HUNGARIAN COMPETITION AUTHORITY

Ne bis in idem
The principle in NCA practice

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10 October 2022

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The „ne bis in idem” principle

Original meaning: the prohibition of double punishment

A principle common in constitutional practice of the Member States of the European Union

- Its application is ensured by:
  - international treaties
  - the Charter of Fundamental Rights of the Union,
  - the European Convention on Human Rights.

Demosthenes (384-322 BC)

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Hungarian Constitutional Court: the „ne bis in idem” principle must be interpreted more broadly

- The „ne bis in idem” principle applies in the Hungarian legal system not only in criminal proceedings, but also in administrative proceedings applying sanctions, including competition supervision proceedings.
- Decisions of the Hungarian Constitutional Court:
  - 19/2009. (II. 25.)
  - 30/2014. (IX. 30.)
  - 8/2017 (IV.18.)

ALKOTMÁNYBÍRÓSÁG

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The case-law of the Court of Justice of the European Union can be considered mature

It is essential to examine the coexistence of three conjunctive conditions.

1. *unity of offender,*
2. *unity of the legal interest protected,*
3. *identity of the facts.*

Aalborg-case

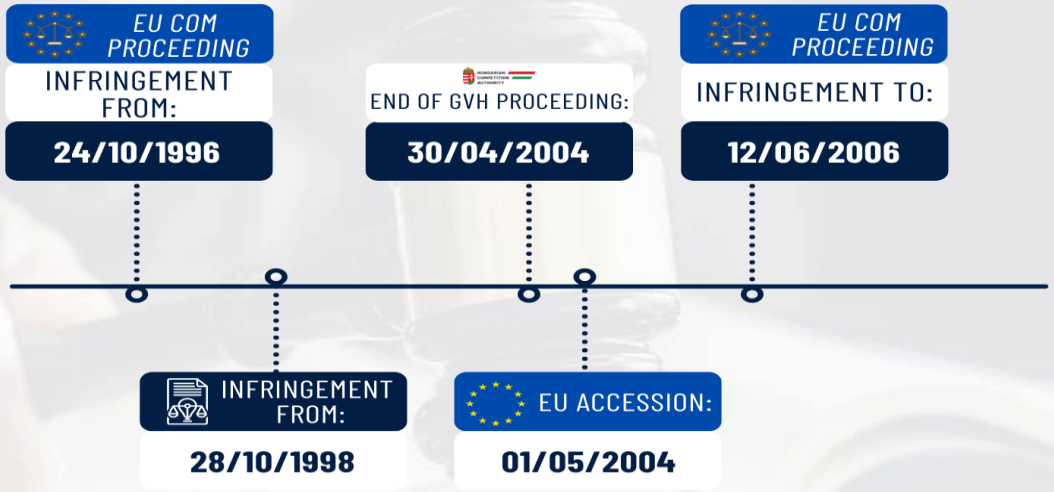
Toshiba-case

The „ne bis in idem” principle came up immediately with accession of Hungary to the EU

Hungary’s EU accession: 1 May 2004

<u>Two notable cases:</u>

Hungary initiated its own case in relation to the Commission’s case on **tv and computer monitors (COMP/39.437),** where the „ne bis in idem” principle was explicitly taken into account.



- The GVH took into account the above principle in a similar way in relation to the **gas insulated switchgear** case gas **(COMP/38.899)**.

These cases have been initiated by a number of new acceding Member States, as leniency applications have been submitted in other Member States as well.

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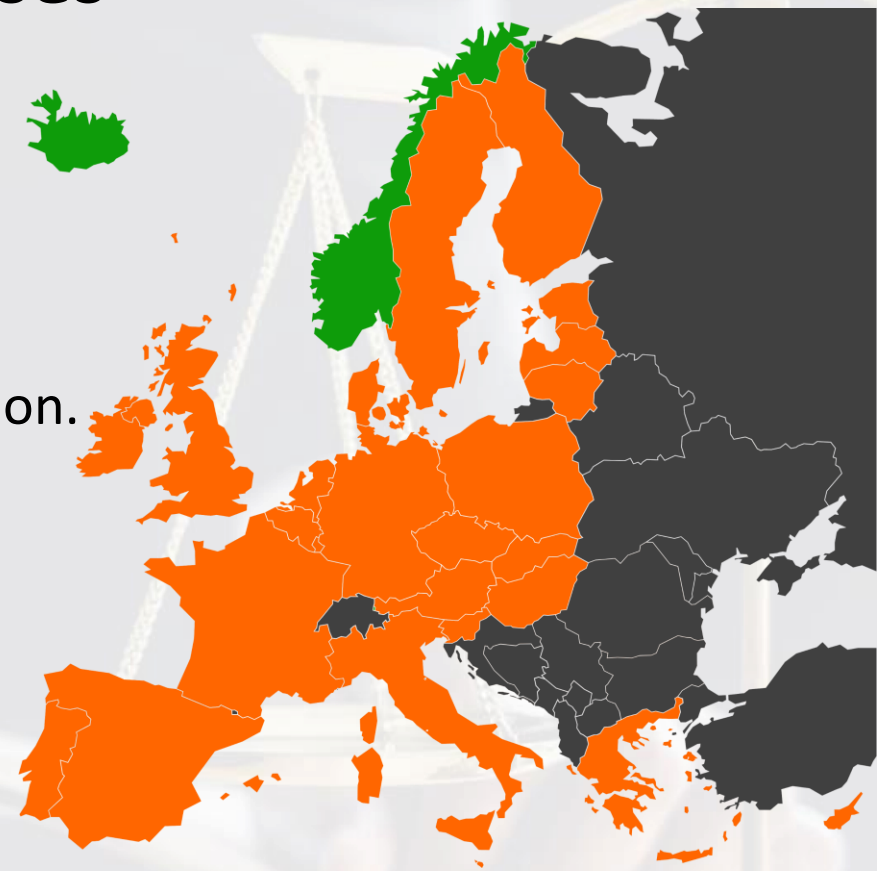
Common features of TV and computer monitors/ Gas insulated swichgear cases



- The cartel existed before Hungary's accession to the EU,
- The cartel also affected the territory of Hungary,
- The scope of the EU cartel procedure did not cover

the geographic market in the territory of Hungary before accession.

Without prejudice to „ne bis in idem”, the Hungarian Competition Authority was entitled to impose a fine for the effects of the infringement in Hungary for the period preceding the date of the country's accession to the EU (1 May 2004).

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Parallel procedures (application of EU and national law)

For the first sight:

parallel application of the law ↯ „ne bis in idem”

But in fact, there is no problem, since:

- Hungarian competition rules are harmonised with EU rules,
- Regulation (EC) No 1/2003 provides for a framework for cooperation between the Commission and national authorities,
- for this, the ECN system provides the administrative background.

Where the infringing conduct affects trade between Member States:

1. One decision.
2. One sanction.
3. The amount of the fine is not more severe if both national competition law and EU competition rules have been infringed.

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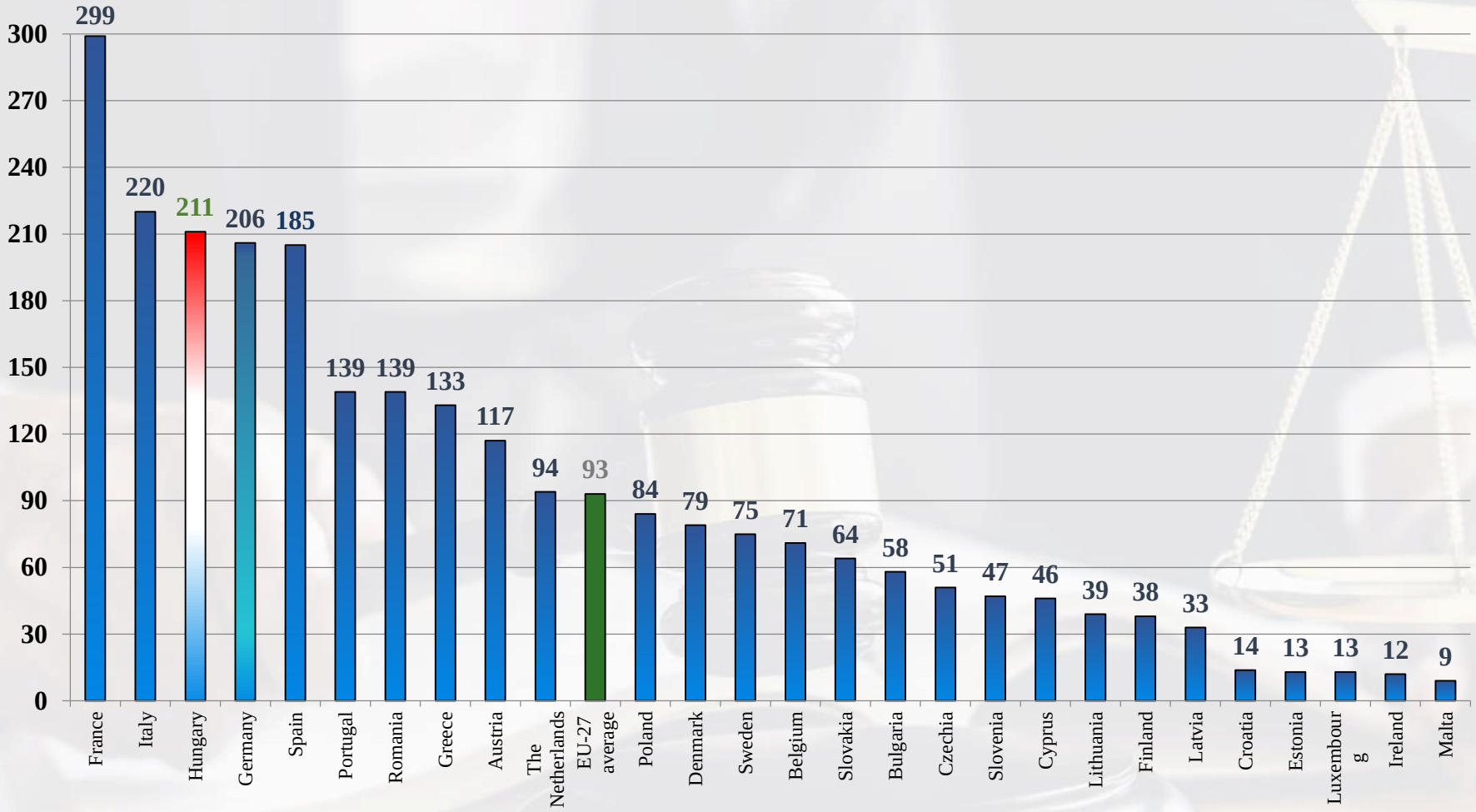
Hungary is 3rd among EU Member States for the opening of cases under Articles 101 and 102 TFEU as a share of GDP per capita pursuant to EUSTAT for the period 2004-2021*



* The GDP per capita statement is based on average GDP per capita data for the period 2018-2021 in order to minimise the distortion of the outcome by the shorter-term economic effects caused by the pandemic.

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Identity of the material facts

- The judgment in C-117/20 Bpost also makes it clear that the application of the principle can only be raised where the final decision on the merits of the case has been made.

- Furthermore, the non bis in idem principle is not intended to be applied where the facts in question are not identical but merely similar.

In our experience, the above requirements tend to be interpreted broadly by representatives of the parties to the proceedings and refer to the principle even if:

- *the previous decision examined similar behaviour but at a different time frame (VJ/30/2015).*

- in cases on misleading consumers the previous decision did not cover allegations of misleading communication, and the new decision subsequently establishes that also other elements of the communication are liable to mislead consumers, since the undertaking continued to apply the given communication after the first decision was taken, which was obviously not covered by the findings of the previous decision (VJ/64/2016).

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Cooperation with other authorities

- The judgment of C-117/20 Bpost is a guide for practice in this regard as well.
- There have also been several occasions in the practice of the GVH that a conduct has had not only competition law but also other sectoral aspects.
- Due to the nature of ex ante market regulation, market failures can emerge which may be detected by an ex post competition investigation (by their very nature, abuses of dominant position).

For example, in case VJ/69/2005, the GVH found that a telecom operator abused its dominant position because its termination fees were capable of foreclosing the market:

National Media and Infocommunications Authority (NMHH) ➔ finding of an infringement + fine for a limited period,

The GVH did not take into account the relevant turnover generated during the limited period.

There was continuous cooperation between the two authorities.

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With whom we cooperate in Hungary

1. National Media and Infocommunications Authority,
2. Hungarian Energy and Public Utility Regulatory Authority,
3. Hungarian Chamber of Commerce and Industry,
4. Hungarian National Authority for Data Protection and Freedom of Information,
5. National Institute of Pharmacy and Nutrition,
6. Ministry of Technology and Industry as Transport Authority,
7. Public Procurement Authority of Hungary,
8. Ministry of Justice,
9. The Ministry Reponsible for Consumer Protection and the Central Bank of Hungary,
10. Central Bank of Hungary,
11. National Food Chain Safety Office,
12. National Tax and Customs Administration

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Recent development

Case C-252/21 Reference for a preliminary ruling, 20 September 2022

Meta platforms Inc., Meta Platforms Ireland Limited, Facebook Deutschland GmbH

v.

Bundeskartellamt, a Verbraucherzentrale Bundesverband e.V

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Thank you for your attention!