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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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ROUNDTABLE ON MARKET STUDIES

-- Note by Hungary --

This note is submitted by the Delegation of Hungary to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 11-12 june 2008.

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1. This submission gives a brief overview of what sector inquiries are under the Hungarian Competition Act (Competition Act), and how they work. After an introduction it deals separately with its conceptual and structural aspects and with aspects related to the process, finally it deals with issues listed in the secretariat's letter of inviting submission but not covered in the first two parts.

2. In Hungary, sector inquiries, carried out by the Hungarian Competition Authority (Gazdasági Versenyhivatal (GVH)) correspond to the term "market studies" used by the Secretariat's request for submission. Basically, GVH sector inquiries are a copy of their similarly called EU counterpart. Beyond sector inquiries, there are two other opportunities to get information on various industries without engaging into an individual law enforcement proceeding. These are "market overviews" and information gathering for the purposes of providing information with international organisations such as the OECD on a voluntary basis.¹ The current Hungarian legal thinking on information gathering holds that public authorities like the GVH may freely rely on public information, but any information request from enterprises, even voluntary type, require statutory empowerment.

3. Sector inquiries have been possible in Hungary since the 2000 amendment of the Competition Act. Over the years, the GVH launched five sector inquiries regarding mobile telecoms (2001-2002), mortgage loans (2004-2005), electricity (2004-2006), bank switching (2007-ongoing) and electronic media (2007-ongoing). Experience gained in the first couple of sector inquiries resulted in refinement of the Competition Act provisions regulating GVH sector inquiries.

1. Concept and structure

4. The idea behind sector inquiries is to investigate a whole industry (or part of that industry) in order to understand the reasons behind a perceived problem in market operation which might indicate that competition is distorted. In the end of the process, the GVH prepares a report, explaining those reasons and reaching conclusion whether further action (i.e. law enforcement and/or regulatory intervention) is needed.

5. GVH sector inquiries are formal proceedings under the Competition Act, different from individual law enforcement procedures in many respects. Triggering events can be anything that indicates problems with market operation like strange price movements, or other phenomena seem to be counterintuitive and unexplained assuming proper – usually competitive – market functioning. In other words, the GVH recognises that "something is wrong" or might be wrong with competition, but it does not have a solid idea about it, it does not really understand it (or if it has general hypotheses it is not yet in the position to substantiate them), to the extent that would be satisfactory for intervention. These problems are different, most importantly less specific both in terms of behaviour and enterprises involved, than problems triggering individual law enforcement proceedings (like merger cases or cases on various agreements (including cartels) and abuse of dominant position), where a theory of harm, a clear behaviour/suspicion, and potential wrongdoers are identified before the proceeding is launched.

6. Beyond the proper nature of the problem, a certain magnitude and importance of it is also required. There are many not fully understood "market mysteries" around a competition authority still not deserving a resource and time intensive closer scrutiny. There are no objective criteria set either in the

¹ In case of "market overviews" the GVH itself, or by commissioning a research firm, overviews the market, its development with special focus on the conditions of competition. "Market overviews" are not formal procedures, and therefore can rely only on publicly available information and data. These exercises do not require statutory authorisation of the GVH or investigative powers, but GVH experience with pure "market overviews" are not very encouraging in terms of quality and usefulness so far. A provision of the Hungarian Competition Act also makes possible for the GVH to gather information from enterprises on a voluntary basis, if this is necessary to fulfil information request of international organisations. This provision has been hardly exercised so far.

Competition Act or in the GVH practice what constitute a beyond-the-threshold-scale problem, nevertheless factors like size of the industry, public attention, potential welfare effects, could be mentioned. In this context EU or broader international interest and similar activity (or experience from it) can play a significant, though never dominant role. Several GVH sector inquiries had a parallel EU counterpart, or other sort of non-occasional international activity in the same subject (like roundtables of the OECD Competition Committee or its working parties). In some cases these may contribute to the initiation, the design or the analytical approach of the GVH sector inquiry in various ways, or can represent a pure, nevertheless useful and encouraging co-incidence in other cases.

7. For example in the case of the electricity sector inquiry the triggering problem was the low switching rate (from the public service segment to the free market) and a subsequent trend of switching back (from the free market segment to the public service) of industrial customers after the first stage of the gradual market opening process came into force. The EU energy sector inquiry did not have any direct impact on the GVH sector inquiry in any respect, the two exercises reinforced each other nevertheless. It was not clear why customers do not move when in principle they could. In the bank switching sector inquiry it was the presumable difficulty (and low rate) to react to price changes in existing credit relationships for consumers, and apparent lack of comparable information on terms and conditions to make an informed consumer choice on current account switching that made the GVH to start an inquiry. In addition, it became clear that the issue is taken seriously by other competition agencies worldwide, and there were examples of well-considered interventions in switching between current accounts in several jurisdictions. The EC banking sector inquiry (started in 2005) also covered switching and it played a role to develop and maintain GVH interest in the topic, as well as the OECD CC roundtable on switching (held in 2006).

8. After the case handlers and the GVH management identified a problem potentially triggering a sector inquiry (for which the information can come either from previous law enforcement experience, or from market developments themselves), an inquiry team is established, a concept memo is formulated and a working plan is set up. They describe the outline of the sector inquiry dealing both with substantive and operational aspects, such as identifying the initial problem, hypothetical explanations, methods to be used, stages of the inquiry, expected duration, various outsourcing issues.

9. The sector inquiry's final product is a report (not a decision), which includes statements, including proposals (not remedies). In this respect, GVH sector inquiries themselves do not have any "practical" consequences. Nevertheless, the results of a sector inquiry, depending on its findings, can be either initiating individual law enforcement or competition (or other) advocacy or both.² Law enforcement (individual procedure(s), technically separate from the sector inquiry) is initiated when the sector inquiry reveals information about a probable competition law infringement during the sector inquiry. This happened in the case of the electricity sector inquiry, after which the GVH launched several individual cases dealing with probably anticompetitive loyalty schemes applied by regional electricity utility. (These cases are still pending.)

10. More typical is a competition advocacy result, especially proposals aiming at the removal, introduction or modification of regulations. On the one hand, competition advocacy proposals are elaborated and included in the conclusions section of the report, on the other hand, they often have an after-life as they are presented repeatedly by the GVH in its competition advocacy activities, sometimes

² In principle it is also possible that a sector inquiry has no any further consequences, because the initially perceived "problem" by the end is understood as a normal market phenomenon. Another theoretical option is that a market failure identified but no (plausible or cost effective) interventions of any kind seem to be available. Finally, in theory it is possible that the phenomenon is not understood to the extent where either individual cases or advocacy proposals could emerge.

after refinement or further elaboration. Thus sector inquiries may yield specific competition advocacy proposals as well as more general competition advocacy activity directions. Advocacy results were the main products both of the electricity sector inquiry, and the mortgage loans sector inquiry.

11. It is important to note that advocacy in the mortgage sector inquiry was not pure competition advocacy, but the report's proposals were mainly about consumer protection measures aiming at improving the conditions of a better informed consumer choice. GVH experiences with sector inquiries in the financial sector suggest that both from a technical and a substantive point of view, sector inquiries are fairly appropriate means to deal with areas where there is a strong overlap between competition and consumer policies, provided that the authority, like the GVH has expertise in both policy fields.³

12. Sometimes the GVH anticipates, or even communicates what types of main consequences of a planned sector inquiry are expected to emerge, but they cannot be predicted for sure. In the electricity sector inquiry, the GVH primarily expected competition advocacy proposals. This was basically correct, individual law enforcement procedures were also needed to start nevertheless.

2. Process

13. The decision to launch a sector inquiry is that of the president of the GVH (unlike individual law enforcement procedures, which are approved by the vice-president).⁴ Ideally, at the same time, firms involved in the information gathering (and therefore parties to the proceeding) receive an information request (including data request). In practice, information request sometimes goes somewhat later for technical reasons. Usually the GVH also holds one (or a few) meeting with the firms requested to provide information, to explain the purposes and the background of the particular sector inquiry (including the concept and the legal background, but also introducing team members, and communicating its main stages and time frame), and to reach a common understanding on the information request. Fine-tuning of the information request as a consequence is also possible.

14. The sector inquiry is done by a team consisted of officials coming from various units of the GVH. The GVH does not have a dedicated unit for sector inquiries or market studies. Core participants of the team are case handlers of the unit to which the sector belongs anyway (in other words they would deal with individual law enforcement cases as well as competition advocacy in that area). Officials (including economists) from general units are often, and members of the Competition Council are occasionally part of the team. GVH sector inquiries are both resource and time intensive exercises – they reach the scale of some of the really big GVH cases or even go beyond.

15. So far, GVH sector inquiries usually (but not always) involved outsourcing. It is never about the whole project, and the final report is always prepared by the GVH. Outsourcing covers mainly sub parts of the sector inquiry, concentrating on issues where analysis requires technical skills or capacity (primarily industry knowledge and empirical work). Nevertheless, in certain cases these issues can lay in the heart of the inquiry. Therefore while technically supplementary, outsourcing can play an extremely important role also from a substantive point of view in the sector inquiry.

16. In the mobile telecoms sector inquiry empirical work (a statistical analysis using price correlation methodology) on mobile/fix substitution was outsourced. In the bank switching sector inquiry surveys on switching habits of the population and SMEs (based on questionnaires), and part of an econometric

³ See also Financial Sector Inquiries – A Hungarian Example Illustrating Some Overlaps Between Competition and Consumer Policies (7th Meeting of the Global Forum on Competition, 22 February 2008, Room Document No. 2, Session IV) (<http://www.oecd.org/dataoecd/32/42/40136225.pdf>)

⁴ In theory, parties to the proceeding can challenge this decision before court.

analysis on the impact of switching were outsourced. On the other hand, in the electricity sector inquiry no outsourcing was done at all.

17. In sector inquiries the GVH basically can rely on all of its information gathering powers that are available in individual law enforcement cases, including access to confidential information and imposition of fines in case of denial. However, dawn-raids – available in cartel and abuse and dominant position cases – cannot be used in sector inquiries. In practice, information gathering is arranged with the parties, and it is an iterative process. On the one hand, obviously, neither the parties, nor the GVH want the information disproportionately burdensome, on the other hand, the GVH clearly wants to make well-based statements in the end of the sector inquiry. The nature of the sector inquiry and the attitude of the GVH imply that normally it is less a unilateral imposition on the parties than in individual law enforcement cases. Even so, there are exceptions: in the electricity sector inquiry, despite an arrangement phase and flexibility, certain parties had to be encouraged to co-operate by procedural fines. In the GVH's experience, in this respect industrial culture is an important factor.

18. GVH sector inquiries do not have a specific statutory deadline – the Competition Act requires the GVH to conclude them within “reasonable time”. Nevertheless, a timeframe and a deadline is part of the working plan. Missing this self-imposed deadline does not have any legal effect, but it is public, therefore unexpected delays without explanation may not improve the reputation of the GVH. To avoid this, sometimes it is useful to review and possibly modify the working plan (as well as to communicate this to the parties as well as to the general public). So far the GVH was not always able to keep initially set deadlines. Delays were sometimes substantial. The typical reasons were: delays in information gathering (late responses by the parties); more complex than expected cases (and their analysis); team members, doing multitasking, needed to concentrate on more urgent tasks (such as a merger case).

19. Sector inquiry reports (their public version – not containing confidential information) must be published by the GVH. They are finalised in the last stage of the inquiry in an iterative and interactive process. It is a statutory requirement to publish the draft version in order to attract comments, to give 30 days for those comments to be made, and the GVH is expected to make reasonable modifications before publishing the final version. Before the final version is prepared, the GVH may hold a hearing for market participants involved in the sector inquiry (a term of the Competition Act that refers a potentially wider group than parties to the proceeding) to discuss their comments and possible changes in the report. A summary of the comments and of the hearing must be published together with the final report. In addition, market participants involved to the procedure may ask the GVH to publish their substantive comments to the draft report together with the final report.

20. Beyond this, in practice, both the draft version and the final version (and the comments) can be found at the website of the GVH, and the draft version is also circulated among those who are expected to be interested (e.g. government agencies, and other stakeholders). The GVH usually also holds an oral consultation (that might be supported by written materials) on the draft version with experts and academics at the issue who were not involved in the sector inquiry. These consultations and the hearing are usually multilateral (not one-by-one) exercises. So far, in no case such comments and consultations implied major substantive changes in sector inquiry reports, especially in their conclusions.

3. Remaining questions of the secretariat

3.1 Approach

- *What criteria do you use to select appropriate markets to study?*

21. See paragraphs 5-7.

- *How do you go about the process of gathering data and other information for the study?*

22. See paragraphs 13 and 17.

- *What are the advantages and disadvantages of using empirical evidence in market studies? What about anecdotal evidence?*

23. The usual attitude of the GVH is to try to get as much empirical evidence in sector inquiries as possible within the scope of time and resources. The reason is that empirical evidence is often regarded to be more “objective”, to get them can be time and resource intensive nevertheless. Empirical evidence does not necessarily imply econometric analysis on hard data in sector inquiries. Surveys are sometimes easier to conduct and relatively informative – even if they may reflect opinions rather than facts, and therefore should be taken cautiously.

- *Is it a good idea to seek the involvement of market participants (sellers, customers, and any other stakeholders), or is it better to conduct the study without them? What are the pros and cons of each approach?*

24. Stakeholders can participate in the sector inquiry draft report consultation process, some of them might be proactively involved by the GVH in that process. In the sector inquiry process they might be involved as an information provider (as a member of a survey sample, or as a party to the procedure who is obliged to co-operate in information gathering). Paradoxically, our experience in the electricity sector inquiry was not too good in implying buyers in the information gathering process – they were more reluctant to give answers than electricity firms. So far the GVH have never tried to co-operate with business stakeholders (other than information providers) before the report consultation stage. The GVH tried however in several times with good results is to contact industry experts or regulatory agencies familiar with the industry in question for a better design of a planned sector inquiry. Regulatory agencies can even play a role during the sector inquiry, certain information and analytical results can be shared and discussed with them, sometimes with a very productive outcome. They also can be a valuable source of information and data.

- *In general, how much transparency is appropriate when conducting market studies?*

25. The GVH wants to provide maximum transparency regarding the general framework of sector inquiries. This is so because in our experience businesses easily confuse sector inquiries with normal law enforcement proceedings (see also answer to question 2.3) that may cause reluctance and distrust towards the sector inquiry in question and may harm the information gathering process. The fact that a given sector inquiry has started is public (and press released), as well as the results of sector inquiries (reports, draft reports and comments to the draft report), providing maximum transparency in this respect too. The information gathered in the course of a sector inquiry is basically treated in the same way as it would be gathered in the course of a normal law enforcement procedure – e.g. strict rules on confidentiality equally apply.

26. The best practice in our opinion probably is the same. At least, the Hungarian situation is satisfactory in this respect.

- *Do the market studies done by your competition authority (or authorities) have distinctive features in comparison to those done in other jurisdictions? If so, what are those features?*

27. We might be in the position to answer this question not before, but after the roundtable discussion.

- *How do you go about setting timetables and milestones for completing market studies?*

28. See paragraphs 8, 19 and 20.

- *What human and financial resources (approximately) have you devoted to market studies (including those for which consultants have been hired)? Have the results been worth the resources spent? Please explain why or why not.*

29. See paragraph 14.

- *Should competition agencies conduct market studies themselves or should the work be contracted out? What are the advantages and disadvantages of each approach? (E.g., are there any concerns about credibility or objectivity?)*

30. See paragraph 15.

3.2 Relationship between Enforcement and Market Studies

- *What complementarities exist between enforcement and market studies?*

31. GVH sector inquiries are initiated on the basis of a less specified problem, they deal with more general issues than normal law enforcement (see paragraphs 5-6). In addition, unlike normal law enforcement, they can hardly solve any problem directly (see paragraphs 9-12). Therefore in Hungary there are clear complementarities between the two in terms of subject, approach and results.

- *What best practices should be followed when a market study turns up evidence of a competition offence?*

32. The GVH does not have too much room to manoeuvre in this respect. If a sector inquiry reveals evidences of a competition offence, the question in Hungary is not if but when. Normally, the GVH would wait until the sector inquiry ends (the report is published), partly for practical reasons (such as resource allocation), partly because the proper interpretation of those evidences is assumed normally to require the sector inquiry to pass its course. Nevertheless, there might be cases where the principle of no time to waste applies (such as a hardcore cartel where destruction of evidence is a danger). It is also worth to be mentioned that under the Competition Act evidences gathered through a sector inquiry can be used in a subsequent individual law enforcement proceeding.

- *What are the pros and cons of having formal powers to conduct market studies?*

33. In Hungary without formal powers, to conduct a sector inquiry, or any sort of market study exercise in the meaning of this roundtable discussion, probably would be impossible legally (See also paragraph 2). Formal powers therefore are useful. One drawback is however that strong powers on information gathering and the fact the GHV sector inquiries are formal procedures often cause misunderstandings among parties, who tend to confuse sector inquiries with normal law enforcement.

- *What conditions or requirements, if any, should be met before authorisation to use those powers is granted? How extensive should the powers themselves be?*

34. For conditions and requirements see paragraphs 5-6 – the same powers can be used in all sector inquiries. (We believe that the Hungarian situation is satisfactory in this respect.) Formal powers have to

be strong (equally strong as in normal law enforcement) regarding information gathering, some powers regarding remedies can be also very useful.

3.3 *Strategies for Using Market Studies*

- *Are market studies useful instruments? What purposes do they serve?*

35. Yes, sector inquiries are certainly useful, in case of absence the GVH certainly would miss them. For the purposes see paragraphs 5 and 9-10.

- *For example, are they used to carry out investigations without having to do so formally? Is that a good practice?*

36. The practice raised by the question probably cannot be regarded as a best practice. In any case, it would be impossible in Hungary. Under the Competition Act sector inquiries cannot be used to substitute for individual cases, since they are different in many ways. Moreover GVH sector inquiries are formal proceedings in the Hungarian regime. (See also paragraph 5.)

- *Another possible use for market studies is to wield them as a tool for effecting regulatory and legislative reform. Have you found them to be effective for that purpose? Why or why not?*

37. GVH sector inquiries are clearly important means in a competition advocacy context. They often produce very good basis and strong arguments for competition advocacy proposals or for advocating in order to facilitate free and informed consumer choice that may sound more convincing, or more solidly underpinned than usual ones.