



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**DAF/COMP/WD(2007)118  
For Official Use**

**FACILITATING PRACTICES IN OLIGOPOLIES**

**-- Note by Hungary --**

*This note is submitted by the Hungarian Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 17-18 October 2007.*

**JT03232449**

Document complet disponible sur OLIS dans son format d'origine  
Complete document available on OLIS in its original format

## 1. Definition

1. The GVH – the competition authority of Hungary – analysed practices facilitating the coordination of business strategies, mainly in procedures initiated against hardcore price fixing of market sharing agreements. With one exception these practices were therefore assessed as complementary elements of the targeted illegal behaviour and were considered in the light of those agreements.

2. Practices facilitating collusion were defined as “concerted practices” and were usually prohibited in line with the hardcore agreement deriving from, or based on that scheme. A clear distinction is made however between two possible effects of such a concerted practice. First it is taken into account as a foundation of a direct price fixing among competitors, and second as a behaviour eliminating or reducing the effect of competition that would otherwise coerce the application of more competitive strategies. It might therefore be considered as a complementary, indirect infringement or as an independent, direct infringement as well.

3. Such a concerted practice may take many forms. It may take place if undertakings participate on meetings where information is exchanged on future behaviour. Similarly it might be considered as a concerted action if one of the parties regularly sends its prices to competitors while these latter do not protest against it. Evidently it also qualifies as a concerted practice if there is a formal mechanism for the exchange of sensitive information. That was the case when information was collected and shared by the association of the given (cement) sector. Similarly a forum for the exchange of information was set up by multiplex cinemas of Budapest, when regular bilateral meetings were held between film distributors and cinemas to determine the rental fee, based on thoroughly detailed price and volume data. Though this was a purely vertical net of relationships as almost all cinema groups were vertically integrated into the level of distribution, there was no doubt that competitors’ sensitive data was available for the cinemas. However this scheme was finally not assessed by the GVH as it mainly concentrated on the actual price fixing.

## 2. The test of illegality

4. The test applied by the GVH is based on the requirement that market actors should bring their decisions independently. This requirement excludes the possibility of all direct or indirect contacts among market participants independent of each other. Should therefore an undertaking reveal its future behaviour (prices to be adopted, costs, stocks etc.) – in order to influence the behaviour of its competitors – and encourage them to behave similarly, it shall reasonably be aware that competitors would at least have regard to that communication while formulating their own strategies. This thereby results in the replacement of the risks of competition with their cooperation. Accordingly undertakings commit antitrust violation in the form of concerted practices if they participate in a mechanism that substitutes the uncertainties generated by competition, and necessarily implies that undertakings can take into account during the formulation of their strategies the information received from competitors.

5. From the above it can be deduced that a concerted action is illegal if it has a clear anticompetitive object (e.g. provision of future price data) or, if such an effect can not be demonstrated *prima facie* (lack of direct evidence of the hard core infringement, provision of more indirect data), than its effect should be subject of scrutiny. However up till now none of this latter situation arose in which the parties argued about countervailing efficiencies.

6. Unless an anticompetitive objective is clear, the GVH analyses the substance, actuality, generality of the information, the frequency of its communication and the importance of the undertakings participating in the exchange, in sum the actual impact on the elimination of uncertainties of competition. Interestingly it is not always a determining factor whether the information exchanged was secret or could

have been known from other sources. In the cartel case of foreign currency exchange outlets one of the parties has sent every morning its prices it intended to apply. Though due to the nature of the service in question, shortly after this communication that information was to become public anyway, the GVH found that it necessarily had to have and it did have influence on the pricing of notified competitors. It can also be seen that reciprocity is not a necessary precondition of the establishment of an infringement. It is also clear that the existence of an agreement is not a precondition of the establishment of illegality, once it is obvious that information was actually exchanged or shared.

7. Though normally information exchange schemes were analysed in connection with hardcore cartels, such a connection is not a necessary element of illegality. In the cement case the GVH assessed an information system operated by the Hungarian Cement Association. The investigation did not reveal any evidence, upholding that undertakings have fixed prices or allocated markets. It was however established that the scheme related to the monthly exchange of confidential, company-specific information and the information shared was not obtainable from other sources. The monthly database contained overall data on production and sales volumes per undertaking and per factory as well. The GVH established that company-specific information, that is capable to influence competition and excludes inherent uncertainty and risk of competition should not be exchanged between competitors. The regular following up of information on producing, sales and stocks broken down into factories and cement-types throughout years enabled market players to foresee each others steps. The GVH established that the various forms of information sharing had an anti-competitive object and effect.

### **3. Exemptions**

8. Not all type of information sharing between undertakings is to be qualified as anti-competitive. In particular on a market with many players the ascertainment or exchange of non company-specific information (consequently totalised data) may be regarded as an expressly pro-competitive behaviour. However the information sharing systems of which object or effect is to reduce the risk coming from the competitors' unpredictable behaviour are contrary to the above mentioned object of competition policy. This means that per se prohibition of facilitating practices like information sharing cannot be justified.