

**ROUNDTABLE ON COMPETITION AUTHORITIES' ENFORCEMENT  
PRIORITIES  
-- NOTE BY HUNGARY --  
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**Introduction**

1. Reflecting partly also to some transitional characteristics of the Hungarian competition policy this report does not focus on narrowly defined or consciously planned priorities - up till now this kind of priorities hardly existed in the law enforcement practice of the Hungarian Competition Office (Office or HCO) or in its competition advocacy. Instead, the report focuses on those issues, questions, problems and tasks on which - with more or less awareness - the Hungarian competition authority concentrated its efforts.

2. In Hungary a Competition Act of market economy character entered into force in January 1990, after the social-economic turn of the late '80-ies, namely Act No LXXXVI of 1990 on the Prohibition of Unfair Market Practices. This Act was replaced after its six year application by Act No LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices in January 1997 which has been in force since then. Consequently, the Hungarian competition law enforcement has nearly ten years practice.

3. Non of the Competition Acts contains provisions about competition law or competition policy priorities, and this kind of rule cannot be found in any other acts either. However, this does not mean that priority setting would have been or would be constrained by law.

4. Until quite recently the Hungarian competition authority did not follow a conscious priority setting policy. Basically, the Competition Office concentrated its activity to areas which have been emerged in the everyday practice. This stands both for the law enforcement practice and the competition advocacy. From another point of view, within the framework of its competencies the competition authority endeavoured to perform considerable activity - again, this stands for both areas, but, that can be stated so much the more for the competition advocacy role of the Office.

5. As far as priority setting practice of the Hungarian competition authority is concerned, certain "historical development" can be observed. In the case of competition advocacy this activity had a "following nature" during the first years of the existence of the HCO, i.e. the competition authority contributed to issues posed to the agenda by the legislation. However, recently the competition authority has undertaken the role of the initiator in many competition advocacy issues, mainly in respect of regulatory reform of natural monopolies. (For example, this has been manifested in the fact, that it gave greater importance to competition advocacy in its annual reports submitted to the Parliament, thematic submissions are prepared for relevant committees of the Parliament.) Increasing willingness can also be observed from the point of view of the Office's activity in connection with initiation of law enforcement actions.

### **Characteristics of transition**

6. In spite of the modest beginnings, many circumstances indicate that priorities have appeared already during the early years after competition law had entered into force. From this aspect countries in transitional period can be regarded as being to some extent in a specific situation: setting up regulatory and institutional framework for a market economy requested necessarily both the governments and the highest legislative institutions to take into consideration certain basic competition policy considerations. In Hungary in this situation the competition authority had the responsibility to assist the Government to recognise these considerations. Moreover, the great number and importance of problems raised by the transition made it necessary that apart from the aspects appearing in the background of decision making, points of view of competition policy be represented. Obviously, the aspects of competition policy were represented by the HCO.

7. As a result of all these, during these early years of the transitional period, the most important topics of HCO's competition advocacy role did not depend on the HCO's own decision, rather the competition authority had discretion to define its concrete goals to be reached and its means, how to reach these goals within given topics (e.g. privatisation). This work of the Office was strongly supported by numerous market studies prepared in the Office at the time after its establishment. These studies served as a basis both for the identification of relevant questions and viewpoints to be represented in the competition advocacy work and also to indicate the first cases to be investigated ex officio under the newly enacted Competition Act. This early activity of the HCO aiming at following or setting priorities manifested in many forms.

- In the early years of the transitional period it had to be decided how to shape the relationship between privatisation and competition policy, how to build in competition policy viewpoints into just ongoing privatisation cases. The problem was solved by participation of competition authority experts in the work of the board of directors of the privatisation agency. As a result of this, competition aspects were successfully forced in many instances. Although considerable deconcentration process has been implemented in many branches of the Hungarian economy prior to the privatisation, favourable market structure effects of this process needed protection against privatizatory intentions aiming at concentrative buy-ups (e.g.: in the sugar industry, grain industry, road haulage, construction industry, etc.), and privatisation resulting in deconcentration was also a well-defined endeavour in some other industries. The participation of the competition authority in the privatisation process brought considerable results in certain concrete cases (e.g.: in the privatisation of retail trade and tobacco industry).
- In the first years it was an urging necessity to reregulate Acts relating to regulated sectors in accordance with the requirements of a market economy. From this point of view the competition advocacy activity of the Hungarian Competition Office concentrated on the separation of administrative and economic functions and on the creation of appropriate accountancy, transparency and institutional conditions of a regulation which is able to enforce efficiency.
- In order to improve market structure and to change the demand-supply relationships of the economy of scarcity, the Competition Office gave an active contribution to the deregulation process which helped market entries and to reregulation which served to create clear conditions for the operation of entrepreneurs. This activity of the Office was properly supported by a provision of the Competition Act, according to which ministers were obliged to solicit the opinion of the competition authority on every draft bill that would have a restrictive effect on competition. Opinions by the competition authority were expressed to many hundreds of draft regulations annually, dozens of which affected significantly the freedom of competition. With some simplification this activity can be summarised by stating

that during the first three or four years the competition authority's advocacy role had an attitude-shaping function from the point of view of bureaucratic administration versus broadly-interpreted competition policy, while later the fight against anticompetitive business interests gained greater importance.

- In the field of law enforcement a specific provision of the 1990 Competition Act reflecting not really circumstances of transition but rather technical necessities resulting from the changing legislation gave possibility for the competition authority to commence proceedings on its own initiation. Of course, provisions of the Competition Act had to be applied to behaviours committed after the entry into force of the Act. However, Article 65 of the Act provided, that the competition authority had the possibility also to examine agreements resulting in restriction or exclusion of competition concluded before the date on which the Act entered into force, if the parties continued their illegal conduct after the Act became effective. In 1991, based its activity on the market studies prepared as a first step of its operation, the competition authority investigated 12 cases under Article 65. Although this series of investigations were not qualified as a 'priority', this step can be interpreted as a priority of the first year's law enforcement. Under Article 65 investigations were made in the cement industry, construction industry, in the field of motor vehicle servicing, etc., mainly in areas, where independent successor undertakings of earlier monopolies or state-owned "trusts" operated on the markets (investigations of this kind were not initiated at a later stage). These investigations had the role to stimulate the turn of these undertakings from traditional into competition conform type behaviours. Although the provision serving as a basis to start these cases was in itself of purely technical character, in practice the HCO tried to use this tool adjusting to the circumstances of the transitional economy (the Office investigated the operation of traditionally co-operating undertakings, drawing the attention to the existence of the competition law, etc.).

### **Law enforcement practice**

8. According to the Hungarian competition law in force proceedings may be started either on applications (for exemptions of agreements or clearance of concentrations) or ex officio. In the case of applications the Office is obliged to start proceedings. There are two types of cases commenced ex officio. On the one hand, this kind of proceedings can be based on complaints. In this situation the decision, whether to start proceedings or not is at the competition authority's discretion. For this decision there is less room for the priorities, the competition authority commences the investigation, if three conditions are jointly fulfilled, namely: the behaviour complained may violate the provisions of the Competition Act, the proceedings are within the competence of the Competition Office and the proceedings are necessary to safeguard the public interest. (At the same time, if the Office rejects the commencement of proceedings, the complainant has a two stage appeal possibility to enforce the Office to proceed.) In this category of cases priorities may have certain role in accordance with the approach and interpretation of "public interest".

9. The other possibility to start proceedings is when the competition authority initiates its investigation on its own. If we speak about priority setting, obviously, this form suits the best any conscious pre-determined enforcement policy. In this sense by now the Hungarian competition authority has not had law enforcement priorities, however, recently this situation seems to change since in 1999 the number of cases initiated ex officio with no previous complaint received increased substantially. This can be shown by the following chart:

#### **Number of cases commenced**

Number of cases	1998	Until 15.09 1999
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*COMPETITION AUTHORITIES' ENFORCEMENT PRIORITIES-- Note by Hungary --05-Oct-1999*

On applications	63	47
Based on complaints (ex officio)	111	93
On own initiation (ex officio)	8	13
<b>Total</b>	<b>182</b>	<b>153</b>

10. As far as the structure by market behaviours of the case-workload is concerned, it is greatly determined by the fact, that a large part of it came automatically to the competition authority. Decisions by market conducts of the Competition Office in 1998-1999 can be seen in the next chart:

Conduct	1998	Until 15.09.1999
Unfair manipulation of consumer choice	72	24
Restrictive agreements	15	4
Abuse of dominance	44	19
Concentrations	49	16
<b>Total</b>	<b>180</b>	<b>63</b>

This "structure of conducts" can be influenced only by ex officio on own initiation commencements of the Office.

11. In the period of 1998 to 15 09 1999 the structure of cases commenced ex officio on own initiation was as follows:

Type of the case	1998	Until 15.09 1999
Unfair manipulation of consumer choice	3	1
Restrictive agreements	1	9
Abuse of dominance	1	1
Failing to ask authorisation for concentrations	3	2
<b>Total</b>	<b>8</b>	<b>13</b>

12. In 1999 experiences of law enforcement provided a catalyst for certain objectives. In certain areas the great or increasing number of complaints stimulated the competition authority to commence investigations on its own initiation in a broader area of the industries given. The investigation of anticompetitive conducts of professional associations and chambers can be mentioned here as an example. In this field there were two proceedings started ex officio on complaints in the Spring of 1999. Based on the experience of these cases and having experienced the increasing number of professional interest protection organisations in different industries, in Summer the Competition Office has commenced proceedings to investigate the self-regulations of further 9 professional organisations. As it has already been mentioned, during the first years of transition efforts of the Office concentrated to change the approach of governmental agencies in respect of conscious creation of competition conditions, now - it seems - it is high time to influence the interest protection organisations, since for the sake to follow their own professional interests they are willing to sacrifice overly easily public interest attached to freedom of competition.

13. In other cases the law enforcement practice accumulated useful knowledge for competition advocacy. The Hungarian experiences show that these two activities (law enforcement and advocacy) cannot be seen as tasks with the performance of one of them going to the detriment of the performance of the other, but work in these two areas is worth to be co-ordinated in order to achieve greater results. At the same time it is also doubtless, that sometimes this principle can be implemented with difficulties only, mainly because of the shortage of resources. From this point of view the Hungarian Competition Act prioritises law enforcement, in the case of some of the key experts of the Office workload devoted to

advocacy can be allocated to "rest capacities" only. Although there are separate units responsible for the two areas, experience shows that advocacy cannot be efficient without exploiting the knowledge of the law enforcers in certain situations, so first of all case handlers are effected by excessive workload.

14. Recently, knowledge and experience gained in the law enforcement practice facilitated the advocacy function in the case of topics as e.g. the regulation of buying up conditions of cable TV companies, elaboration of Act on Cemeteries and Funerals, amendment of the Act on Telecommunications (according to which the new regulation limited the entry possibilities by telecommunications companies to cable TV markets), elaboration of regulatory concept for electric energy supply, etc. Sometimes the advocacy motivated analyses of law enforcement lead to priority setting, at least this practice has increasing importance in the work of the Hungarian competition authority.

15. In 1999, as a new project, the systematic analysis of certain markets were started in the Competition Office. This work also has been strongly supported by law enforcement experiences, nevertheless the basic aim of these so-called 'market studies' is to base our later investigations on a systematic body of knowledge on the one hand, and, on the other hand it is also expected from this work that it will have efficient repercussion on advocacy as well. Up till now studies of this kind have been prepared about sugar industry, electric energy market, retail and wholesale trade of foods, while other studies, like those on credit card markets, pension funds, programmed video tape distribution, cable TV services, pharmaceutical industry, dairy processing industry, gas industry, internet services, taxi services are under preparation.

#### **Reform of competition law and competition advocacy**

16. During the reform of the Hungarian competition law in the mid '90-ies certain points were taken into consideration as priorities. Up to this period the competition authority overcame the difficulties of the beginning in competition law enforcement, gained certain experiences and, mainly as a result of assistance provided by OECD member countries and EU Member States, managed to get more and more acquainted with international experiences too. During the amendment of the 1990 Competition Act the adaptation of these experiences was regarded as a priority by both the experts wording the drafts and the legislators themselves. At doing this, taking into consideration the association agreement concluded between Hungary and the European Communities, which entered into force in January 1994, special emphasis was given to the adjustment to the competition norms of the EC.

17. The competition advocacy role of the HCO has been implemented in many respects:

- opinion-forming about draft bills and regulations in compliance with the possibility granted by the Competition Act;
- annual reports prepared for the Parliament, on the basis of which the Parliament may formulate recommendations for the Government;
- studies on particular topics prepared for special committees of the Parliament, these may also serve as basis for recommendations of the Parliament for the Government;
- drawing the attention of special committees of the Parliament to needs for certain pro-competitive regulations;
- preparation for the broader professional society of "competition policy standpoints" reflecting the approach of the competition authority in the form of publications.

18. To some extent the advocacy function of the competition authority is based on Article 36(3) of the effective Competition Act, which says, that "the President of the Office of Economic Competition shall be heard concerning all draft submissions or draft legislation that have a bearing on the responsibilities of the Office of Economic Competition, in particular if such planned measures or legislation restrict competition (performance of some activity or entry into the market), grant exclusive rights or contain provisions pertaining to prices or terms of sale." This wording reflects clearly that this kind of the competition authority's activity has necessarily reactive nature. This basically has been manifested by the

fact that in compliance with the regulatory philosophy of the Act on Legislation the Competition Office has not had the right to submit draft pieces of legislation. This means that the HCO, using its law enforcement experiences as basis, may express the competition policy aspects by giving its opinions to draft regulations.

19. Under these circumstances the attention of advocacy focuses mainly on sectors/topics the regulation of which are on the agenda of the legislation. Fortunately, after the completion of the establishment of market economy regulatory circumstances, the survey and reform for reregulation of sectors which have been regulated in the first wave early in the '90-ies has begun recently. For example, the wording of a general act on communications (telecommunications, frequency, post) is on the table, reregulation of acts on media, public procurement, energy, public passenger transport is under elaboration, preparation of implementing rules to the Act on Railways is a task to be done etc., all of them being relevant topics. Pronounced representation of competition policy aspects is necessary to answer the question, how to regulate them.

20. In spite of this basically "reactive nature" of its advocacy function, the HCO tried earlier and increasingly tries nowadays to show pro-active approach in this activity. As formal means to do this advocacy it has its annual reports prepared for the Parliament, different competition policy papers written for the Economic Cabinet of the Parliament and publication of its "competition policy standpoints".

21. The President of the HCO has to report annually to Parliament about the activities of the Office and also about the compliance in Hungary with the requirement of fairness and freedom of competition. A practice has been shaped during the last few years, namely, based on the annual reports of the competition authority, the Parliament formulates recommendations for the Government. The last recommendation of this kind was brought about on 1 June 1999 based on the report about 1998. In this document the Parliament requested the Government to take further steps towards a competition-based regulatory reform in the field of natural monopolies and exclusive rights by the end of 1999. Moreover, building on sectorial studies prepared by the HCO, more concrete recommendations were addressed in the same document to the Government in connection with the regulation of telecommunications and the energy sectors and attention was called for the importance of the regulation of local monopolies.

22. The fact, that the Economic Cabinet of the Parliament requested the HCO to formulate its opinion about the up-to-date regulatory needs which can be regarded as necessary from competition policy point of view, shows the increasing advocacy activity of the competition authority. (It should be noted that every annual report of the HCO has contained suggestions for new regulations or corrections of regulations - these suggestions were derivatives of the law enforcement activity of the Office or of the market analysis.) Late in April 1999 the Office submitted its regulatory proposals relating to regulated sectors, consumer protection and some other areas (like media, non-profit organisations, etc.). Not all, but some of the proposals have become basis of preparatory works of regulations.

23. Based mainly on its sectorial studies prepared for the Parliament in two topics (competition policy issues of telecommunications and electric energy sector) publications containing the "competition policy standpoints" of the Office were prepared and published for the broader professional society, drawing up how the HCO thinks about timely regulatory issues of these sectors. Although these standpoints are without prejudice to its decisions made during its proceedings, they may make the activity of the HCO more transparent, predictable and comprehensive.

24. Summing up it can be stated that beginning from late 1998 - in spite of the fact that this possibility cannot be found in the Competition Act but building on its annual report obligation - the Competition Office has undertaken considerably more active advocacy role and increasingly active initiation. As a result of this, theoreticians and practical experts of the competition authority take part in the

work of inter-ministerial working groups set up for the elaboration of regulatory concept of sectors under reform process (energy, telecommunications/broadcasting, health care).

### **Timely, long run priorities**

25. The improvement of competition culture is a new, emerging priority. This can be evaluated as a factor which contributes to relieving the advocacy and supports to assert its effects.

26. As an endeavour, the development of competition culture has been among the plans of the HCO for a long time. In the near future the Office wants to give real and effective role to this factor, though, it is doubtless that only the rest of (both human and financial) resources can be calculated for this purpose. What is the reason of focusing on this issue? Although steps have been taken gradually to increase the level of competition culture, the experiences of the HCO suggest that the relatively underdeveloped nature of it diminishes the effectiveness of the Office's activities both in the field of proceedings in individual cases and in the advocacy - in some cases it is almost a barrier to step forward. With the development of competition culture it can be expected on the one hand, that undertakings would be more willing to voluntarily adjust their practices to the law, on the other hand it would improve the "quality" of complaints and notifications sent to the HCO (e.g. the number of irrelevant complaints would decrease), the review of HCO decisions, the communication with the state administration, the understanding of HCO's suggestions by public officials, politicians and other decision-makers. At the same time, an atmosphere with more vivid competition culture would improve the work of the Competition Office as well. The importance of this activity is also highlighted by the approaching EU membership of Hungary - to have the Hungarian undertakings got acquainted with the competition regime which will relate to them within the common market forms also the task of the HCO. This "mission" can rationally be connected with having the Hungarian professional society got acquainted with the basic theses of broadly interpreted competition policy.

27. Another important priority undertaken in the long run is the preparation of the Hungarian competition authority for the approaching EU membership of the country. In this respect an essential task could be to prepare the institution to be able and ready to apply Community competition law beginning from the date of membership - the expected developments of the EC competition rules gives even greater emphasis to this requirement. In addition to getting acquainted with the EC competition rules preparation has to cover the mapping of the EC law enforcement practice as well. Since Member States' courts are also responsible for the application of EC competition law, this studying process of the HCO serves also the preparation of the broader professional society.