The Effect of a Stronger Bargain Position on the Perfection and Completeness of a Contract*

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With a stronger bargain position, it is possible to achieve more favourable conditions for the potential conclusion of a contract. Although a dominant position is commonly associated with a stronger bargain position, their relationship is neither required nor common. A relatively stronger bargain position usually results from the parties' reliance and dependence on each other. Reliance is generally based on the lack of alternatives and reserves. The effect of basic factors affecting reliance may be influenced by the relevant knowledge and negotiation techniques of a party. Even the conclusion of a so-called perfect contract may be hindered by an intent to abuse a stronger bargain position, and after conclusion, it may lead to performance problems. The conclusion of a so-called complete contract may be hindered as well, since higher risk exposures increase the number of future alternatives. A certain degree of exploitation of a strong or relatively stronger bargain position gained through business successes is an important driving force in market economies, but it is challenging to adjust this to the demands for perfect or complete contracts.

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1. Introduction

Under market conditions, business partners voluntarily enter into economic interactions with each other. Their corresponding relationship is primarily manifested by the fact that none of the parties can use force or coercive power in order to establish an economic relationship, i.e. to conclude a contract. Coordination is precisely expressed in the assent embodied in the contract (*Markovits 2020*), as each party has their own unique intent to conclude the contract. An assent is considered to be an assent even if the parties are not able to impose their will on each other to the same extent during the determination of the assent. However, if the potential contractual parties are not able to adjust or harmonise their own

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individual will with their counterparties to the necessary extent to determine the assent, the contract will not be concluded.

A contract is therefore not necessarily concluded on a voluntary basis, even if all of the possible parties have a contractual intent. Nonetheless, the assent, and thus the conclusion of the contract, will not guarantee that the contractual terms are executed without problems, i.e. whether each party will intend or be able to comply with their contractual obligations, or will be able to exercise their rights. Insofar as the parties do not fulfil their obligations immediately after concluding the contract, they may have to face a number of problems later on. Typically, the longer the parties' performance period is, the higher uncertainty and risk they need to expect in terms of performance. Both legal and economic disciplines try to handle such uncertainties and risks of contracts, which are significant in terms of the performance of contractual terms. A perfect contract in the legal sense, hereinafter referred to as the "perfect contract", aims to guarantee by any means that the assent established in the contract is executed according to the contractual terms (*Bag 2018*). On the other hand, a perfect contract in the economic sense, hereinafter referred to as the "complete contract", aims to achieve that any possible realisations of the future become separate elements in the contract, and each of them are individually assigned with the legal consequences of the parties' rights and obligations (*Arrow 1963*). In fact, both approaches, which are discussed in greater detail in *Section 4*, aim to minimise the uncertainties and risks arising from the performance of the contract with their own set of tools. However, neither of the approaches provides a detailed analysis of the manner of determining the assent established in the contract, and as such, how the features of this determination may later affect the approach to the ideal conditions in the conclusion of a perfect or complete contract.

Credit institutions place great emphasis on a high level of legal compliance of the contracts they conclude, as well as on being able to realise an adequate amount of income through them, regardless of the future. With regard to financial performance, which is the essence of credit products, it can be stated that performance problems mostly arise on the clients' side and mainly involve repayment. In the case of perfect contracts, it is ensured at all costs that clients perform in the correct manner and to the correct extent; in the case of complete contracts, the obligations of the clients are clearly defined for any future situation, as well as the obligations of the credit institution. It is important to note that both types of contracts ensure these conditions in such a way that the contract is not modified after conclusion, as this is unnecessary. In the absence of the possibility of amending the contract, which possibility is otherwise provided in the case of necessity by the theory of the perfect contract, the perfection and completeness of the contracts become particularly vulnerable in terms of uncertainty and risks.

Contracts appearing to be perfect or complete before conclusion (ex ante) can only be determined to be indeed perfect or complete after the conclusion (ex post). In the case of an unfavourable turn of events, even a ten-line "rough" contract can be perfect, or complete, if there is no problem with performance, and the future develops in a way the parties expect it and conclude it in writing. Yet, even a contract concluded with great attention and care may subsequently prove to be imperfect or incomplete because of unexpected future events, and performance cannot be properly ensured by the contract for the credit institution.

In the conclusion of a loan contract, the bargain position of the parties is also a determining factor. Credit institutions can select their clients, within the framework of the provisions of the relevant legislation, but the reverse is also true. A loan contract can be concluded when the intent of both parties becomes compatible in the form of an assent. However, further factors also obviously matter, among other things, for example, the size and profitability of the credit institution, the level of risk of its credit portfolio so far, and whether the client is another credit institution, or a petroleum industry giant, or a hairdresser launching his/her business. The parties are neither obliged to enter into a contractual relationship, nor required to conclude a contract with the same conditions as with another potential partner. Therefore, even in the case of credit institutions, the reconciliation of individual wills in an assent depends on the bargain position of the parties.

As such, it is worth taking a step back from the conclusion of contracts and examining the determination of the assent, and its effect on the extent to which the contract is able to approach the ex-ante perfect or complete condition. The question is how the use of a stronger bargain position affects the conclusion of a perfect or complete contract via the nature of the assent expressed in the contract.

Many factors may influence the appropriateness of contracts and the full performance of their conditions. This study does not undertake to account for and analyse all of these factors. The study aims to present the nature of relatively stronger bargain positions and the effect of taking advantage of such positions on the conclusion and expected performance of the contract. The achievement of a stronger bargain position is in itself an interesting topic as it does not necessarily mean having a dominant position, as the study will also later reveal. On the other hand, it is also possible to use the previously achieved, already existing stronger bargain position to varying degrees, or even refuse to take advantage of it. The study does not intend to take a normative stand on how and to what extent it is "worth", just or fair to exploit an existing stronger bargain position. In a purely descriptive and analytical manner, it aims to shed light on the achievement of bargain positions and the most possible consequences of taking advantage of such, as an independent variable.

Sections 2 and *3* of the study present the nature of a bargain position and a stronger bargain position. *Section 4* reveals how the perfect or complete contract can be related to the use of a stronger bargain position, and from this point of view, to each other.

2. The concept of bargain position

First of all, we need to clarify the reasons why potential contractual partners intend to enter into an economic relationship with each other. Why do they wish to extend their existing rights and obligations "into a package" by concluding a contract? Of course, having additional rights may be attractive, but it is not possible to gain them without taking on certain obligations. At the same time, we should not forget that concluding a contract, i.e. undertaking a specific combination of rights and obligations, is not an end in itself. In a market economy, an economic operator obviously aims to reach a more favourable economic situation due to a contract.

Contracts for the supply of goods or provision of services, or exchange contracts, with loan contracts belonging to this common group, typically involve a relatively less complex situation. In these cases, only prices may seem to be primarily important, and the parties share their possible gains based on the determination of the prices. If the cost price of a melon farmer is 100 HUF/kg, while the retail chain wants to sell melons to its customers at 250 HUF/kg, apparently, 150 HUF forms the pie that is divided between the parties by determining a price. With a contract price of HUF 100/kg, the melon grower does not benefit from the profit, and with a contract price of HUF 175/kg, the profit is halved. However, melon farmers do not have many days to pick and deliver ripe melons, and therefore, if they make an agreement with the retail chain only a couple weeks or days before ripening, they may only intend to cover the costs of harvesting and delivery, i.e. 20 HUF/kg. Thus, it is possible that the retail chain can reach a price of 21 HUF/kg through the contract. So, the size of the pie for a customer with such a perspective will be 230 HUF/kg. However, this is only an apparent pie. In fact, there are two pies in question. One of the pies symbolises the rights, and the other one represents the obligations (*Markovits 2020*). The payment of the price is only one of the obligations, which is obviously charged to the purchaser, and one of the rights, which the seller can clearly claim.

In a loan contract, several details are defined besides the date of loan disbursement for the credit institution and the repayment schedule including the interest rate for the debtor. A loan contract can also provide many rights, for example, in terms of contract amendments, and it can incur many obligations, such as obligations on providing information. The two pies are of course related to each other, since the right for one party is ensured by imposing an obligation on the other party.

However, the sizes of the pies, i.e. the scope of rights and obligations can only be approximated, even theoretically. Determining the value of the pies is even more challenging, as the value of many rights and their use can only be estimated in advance, as well as the value of obligations as their counterpart (*Rudolph 2006*). Nonetheless, regardless of the sizes of the pies, a finite number of possibilities for rights are contrasted against a finite number of possibilities for obligations. Rights can only be acquired at the expense of the other party, and obligations can only be transferred to the other party. The same applies to their value. Thus, using game theory terminology, the distribution of rights and obligations also corresponds to a zero-sum game (*Rudolph 2006*). In the example of the melon farmers above, the size of the pie could only be precisely determined because both the rights and the obligations were narrowed down to the price to be paid.

Cooperation, association, investment and other similar contracts are usually more complex. In these cases, firstly, it is necessary to produce or create a certain value, or at least make an attempt at it; secondly, provisions need to be made for any benefits arising. Let us examine the case of a fattening pig raised in a backyard farm but received from the producers' cooperative, which provided feed materials and other things for the farmer, then the cooperative later took over the animal at a set price and either resold it or processed it. In this case, we can actually talk about four pies since there are rights and obligations related to the added value and the potential gains as well. Therefore, the bargain must cover both areas.

In everyday life, in the case of a retail loan product, for example, it is common that one of the parties offers a ready-made, non-negotiable contract to any potential party that belongs to a certain customer group. But even in such "take it or leave it" situations, it can be seen that the party facing the ultimatum has a strong bargain position in terms of either accepting the offer or rejecting it (*Binmore 2007*). Rejection can be the sign of a weak bargain position as well, which is often connected to the client's recognised partial lack of performance expected in the "take it or leave it" offer. However, with a strong bargain position, it can also mean a realistic alternative for decision if the client has a better offer compared to the one received. Nonetheless, it is common in business, just as much as for credit institutions' major clients, that the parties can influence the contractual terms ex ante with respect to what obligations will be imposed or what rights will be granted to which party. Having a strong bargain position, i.e. the possibility of greater influence can result in concluding a contract with more favourable conditions (*Berz 2015*). Thus, for example, a large, well-capitalised, profitable company with a good banking history can obtain more favourable loan conditions from a credit institution for a major investment project with promising prospects, especially if the company subsequently becomes a client of the credit institution and uses other services as well. But let us examine the concepts of a strong or a weak bargain position.

A position, related to a bargain, means a set of relevant attributes that one of the parties considers important about the other party's negotiating power, but in the meantime, they also have an inventory type of value judgement on their own relevant attributes (*Berz 2015*). In this sense, position means a kind of relation to the other party, which results from the overall set of one's own and the other party's relevant characteristics. In other words, for example, if good reputation plays any role in the rights and obligations expected to be regulated by the contract, and a potential customer considers the credit institution to have the best reputation possible, while considering his/her reputation to be average, then we can talk about some kind of position (*Binmore 1994*). Of course, a position consists of several features like the above, and each feature may have different significance. With regard to their own position, one of the parties tries to secure an advantageous position or relation compared to the other party in order to achieve favourable contractual terms. One party positions the other party, but at the same time it also positions itself, and also compares its own perceived position with the assumed position of the other party (*Lovry 1976*). We can talk about objective and subjective elements with respect to one's own and the other party's position (*Rudolph 2006*). In both positions, the best alternative to a negotiated agreement, or BATNA, which serves as a potential safety net, can be considered objective, and the greater certainty and information on the resistance point of the other party can also reinforce the bargain position (*Bakacsi 2017*). Other objective elements in the conclusion of a contract are the additional, measurable and relevant reserves available to a party, such as the amount of time and financial reserves (*Lovry 1976*). The initial positioning attempt of the parties, when the expectations do not necessarily meet the other party's perspective, is only the starting point of a bargaining process (*Krajcsák – Kozák 2018*). Provided there is any room for bargaining. If so, the bargaining process will not start if at least one party positions the other and itself in such a way that it excludes the possibility of cooperation and the conclusion of a contract. If, however, the bargaining process starts, the parties have the opportunity to obtain more information about how the other party positions itself and its potential contractual partner (*Barnhizer 2005*). For both parties, including themselves, the number of positions is dependent on the number of parties aiming or actually starting the bargaining process. Therefore, in terms of two parties, there are a minimum of two positions, assuming they have the same opinion on each other and themselves; or a maximum of four positions if their opinion on themselves and the other party does not match at all.

The positions declared by the other party, for itself and for the others, are perceived and noted by each party in a certain way and degree at the start of the bargaining process and during it. It may be good or bad as there is no guarantee that the parties can read each other's signals in the right way. At the same time, there is no guarantee that the other party will not show, intentionally or unintentionally,

misleading or incomplete signals in terms of positioning. As a result, it cannot be made sure that one party relates to another in a way that the other signals or shows it (*Berz 2015*). Primarily, the actual relationship is the one that matters from the two options, and not the external indication or perception of it for the other party. After all, it is the actual relationship that influences the contracting parties' behaviour vis-à-vis each other in terms of the bargaining process (*Binmore 2007*). When one of the parties tries to position itself in a way that does not match the other party's perspective on the first one, the other party may consider it unreliable, or a bluff. At the same time, if a position wished to be acquired is considered to be a bluff and its degree is estimated by the other party, it can have an influence on the party's attitude and the future progress of the bargaining process (*Rudolph 2006*). Bluff as a technique, however, is fairly wide-spread in a bargaining process (*Barnhizer 2005*).

How do the strengths and weaknesses of a bargain position manifest themselves? If we assume that concluding a contract is potentially advantageous for both parties, we can claim that the stronger a bargain position is, the less reliant the party becomes on the performance of the contract. It will be less important or significant to gain a potential advantage by means of the contract, considering the passage of time or any other important aspect (*Scott 2020*). In the event of having a stronger bargain position, the party possesses a relatively wider scope for negotiation, even when it starts or goes through the bargaining process. With a stronger bargain position, the other party treats the given party in a more favourable way. This means that there is a relatively better chance for the given party to regulate the rights and obligations in a more advantageous way in the contract, regardless of how strong the other party's bargain position is. Thus, a stronger bargain position is simply better and more beneficial for the given party. As a result, basically, the most rational act of the parties is if even prior to the bargaining process, they can take the strongest position compared to the other party (*Scott 2020*). On the other hand, they should not only attempt to maintain the initial position during the bargaining process, but also to strengthen and improve it, even using the technique of bluffing. In theory, taking a bargain position by bluffing that is weaker compared to the one the party thinks of itself can also be part of rational behaviour, but as opposed to poker, it is exceptional in business practices. The behaviour, the signals shown and information provided during the bargaining process usually represent additional knowledge for the other party, which can be the basis to continuously confirm or re-evaluate its initial relationship towards the given party (*Barnhizer 2005*). A weak bargain position, as the next Section also reveals, means that it is necessary to become relatively more lenient in terms of entering into a bargaining process or discussing questions related to it, it is also necessary to take on more obligations in order to gain fewer or less valuable rights.

Positions may vary several times during the bargaining process, especially in case of a longer process, as the parties may obtain more and more information on each other (*Scott 2020*). Both parties can have an equal bargain position compared to each other, which is called equal footing. Apart from this, only one situation can occur, i.e. only one of the parties can have a stronger bargain position compared to the other. The extent to which one party will be able to more effectively achieve its goals through the contract, at the expense of the other party, depends to a significant extent on the bargain positions, so even when it seems they are discussing the contractual conditions, in reality, they are still clarifying their bargain positions (*Berz 2015*). So only after their rivalry on bargain positions comes to a halt, even temporarily, can the real negotiation start on the conditions of the contract.

The concepts of a dominant position and a strong bargain position are often confused. Similar to other developed market economies, the *Fundamental Law of Hungary*[1] also has provisions on dominant positions. Pursuant to *Article M* (*2*), Hungary takes action against the abuse of a dominant position. With respect to this, according to *Article 22* (*1*) *of Act LVII of 1996*[2] *on the Prohibition of Unfair and Restrictive Market Practices* "a dominant position shall be deemed to be held on the relevant market by persons who are able to pursue their economic activities to a large extent independently of other market participants without the need to substantively take into account the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct." A dominant position in a given market is possessed by those that pursue economic activities in a way that they can unilaterally define the terms of a contract while staying within legal limits (*Këllezi 2008*). The concept of a dominant position is directly associated with a bargain position in the so-called Five Forces model of *Porter* (*1989*). According to his view, a dominant position in a given market is held by those who individually have a strong bargain position vis-à-vis their clients or suppliers; furthermore, they do not have to fear direct competitors, new entrants or indirect competitors producing a substitute product. As a result, in this case, depending on the number of suppliers and customers, we may state that it is a matter of a strong bargain position, supplemented by a dominant market presence. It seems that a strong bargain position vis-à-vis other relevant market players is a natural consequence of a dominant position.

Indeed, taking advantage of a dominant position is manifested in taking advantage of a stronger bargain position. In this case, the party having a dominant position makes it clear for the business partners during the bargaining process that it has a stronger bargain position and intends to make use of it, and the partners will relate accordingly. However, many operators with actual dominant positions do

[1] *Fundamental Law of Hungary:* https://net.jogtar.hu/jogszabaly?docid=a1100425.atv
[2] https://net.jogtar.hu/jogszabaly?docid=99600057.tv

not aim to achieve this in every case, or not vis-à-vis every party (*Binmore 1994*). Companies that are at the forefront of social responsibility, but at the same time have a dominant position, are also able to voluntarily limit themselves in such a way that they do not take a strong position in contracts in many areas (*Hopkins 2003*). In other cases, the dominant party intends to take a stronger bargain position, but the business partners do not accept it or relate to it in the right way in the bargaining process, or at least until they face the consequences of their inappropriate relationship. As we will see in *Section 3*, it is also possible that the clearly measurable characteristics of the party in the dominant position that make it likely to achieve a strong bargain position are not combined with such important components as a high degree of proficiency in certain special bargaining processes. If, on the other hand, the other potential contracting party possesses the latter skill, the situation can change, i.e. it becomes doubtful that a stronger bargain position can be reached by the dominant position. At the same time, it should not be forgotten that a strong bargain position can be obtained even without the economic operator actually having a dominant position. In the previous parts of this Section, we could see that a strong bargain position is ultimately determined by the fact how the other parties involved relate to it. It is therefore not necessary for the other party to actually have a strong position, it is sufficient if the other parties believe it or accept its illusion. Information asymmetry, or having greater knowledge on the subject of the potential contract, and the advantage of proficiency in the bargaining process can be possessed by such parties as well that otherwise do not have any dominant position. In this way, however, they are able to put themselves in a strong bargain position (*Spread 2018*).

3. Factors influencing the strength of a bargain position

Except for the use of a dominant position, no information has been provided so far on the actual achievement of a strong position on a bargain. As *Section 2* presented, this relationship does not emerge automatically, not even for a party in the dominant position. At the same time, we must also see how the bargain positions of the parties are also related to each other during the bargaining process. Any participant can even have a strong bargain position, which provides a lot of room for manoeuvre, but in this case the advantage arising from strength disappears in relation to each other as the positions become balanced. Not all parties, usually two parties, can have a relatively stronger bargain position. In this sense, it is approximately a zero-sum game (*Berz 2015*). If one of the parties has a relatively stronger bargain position, the other will inevitably have a weaker one. We can only speak of an approximately zero-sum game, because the relationship between the parties is not strictly mathematical or based on some kind of formula. Consequently, the party possessing the stronger bargain position does not necessarily seem to be as much of a stronger negotiator to the other party, as the other party seems to be

weaker compared to it. The benchmark for a stronger or weaker bargain position is the case when they consider each other to be mutually equal negotiators and treat each other in this way during the bargaining process (*Table 1*).

Table 1
Determination of relative bargain positions with respect to two parties

		Party A's position in itself		
		Strong	**Medium**	**Weak**
Party B's position in itself	**Strong**	**Balanced**	Party A is stronger	Party A is stronger
	Medium	Party B is stronger	**Balanced**	Party A is stronger
	Weak	Party B is stronger	Party B is stronger	**Balanced**

However, balanced bargain positions (*Table 1*) do not always result in the same bargaining process or in the conclusion of a potential contract. When the possibility of an agreement arises in the case of two parties with a weak bargain position, they are strongly dependent on each other, there is a mutual willingness to make concessions, so there is a high probability for the conclusion of a contract concluded between the parties, moreover, in a balanced manner. Nonetheless, it is possible that a weaker bargain position results from the lack of reserves (as well), and thus the performance risk increases. Two parties with a strong bargain position have little need for the performance of the given contract; it is not rational for either party to make concessions, and so there will be little room for manoeuvre in the bargaining process (*Spread 2018*). In this case, there is a small chance that a contract will be concluded, but if one is concluded, it will have a balanced distribution of rights and obligations between the parties.

Before we take into account the possible factors influencing the achievement of a stronger bargain position, let us review why and in what way the parties intend to establish an economic relationship or contract with each other.

1. Mutual interest: the ability of both parties to perform a potential contract in such a way that, subject to each party's own contribution to performance, both parties are in a position to benefit from it.

2. There is essentially a market coordination mechanism prevailing between the parties (*Kornai 1993*), which may, however, be complemented by ethical and family coordination to some extent. In any case, the parties enter into a relationship voluntarily, and they have a coordinative relationship.

3. The parties do not have all possible information and knowledge at their disposal. They have limited rationality. The information they have is evaluated and processed in a more or less subjective way as well.

4. Although in everyday life, some parties intend to enter into a contractual relationship maliciously, in this case, we are only discussing the one that intends to follow the related legislation, also in terms of good faith and fairness.

The degree of reliance on the other and on each other is a key factor in the relationship system of the parties. This is the main driving force that acts towards the conclusion of the contract (*Berz 2015*). However, many other factors are manifested in their reliance on the other or each other. With respect to a bargain before the conclusion of a potential contract, the bargaining power is relatively stronger for the party which is less dependent on the other party's contractual performance, which is obvious to the other party as well. Consequently, although the degree of actual reliance on the other party obviously matters, if it can be defined in an objective way at all, what is more important is to know how much the other party perceives from this. The party that seems to be less reliant on the other will gain a stronger bargain position, besides having dominance in the market coordination mechanism (*Lovry 1976*). For the party less reliant, from the viewpoint of the other party, the potential conclusion is not that essential, as it is not in such a position that would require it to accept any conditions (*Binmore 2007*). It is necessary to make the agreement attractive for the less reliant party by means of ensuring more favourable conditions in terms of rights and obligations. On the other hand, the person who is more in need of the other party's performance on the potential contract must make concessions by securing additional rights and taking on additional obligations, in order to be able to ensure the other party's performance through the contract.

As seen, a dominant position is strongly related to the stronger bargain position vis-à-vis the business partner, but the two are not necessarily entailed by each other. As a result, it is not necessary to have a dominant position, in order to gain a stronger bargain position in a negotiation. Hence, it is worth taking those factors under scrutiny that affect or may affect the achievement of a strong bargain position.

These factors can be divided into two groups (*Table 2*). One of the groups includes those factors whose combination is vitally important in achieving a stronger bargain position, without which it may be impossible. Modifying factors which go above

and beyond these basic factors are also very important, but they can have less of an effect on their own (*Spread 2018*).

Reliance also means a certain type and degree of vulnerability in terms of the performance of the potential contract by the other party. Vulnerability can basically arise from the lack of adequate reserves, including financial and time reserves, or the lack of alternatives. The lack of alternatives, i.e. of possible additional appropriate contractual options, may be specific to the type of potential cooperation, the type of business partners involved, or the goods to be acquired and/or sold. The time factor can also be crucial, because if the value of the goods involved in the cooperation decreases rapidly over time, not many agreement alternatives will be available. The appearance of excessively specialised goods and activities for any of the parties also narrows the scope and probability of agreements (*Williamson 1979*). However, it does increase the room for manoeuvre, and thus strengthens the bargain position if the given party has a stable safety net of BATNA, for example, by having option rights independent of the cooperation (*Fisher et al. 1983*). The time factor can be crucial with respect to a longer cooperation, as the parties' knowledge about the future may become more valuable. Furthermore, the longer a cooperation is, the more rarely parties conclude such a contract, which further increases vulnerability. It is expected that frequent and consecutive, regular cooperation will somewhat reduce the gap between stronger and weaker bargain positions (*Berz 2015*).

Factors modifying the effect of basic factors are basically relevant bits of knowledge. With this special knowledge, a party may significantly change the degree of reliance determined by the basic factors. Insider trading is known to be illegal, but at the same time, it is the transfer, acquisition and use of several pieces of business information that can provide serious additional bargaining power. Even proficiency in the bargaining process may result in a significant advantage, which can also improve an initially weaker position (*Bakacsi 2017*).

It is a common saying among the clients of credit institutions that the only ones that can get easy loans with good conditions are the ones that do not even need them, as they have an advantageous financial background. Apart from the obviously ironic exaggeration, this view has some truth to it. After all, as we have seen above, if a party has sufficient reserves, favourable prospects, a large margin of manoeuvre, and also a high level of knowledge and expertise in lending practices, a relatively strong bargain position will make it likely to be able to obtain a loan on favourable terms.

Table 2
Basic and modifying factors affecting reliance

Basic factors affecting reliance (For a certain party)	Factors modifying the effect of basic factors
A. Importance of the property the other party intends to acquire	I. Access to additional relevant information;
B. Specificity of the property the other party intends to acquire	
C. Warranty of the property the other party intends to acquire	II. Knowledge needed for the correct interpretation of information;
D. Importance of the property intended to be acquired through the cooperation	
E. Specificity of the property intended to be acquired through the cooperation	III. Proficiency in the methodology of bargaining.
F. Warranty of the property intended to be acquired through the cooperation	
G. Advantage of a contract that can be concluded with a third party	
H. Potential availability of other third parties	
I. Availability of other types of cooperation alternatives	
J. One-off nature or planned frequency of the cooperation	
K. Planned duration of the cooperation	
L. Level of reserves required for the proper future operation of the party	
M. Level of reserves required for the proper future operation of the other party	

From the perspective of credit institutions, regarding corporate loans, it is also significant to know what bargain position the company is able to take with its business partner during its operation. If the company generally has a weak bargain position, for example due to its profile, financial situation or the strong bargaining power of its business partners, and it has few reserves and future alternatives, it means that it is forced to undertake relatively too many obligations in exchange for relatively few rights in its concluded contracts. This clearly makes any loan that it may be granted more risky.

4. Effect of a stronger bargain position on certain types of perfect contracts

In this Section, we attempt to make a connection between taking advantage of a relatively stronger bargain position and contracts with uncertain performance, which thus become problematic. In order to do this, first of all, we need to identify why contracts previously considered to have realistic performance conditions and concluded in good faith between the parties may become problematic later on. By a problematic contract, we mean that the assent of the parties expressed in the contract is at least partially not performed according to the predetermined time

schedule (*Rudolph 2006*). In this definition, we also included such possibilities when the original assent is never performed in any way.

Basically, problems can arise for two reasons (*Rudolph 2006*):

I. On the one hand, the internal and external relevant circumstances of the parties may change significantly over the course of time.

II. On the other hand, these circumstances may have not changed or changed as expected, but the contract did not appropriately express these or the assent.

Group I includes changes in circumstances affecting management that may negatively affect the ability to perform according to the contract. At the same time, it can also incorporate changes that may negatively affect the intent to completely fulfil the obligations set in the contract. These may include changes in preferences, and as a result, in interest as well, in addition to the so-called time inconsistency (*Fömötör et al. 2017*).

Group II includes shortcomings of the contract concluded between parties in good faith but having information asymmetry and their consequences, which themselves can result in performance problems (*Rudolph 2006*). Due to the hidden information, the contract is incomplete or partially unilateral even when it is concluded. The shortcomings of the contract provide possibilities to one or both of the parties to engage in such so-called disguised actions that affect the performance of the assent set but not regulated in the contract. Finally, the contract may also provide some parties with hidden unilateral gains that were not disclosed in the contract bargain, i.e. the parties have allocated the contractual rights and obligations between themselves without taking them into account. Upon fully revealing all three hidden elements when concluding the contract, i.e. providing symmetric information, the parties would have not concluded the contract, or with different conditions.

In both groups, it is obviously significant to understand the legal and economic capacity of the contract concluded between the parties to express the real assent of the parties, and furthermore, whether the parties can perform this assent in the correct manner and to the correct extent, despite all uncertainties and risks of the future.

We can distinguish two types of perfect contracts. Perfect contracts in the legal sense put emphasis on the extent to which the parties' assent set in the contract can be performed without any problems. A perfect contract in the economic sense, which we refer to as a complete contract in this study for the sake of clarity, contains all possible future alternatives and their related legal consequences in connection with the parties' assent expressed in the contract. No matter how the future evolves, the contract clearly defines the rights and obligations related to that

alternative. In this Section, further analysis is provided on how the use of a stronger bargain position can influence the performance of the assent set in the contract, i.e. the perfect contract, and how it influences the scope of future alternatives and legal consequences set in the contract, i.e. the complete contract.

In the legal sense, the key point is the full enforceability of the assent of the parties (*Bag 2018*). A perfect contract means that the contract complies with the parties' contractual intents and the provisions of all related legislation, these provisions can be fully performed, there is no need for enforceability, and its effective alternatives are otherwise included in the contract, so no legal proceeding can be expected (*Hevia 2013*). As a result, compared to the bargain position and negotiation skills of the parties, a perfect contract can provide a relatively effective solution for the parties to gain mutual advantages and establish a new status quo. An imperfect contract can be relatively efficiently made perfect by replacing its shortcomings, i.e. by supplementing or amending the contract, which will help to avoid undesirable legal consequences arising from the lack of perfection (*Bag 2018*). According to *Bix* (*2012*), a perfect contract can reach the optimal harmonisation of mutual interest the most when it is fair. In other words, during the conclusion process, neither party abuses its dominant position, which may also result from an information asymmetry in its favour. Whether the contract can be considered perfect largely depends on the type and the flaws of the relevant legislation, and as a result, what tools the law, the community, or the government can provide for the enforceability of the assent defined in the contract (*Bag 2018*). In order to reach the goals established by the assent in the contract, after the conclusion, there is no economic method which is more effective (*Eisenberg 2018*), in principle, the conclusion aims to ensure that the provisions of the contract will be performed if it depends on the will of the parties. However, this does not mean that prior to the conclusion of the contract, it would not have been possible to conclude a contract that could have better served the interests of the parties individually or even together (*Knapp et al. 2019*).

It is a significant factor in the conclusion of the perfect or almost perfect contract in the legal sense if the bargaining process involves parties with unequal bargain position as the distribution of obligations and rights can change significantly. The party with the stronger bargain position acquires additional rights during the establishment of the contract, while obtaining partial exemptions from certain obligations (*Eisenberg 1982*). Meanwhile, the party with the weaker bargain position has to undertake additional obligations and waive certain rights. As an overall result, the party that has and uses a stronger bargain position transfers some additional value to itself from the other party, as opposed to a situation where the stronger bargain position would not have been used or the parties would have been equal (*Eisenberg 1982*). In other words, although the contract still reflects the assent, it is less favourable for the party with the weaker bargain position. Such a party is less

interested in complying with its obligations under a less favourable contract, and so in this case it is necessary to strengthen the contract in order to realise its related performance. Contractual performance is risky in any case, but it is questionable whether the party with the weaker bargaining power will find the additional performance it is forced to undertake, we assume in good faith, consistent with its performance capacity at the time of performance. In any case, requiring additional performance increases performance risk (*Eisenberg 2018*). The partial withdrawal of rights significantly increases the performance risks of the party with a weaker bargain position if it involves a decrease of its income or profit. These additional risks remain risks even if the contract can appropriately motivate the party with the weaker position to perform, which results in the contract diverging from a legally perfect contract (*Knapp et al. 2019*). This problem can only be resolved in a way that other parties join the party with the weaker bargain position in the performance. These can be direct contracting parties or underlying contracting parties, for example, insurance companies, if the nature of the performance allows it (*Eisenberg 2018*).

The theory on complete/incomplete contracts is clearly a subfield of economics, according to the work of *Arrow* (*1963*), among others. From an economic point of view, the focal point of a contract is the harmonisation of the parties' activities and their additional gains received by it (*Bag 2018*). The entire contract defines all of the possible facts that are likely to occur in the future, thus having a probability of 100 per cent, and sets out the legal consequences for each of them. As a result, the parties are not burdened by the uncertainty arising from the contract's shortcomings, which allows them to make more effective decisions regarding the contract. In principle, they do not have to make amendments because of the lack of options and consequences in the future in any part of the contract concluded, as it contains the rights and obligations of the parties with regard to all alternatives for the future (*Baker – Krawiec 2006*). However, in everyday life the prevalence of incomplete contracts can generate additional problems such as moral hazard. An incomplete contract cannot be made complete by supplementing or completing it, unless the parties renegotiate it (*Bag 2018*). The reason for this is that new future alternatives can only emerge by redefining the risks, which otherwise should have been fully assessed by the parties when they concluded the contract (*Eisenberg 2018*). The conclusion of a full contract is a very time-sensitive question in terms of the duration of the contract, as the longer the contract is, the less likely it becomes that the future alternatives can be fully predicted. However, much also depends on the information and hidden but legitimate intentions of the parties. The question of the completeness of the contract is of particular importance for the parties in this case because a certain extent of the incompleteness of the contract could mean that the parties would not have concluded the loan agreement or not on such terms.

As opposed to the bargain of equal parties, the fact that the party with the stronger bargain position acquires additional rights, while its obligations are reduced, naturally has a major impact on the complete contract. As seen in the earlier discussion of the perfect contract, this increases the performance risk of the party with a weaker bargain position, even if it is fully committed and acts in good faith. It may result in further risks that the value extracted from a party in the weaker bargain position reduces its motivation to fully perform its obligations as undertaken (*Eisenberg 2018*). It may be possible to try to build additional incentives into the contract to create a legally perfect contract, but the so-called moral hazard is likely to prevail by exploiting existing loopholes (*Arrow 1963*). The longer the term and the more complex the combination of rights and obligations are, and the more unpredictable the methods of performance become, the greater and more diverse the risks are that need to be taken into consideration as a result. Moreover, certain risks can also have an impact on each other. All in all, we can claim that the more diverse and the more complex or interconnected risks the performance of a contract involves, the more future alternatives must be taken into account in a perfect contract in the economic sense (*Eisenberg 2018*).

Based on the above, taking advantage of a stronger bargain position results in additional risks. All of this increases the number of alternatives that need to be addressed in the contract. Assuming good faith in terms of maximum bargain and the conclusion of the contract, when the party with the weaker bargain position faces these, its attitude towards the performance of the contract can change. This changed attitude has not been taken into consideration as a potential risk when concluding the contract; therefore, such future alternatives, or loopholes, can be realised in the conduct of the party with the weaker bargain position that are not addressed by any factual circumstances, nor legal consequences in the contract (*Knapp et al. 2019*). On the other hand, the party with the weaker bargain position actively influences the realisation of an alternative which, because of its low, negligible probability originally assumed, has only relatively favourable legal consequences for it. The more the party with a stronger bargain position uses its power to determine the contract, the more additional value it transfers from the other party, and thus, it needs to consider that the contract inevitably grows further and further from being complete, especially in terms of the increased moral hazard.

5. Conclusions

In most cases, when one of the parties has a strong bargain position related to the conclusion of a contract, a dominant position is not or cannot be involved. The possession of a strong bargaining position is much more widespread, especially because its establishment is also influenced by factors such as greater relevant knowledge or proficiency in bargaining processes. In general, credit institutions

could only have a dominant position over their clients if they joined forces. On the other hand, they have an absolutely strong or relatively stronger bargain position vis-à-vis most of their clients, even in terms of the previously described basic factors or the attributes of their modifying factors. The creation of a strong or stronger bargain position and its use are basic features and driving forces of market economies (*Spread 2018*).

The present study does not wish to provide a normative definition on how and to what extent a party having a strong bargain position or a stronger one compared to the other party should take advantage of its bargaining power. However, it definitely aims to point out that the extent to which the provisions of the possibly concluded contract can be fulfilled without any problems may depend significantly on the way and the extent the party with a stronger bargain position uses its bargaining power when defining the terms of the contract. Because the increased use of a strong bargain position is a double-edged sword: although it increases the likelihood of gaining a relatively larger share of advantages in the contract, it also increases the problems of performances. This relationship is recommended to be taken into account when determining how to use a stronger bargain position.

In the context of two theoretical "extremes", i.e. the perfect and the complete contract, the study examined the effects of the increased use of a stronger bargain position on the ability of the contract to be performed without problems. The theory of the perfect contract that focuses on the performances to be realised by any means is barely sensitive to the information asymmetry arising between the parties. Regardless of the development of future circumstances, the contract intends to ensure the performance of the parties at all costs, even in the event of unforeseen changes. Therefore, it aims to achieve this even in those cases when preferences or interests change in the meantime, regardless of the extent of the parties' asymmetry at the conclusion of the contract (*Fömötör et al. 2017*). The theory of the complete contract primarily aims to eliminate information asymmetry, its consequences, hidden information, disguised actions and hidden returns, in order to reduce uncertainty. If this effort is successful, all future outcomes will be regulated in the contract. It is a different issue how it can improve the full performance of the assent under the contract. Therefore, the completeness of the regulation does not necessarily mean that performance will be fulfilled without any problems, only if the legal consequences assigned to the factual circumstances completing each other are appropriately harmonised.

Hungarian credit institutions seem to be more committed to the conclusion of perfect contracts, rather than complete contracts, which can also be seen in the ruling of the *Curia of Hungary* (*2019*) on the validation of foreign currency loans. Certain future alternatives also appear in loan contracts, but they do not require the conclusion of a complete contract at all. In accordance with the theory, the Curia

also prescribed the retroactive amendment of contracts with regard to creating a perfect contract. In terms of the complete contract, shortcomings revealed after the conclusion of the contract cannot be replaced in hindsight.

Obviously, by taking advantage of their stronger bargain position on concluding loan contracts, credit institutions do not aim to put such burdens of additional risks and obligations on clients that would negatively affect their ability or willingness to perform. However, as we saw from the example of foreign currency loans, they need to act with greater care in terms of the conclusion of contract and the bargaining processes. The Central Bank of Hungary (Magyar Nemzeti Bank), as a supervisory body, also encourages them to do so, but the credit institutions can also commit themselves to implement such changes.

Naturally, credit institutions, as successful market economy operators, do not have to and should not give up their absolutely strong bargain positions. At the same time, most clients do not have a strong bargain position in the absolute sense, but it is possible to change it. As seen, the basic factors that affect the bargain position are inherent features of market operators that arise from their previous activities and their nature. Credit institutions do not have any significant influence over these. On the other hand, they are able to influence the factors that change the effect of basic factors. They are able to provide more information to clients and help them understand and evaluate the information. As such, based on the theory of a complete contract, reducing information asymmetry between the parties shifts the contract to becoming more of a complete contract. Obviously, it also requires that more relevant information be shared with clients, as well as their interpretation and evaluation, appear in the contracts themselves, in the form of possible alternatives for future circumstances, or the legal consequences assigned to them. Nonetheless, clients could also strive more in order to solve the problem of information asymmetry as it would be mainly in their favour, but this would be the topic of another study.

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