful from a competition law perspective and parallel conduct lawful from a competition law perspective is important, because in the former case competition supervision intervention is justified, while in the latter case this is not allowed (an example for concerted practices is when undertakings exchange information on what changes they are planning to their general terms and conditions). In addition, a situation may occur, where there is no evidence on the collusion of undertakings, but the market characteristics lead to distorted competition (e.g.: general terms and conditions unfavorable to consumers becomes general practice on the market). This situation can be remedied by regulation. An example for this are the rules introduced on the bank account market in Northern Ireland, examined in the dissertation, which remedied some anomalies of competition with instruments set forth in consumer protection rules of civil law.

7. It was raised in literature that model GTCs created as a result of an agreement of undertakings or decision of an association – unless they contain a tacit agreement on the unification of prices or discounts – are probably unproblematic from a competition law viewpoint. The concurrence of wills of the undertakings regarding prices or discounts clearly qualifies as a restriction of competition, however, according to my opinion the potential restriction of completion as a result of GTCs must be approached in a more differentiated way. It matters whether the prescribed GTCs are strictly binding for the parties or only optional, and whether they were created in the form of a binding or recommended decision of an association. In case of the latter, it can be an aspect of the examination what is the share of the market players that are represented in the association of undertakings. In addition – as I explain in my dissertation – it is relevant from a competition law viewpoint what the content of the GTCs is. Furthermore, it is important on what market the given general terms and conditions are applied, as in certain fields the GTCs have special importance from a competition law aspects (see e.g. insurance market).

8. In applying the exemption criteria (Art. 101 (3) TFEU; Section 17 of the Competition Act) the authority referred in several competition supervision proceedings to the positive aspect of the given GTC provision that products, services of certain undertakings are comparable, as well as the related fact that thereby – particularly if it is a complex product, service, which is difficult to compare – the consumer can make a real decision more easily. If however – due to the content of certain GTCs described below – this consumer decision is purely ostensible the exemption of the agreement from the prohibition of restriction of competition is not actually possible. The reason for this is that model GTCs containing such clauses due not qualify for the criterion of exemption from the prohibition of restriction of competition, according to which, the agreement otherwise violating the prohibition of restriction of competition can only be exempted from the mentioned prohibition, if the equitable part of the benefits thereof is passed-on to the business partners (consumers) not participating in the agreement. As I referred to above, if either criterion of Art. 101 (3) TFEU or Section 17 of the Competition Act is not met by the given agreement, it cannot be exempted from the prohibition of restriction of competition. Such problematic clauses – derived from the Directive – can be the following.
• GTCs, which "lock-up" the consumer in the contract (taking away the incentive of the consumer to switch service providers) – from the Directive, the following clauses belong to these:
  
  — claiming as damages the payment of a disproportionately high amount from the consumer not meeting her/his obligations;
  
  — allow the seller or service provider to keep the amounts paid by the consumer in cases, where the consumer can decide not to conclude the contract or not to meet the contractual conditions, however, they do not enable the consumer to receive the same amount from the seller or service provider if the contract is terminated by the seller or service provider;
  
  — consumer irrevocably obligated by conditions, which the consumer had no actual possibility to get to know in detail before the conclusion of the contract.

• GTCs, which expose the consumer to factors (e.g. payment obligation), which was not specifically discussed at the conclusion of the contract – from the Directive, the following clauses belong to this category:
  
  — entitle the seller or service provider to unilaterally change the contractual condition without a valid reason indicated in the contract;
  
  — entitle the seller or the service provider to unilaterally change the characteristics of the goods or services without valid reason;
  
  — prescribe that the price of goods or services is determined at the time of delivery, or allow the seller of the goods or the provider of services to unilaterally increase the prices, in both cases without providing for adequate rights for the consumer to terminate the contract in case the increased price is higher that that was agreed upon at the conclusion of the contract – as presented above, essentially this possibility was included in the GTCs forming the subject-matter of the Bagnasco case, as they provided for a right of the given bank with respect to current account contracts to change the interest rate depending on the fluctuations of the money market.

• GTCs, which provide for the possibility that performance depends on the arbitrary decision of the party using GTCs – from the Directive, the following clause may belong here: contract binding for the consumer, while the performance of the obligations of the seller or the service provider is conditional, the occurrence of which only depends on the intention of the seller or the service provider.

The above-described GTCs – according to the consumer protection rules of civil law – are problematic even if they are applied only by a single undertaking. If however several – or even all – undertakings apply such GTCs on the basis of an agreement of undertakings or a decision of an association, according to my opinion this concern should be reflected in competition law decision-making as well. In this case it is the value protected by competition law, i.e. the undistorted market competition, that is violated, as the consumer – taking into consideration that the consumer encounters on the market detrimental GTCs with basically the same content – cannot actually switch to anybody else.

From the competition law viewpoint, the situation is similar with the GTCs recommended by the association of undertakings: if these model GTCs contain clauses unfair according to the consumer protection rules of civil law than actually the consumer – because the actually applied GTCs with such content will spread on the
market – will only suffer the disadvantages of the model GTCs, and due to its widespread application, the consumer will not have the possibility to choose another service provider. This is supported by the German competition law case, where the German Federal Competition Office, the Bundeskartellamt held the GTCs recommended by the German Construction Association compatible with competition law requirements, because they took into consideration the consumer protection rules of civil law (e.g.: transparency requirement, balance of contractual rights and obligations of the contractual parties).

With respect to the above, my opinion is that it would be important that the competition law authority would take into consideration the case-law on unfairness, created in consumer protection rules of civil law, while it applies the criteria set forth in Art. 101 (3) TFEU. If a given GTC qualifies as unfair under the consumer protection rules of civil law, by – as a result of the agreement of undertakings or the decision of an association – becoming general market practice, it would probably not meet the criterion of Section 17 of the Competition Act or Art. 101 (3) TFEU, according to which the equitable part of the benefits from the agreement (decision of an association) must be passed-on to the business partners (consumers) not party to the agreement. If this criterion is not met, the given agreement or decision of an association cannot be exempted from the prohibition set forth in Section 11 of the Competition Act or Art. 101 (1) TFEU.

9. In order to adequately manage the problem of unfair GTCs from a competition law viewpoint, it would be important that the cooperation among certain state bodies is closer, thus, the legislator could prescribe consumer protection bodies that if they experience unfair clauses spreading on the market, they notify this to the authority having competition law competences, i.e. the Hungarian Competition Authority. The competition authority can decide whether or not to initiate competition supervision proceedings, or a sector inquiry, or launch regulation.

10. In 2003, the European Commission initiated the creation of EU-wide standard terms and conditions. The framework of the model GTCs to be created is on the one hand consumer protection rules of civil law (e.g. Directive 93/12/EEC), on the other hand the competition law rules. It seems that the process has stalled, the reason of which – inter alia – is that the regulation on GTCs in the Member States is uneven, due to the minimal harmonization applicable in the given field. According to my opinion, this projects that it will be probably very difficult for the parties coming from various Member States creating the model GTC to come to an agreement on the content of the individual contractual clauses.

11. The types of abuses of dominance (Section 21 of the Competition Act; Art. 102 TFEU) mentioned both in the Competition Act and the TFEU are "the unjustified stipulation of benefits" and the "coercion of the acceptance of detrimental conditions". My analysis focuses on the detailed examination of these practices, because competition law case-law found an infringement typically in cases, where undertaking in such a market position enforced these by GTCs.

As pointed out in the dissertation, in competition law decision-making it has special importance that for the investigation contractual relationships when does – or did at all – the dominant position of the given undertaking exist. For the finding of an infringement, apart from abusive nature, the dominant position is also necessary, this can only exist if the consumers (purchasers) of the given undertaking are already vulnerable to the dominance thereof at the time of the conclusion of the contract.
On the basis of the relevant competition law case-law, I made it subject to examination in the dissertation when the dominant undertaking can commit an abuse by applying general terms and conditions in a contractual relationship. On the one hand: the dominant undertaking already applies general terms and conditions violating competition law at the time of concluding the contract (e.g.: GTC, which entitles the dominant undertaking „depending on the change of the prevailing market situation” to unilaterally change interest or handling costs); on the other hand: the undertaking dominant at the time of concluding the contract commits an infringement during the existence of a contractual relationship (e.g.: the dominant undertaking coerces the other contractual party by the unilateral interpretation of the contract to accept conditions exclusively favorable for it or detrimental to the other party). Also, in case the undertaking is not in a dominant position at the time of concluding the contract, but during the contractual relationship, the market circumstances and the situation of the undertaking changes, so a dominant position can be established, this does not qualify as an abuse of dominance, if the undertaking exercises its right from the contract concluded at the time it was not in a dominant position, thereby causing harm to its contractual partner, irrespective of the harm occurring at the dominant position established in the meantime.

In my examination – apart from a few exceptions – I have analyzed Hungarian case-law; the reason for this is that practically there is no EU case-law, which would overlap with the domestic, exploitation type infringements against consumers examined above. I came to the conclusion on the reason for this that abuses by GTCs – due to the different national legal systems on GTCs – basically occur within the borders of the individual Member States, thus, the relevant types of infringements are probably such that the capability to influence trade between Member States is typically not established.

Furthermore, I have examined where competition law decision-making can connect to consumer protection rules of civil law. On the basis of competition law case-law, the dominant undertakings must at least comply to other provisions of other laws (e.g. Civil Code) regulating general terms and conditions. According to competition law case-law, for the competition law assessment of the practices of dominant undertakings applying GTCs the competition authority can rely on the Civil Code and similar other laws – within certain limits. I have presented in case of several competition supervision proceedings that the clause qualified as anticompetitive showed similarities with the type of clauses qualified as unfair under consumer protection rules of civil law (e.g.: it was qualified as an abuse of dominance, when the cable television service provider applied a clause in the GTCs used towards consumers, which enabled for the dominant undertaking to amend the GTC without notifying the consumer thirty days in advance – this infringement is equivalent with the provision of the Directive, according to which the contractual clause is unfair that entitles the seller or service provider to unilaterally amend the contractual conditions without a valid reason indicated in the contract).

Although it falls outside the framework of the topic of this paper, another difference must be mentioned between civil law and competition law with respect to the assessment of contractual prices. Under competitive circumstances, it is typically rare that an external player (e.g.: authority, court) determines or examines the price. An example of the former is the price act, an example for the latter is the rule on prominent value disproportion in the Civil Code. Furthermore, according to the Civil Code „[r]ules on unfair contractual conditions are not applicable with respect to
contractual clauses determining the main service or the proportion of service and remuneration, if they are clear and intelligible.” This rule is generally hindering the examination of prices from the perspective of unfairness. Contrary to this, the rules of EU and Hungarian competition law on abuse of dominance, price can be subject to assessment.

At the same time, the finding of the case-law must be mentioned, according to which the competition authority – as the Competition Act does not contain the respective definition – relies on the definition of general terms and conditions set forth in the Civil Code. Competition Council decisions, however, do not provide guidance on in which specific cases the authority relied on the Civil Code's GTC definition. It can only be inferred that the "abundance" (the GTC is created "by the party for the conclusion of several contracts) in the Civil Code's GTC definition can be probably relevant for the general practice of the undertaking for the enforcement of public interest – i.e. competition to be protected by the HCA – at the initiation and the conducting of the competition supervision proceedings.

Finally, it is important to point out the difference between the applicability of consumer protection rules of civil law and the competition law rule regarding abuse of dominance, according to which competition law intervention on the basis of the Competition Act's rules on abuse of dominance is basically only justified if the given contractual relationship has a negative effect on consumer welfare (e.g.: thereby, variety is limited, output is reduced, prices are increased), while this is not a requirement for the application of the examined consumer protection rules of civil law.
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