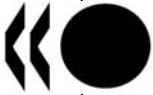


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**HUNGARY - REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)**

*The attached report updates information on the current state of competition in Hungary. It was edited after the Competition Committee discussion (Item VII) in October 2004, which compared experiences in ten countries. It is circulated FOR INFORMATION.*

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English - Or. English

## **UPDATED REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)**

### **HUNGARY**

1. Hungary adopted its first modern competition law in 1984. Major changes in 1990 and 1996 substantially strengthened the law by introducing rules related to merger control and consumer deception, and effective enforcement structures and procedures. In 1999, the Report of the OECD's regulatory reform review concluded that "Hungary's competition policies and institutions are within the mainstream practice of OECD countries, and in some respects are stronger than those in many countries."<sup>1</sup>

2. The 1999 Report played an important role in the 2001 amendments to the Hungarian competition law. Several recommendations have resulted in changes in the law and in enforcement practice, most notably those suggesting greater focus in the enforcement activities of the Hungarian competition authority, the Gazdasági Versenyhivatal ("GVH") on cartels. A cartel unit was created, deadlines for cartel investigations were extended, the GHV obtained new investigative powers, and appeals against decisions imposing fines no longer have suspensive effect. The level of fines imposed by the GVH has increased. Notices were recently adopted that made the GVH's fining policy more transparent and introduced a leniency program.

3. The 1999 Report recommended expanding the role of competition policy in specific sectors, including network industries and professional services. The results have been mixed. The GVH has closely cooperated with sector regulators to liberalize network industries and introduce more competition. As of June 2004, these efforts have been more successful in some industries, such as electricity, and less successful in others, such as gas and fixed line telephony. Restrictions in professional services continue to be pervasive, despite successful enforcement action in some cases against restrictions imposed by professional organizations. Consistent with recommendations in the 1999 Report, the GVH has been a very active advocate of pro-competitive reforms. There are questions, however, whether the GVH should become more selective in its advocacy to ensure greater effectiveness.

4. The 1999 Report already referred to Hungary's efforts to bring its national competition law in line with European Union competition law. Since the 1990s, each major reform project brought Hungarian competition law closer to EC competition law. On the day of Hungary's accession to the EU, however, major reforms of EC competition law became effective which fundamentally changed principles of enforcement concerning Article 81(1) of the EC Treaty and decentralized enforcement responsibilities. As a result, further reforms of Hungarian competition law have to be considered.

5. A principal recommendation of the 1999 Report was the setting of enforcement priorities, by shifting competition policy focus and priorities towards enforcement against cartels and anticompetitive mergers. This Report will describe that much has been accomplished in this respect. But the Report also will examine how further reforms could increase the GVH's ability to prioritise enforcement efforts and further strengthen the effectiveness of competition law enforcement. In light of its expertise and know-

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<sup>1</sup> OECD (2000) 51.

how, the GVH should be in a position to make informed choices as to areas that should be prioritised, and, importantly, areas that should not. Examples of potential reform areas include: (i) individual complaints, which continue to create a heavy, largely unproductive workload, suggesting that greater flexibility for the GVH would be desirable; (ii) further approximation to EC competition law, which not only might avoid time consuming and unnecessary jurisdictional disputes, but also might eliminate an incentive for complainants to seek redress before the antitrust authority rather than the courts; (iii) abuse of dominance, where the GVH might consider moving away from acting like a “consumer protection” agency that deals with numerous complaints about “excessive” prices and focusing instead on cases where access restrictions make markets less competitive; and (iv) advocacy, where “more focused” instead of just “more” advocacy activities might produce better outcomes. Several of the potential reforms discussed in this Report, however, would require legislative action and not only changes in the GVH’s enforcement practice. Thus, to bring about such reforms, the GVH would have to persuade lawmakers of the benefits of further changes to Hungarian competition law.

### Substantive law

6. Hungarian competition law closely follows the substantive rules of EC competition law with respect to restrictive agreements, abuse of dominance, and merger control (with respect to the substantive assessment of mergers). EC competition law reforms based on Regulation 1/2003,<sup>2</sup> however, have created differences between the two systems which may make reforms of Hungarian competition law concerning the treatment of restrictive agreements advisable.

7. The Hungarian Competition Act incorporates the equivalent of Article 81 of the EC Treaty. Article 11 prohibits agreements that appreciably restrict competition, whereas Articles 16 and 17 provide for the possibility of individual and block exemptions.<sup>3</sup> Important differences, however, exist between the two legal systems. First, Hungary continues to apply the so-called prohibition principle in basically the same way the European Commission did before the recent reforms. Provisions in agreements that appreciably restrict competition are prohibited and unenforceable unless exempted,<sup>4</sup> and exemption can be granted only by the GVH, and only upon notification. The prohibition principle also used to apply this way under EC competition law,<sup>5</sup> but in May 2004 important changes were introduced in EC law. Agreements and decisions which satisfy the conditions of Article 81(3) are valid and enforceable with no need for an administrative decision to that effect (this is the directly applicable “exception system”).<sup>6</sup> Moreover, national courts and competition authorities (including those in Hungary) have the power to apply EC competition law. They can determine whether an agreement falls under Article 81(1) of the EC Treaty, and, since the May 2004 reforms, decide whether an agreement is exempted under Article 81(3). In contrast, Hungarian courts are precluded from applying Hungarian competition law.

8. Even though the substantive rules of the two systems concerning restrictive agreements are largely the same, and therefore the outcome of a case should not depend on the applicable law, these

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1/1(2004).

<sup>3</sup> Hungary has adopted most of the EU’s block exemptions into Hungarian law.

<sup>4</sup> When it introduced its first competition Law, Hungary had opted for a more lenient treatment of vertical restraints than EU law. Not even retail price maintenance was subject to a per se prohibition. As a result of the accession negotiations, Hungary had to bring its rules concerning vertical restraints in line with EU law, thus introducing the current system based on prohibition and exemption.

<sup>5</sup> Under EU law, however, national courts (as well as national competition authorities) always had the power to apply Article 81(1), although not Article 81(3).

<sup>6</sup> Regulation 1/2003, *supra* note 2, Article 1(2).

differences could lead to confusion and unnecessary litigation. The GVH as well as courts could be confronted with parties raising questions related to proper jurisdiction in an attempt to avoid or delay findings on the merits of a case.<sup>7</sup> To ensure greater consistency between Hungarian law and EC competition law and to avoid the potential for such jurisdictional disputes, the introduction of an EC-style “exception system” into Hungarian competition law (which would eliminate the need to notify agreements to the GVH), combined with a right of private action before Hungarian courts, should be considered.<sup>8</sup>

9. Eliminating notifications from Hungarian competition law would not impair the effectiveness of competition law enforcement. Experience shows that the advantages of a notification system are limited. Under EC competition law before the reforms under Regulation 1/2003, for example, the vast majority of agreements were never notified to the Commission. The enforcement agency may have learned relatively little about market practices from notifications, in particular with respect to the agreements that raised the most serious competition issues (which were not notified because parties knew they would be rejected). Obviously, many firms learned to live with some legal uncertainty. The small number of agreements notified in Hungary each year points in the same direction, thus suggesting that moving to a notification-less enforcement system would change little.<sup>9</sup>

10. Hungarian competition law differs from EC competition law also in its application of a “de minimis” rule to vertical agreements. Under both EC and Hungarian competition laws, agreements of all kinds between parties with small market shares (agreements of “minor importance”) normally are not subject to the prohibition of restrictive agreements, based on the rationale that these agreements will not have a substantial impact on competition.<sup>10</sup> Under EC rules, however, certain types of restrictions do not benefit from the de minimis rules, regardless of the parties’ market shares. For example, certain active, and all passive sales and/or customer restrictions in principle are always considered appreciable restrictions of competition and are unenforceable. Hungary, in contrast, applies de minimis rules to all agreements where the parties do not exceed a 10% market share, with the exception of resale price maintenance.<sup>11</sup> Given that vertical restraints are unlikely to harm competition in the absence of market power, there are strong arguments in favour of maintaining Hungary’s more lenient treatment of vertical agreements which is more

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<sup>7</sup> If an agreement is capable of affecting intra-Community trade and therefore is subject to EU rules, it will be considered enforceable, unless a court, the Commission or the GVH have found to the contrary. Importantly, Hungarian courts will be able to decide that the Article 81(3) exemption criteria have been met, thus ensuring that agreements are enforceable. On the other hand, if an agreement is subject only to Hungarian law, only the GVH has jurisdiction to analyse the agreement and only it can grant exemptions, provided the parties have notified the agreement and requested an exemption. Despite the Commission Notice on the criteria to determine whether an agreement is capable of affecting intra-Community trade (Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. C 101/81 (2004)), determining the jurisdictional scope of EU competition law is an inherently difficult task. In addition, courts that are anxious to clear their dockets might have an incentive to find that an agreement does not affect intra-Community trade, in which case they do not have jurisdiction to decide the case.

<sup>8</sup> For a more detailed discussion of private rights of action, *see infra*.

<sup>9</sup> The GVH has received approximately 5-6 notifications annually.

<sup>10</sup> Under EC law the threshold is a combined market share of 15% for vertical restraints, whereas in Hungary the threshold continues to be 10%.

<sup>11</sup> The statute also allows the GVH to take the cumulative effects of similar agreements in an industry sector into account to assess whether an agreement that in principle falls within the de minimis safe harbour nevertheless restricts competition.

sensitive to the economics of vertical restraints.<sup>12</sup> On the other hand, if the difference is maintained, the enforceability of an agreement between firms with small market shares will again turn on the question whether the agreement is capable of affecting intra-Community trade and thus subject also to EC competition law. In a potentially large number of cases jurisdictional disputes could again be more important than an assessment of the effect of an agreement on competition.

11. Like EC competition law, Hungary's competition law prohibits firms from abusing a dominant position. The statute contains detailed, non-exhaustive lists of criteria to determine dominance and conduct that may constitute an abuse, which substantially follow EC case law. Hungary's law also explicitly recognizes the possibility of joint dominance by several firms. There are no statutory market share-based presumptions of dominance, which are used in some other countries, although internally the GVH uses a market share of 25 to 30% as a safe harbour, below which the finding of a dominant position is unlikely.<sup>13</sup> Firms with a market share above the safe harbour threshold, however, are not presumed to be dominant. On the contrary, typically shares well above 50% are required before the GVH may find that a firm holds a dominant position.

12. Abuse cases have consistently represented a relatively large portion of the GVH's case load, accounting for approximately one fourth to one third of the GVH's antitrust cases. Especially numerous have been cases involving complaints of abusive prices and abusive terms and conditions, in particular involving cable-TV companies. Cable-TV pricing cases can account for up to one third of all abuse cases in certain years. The GVH has found it difficult to establish infringements in these cases as it has struggled to determine when a price and/or terms and conditions can be considered abusive. By far the majority of investigations were closed without establishing a violation of the Competition Act.<sup>14</sup> A 2003 court decision will make it even more difficult to bring abusive pricing cases. The court held that GVH must use a full cost analysis to examine whether prices were cost based or excessive, rejecting the benchmarking method that the GVH had used to compare prices of the dominant firm under investigation with those offered by other suppliers.<sup>15</sup>

13. The difficulties faced by the GVH in cases where the alleged abuse consisted of exploiting market power through "excessive" prices or unfair contract terms raises questions about the most effective use of the GVH's resources to prevent anticompetitive conduct by dominant firms. It appears that, primarily because of the current legal framework, the GVH deals with too many of the "wrong" cases, in particular cases where the alleged abuse consists of excessive prices. Instead, it could be considered whether focusing on cases involving exclusionary conduct by dominant firms would contribute more effectively to the development of competitive markets than investigating numerous "excessive" pricing cases. Successful cases prosecuting exclusionary conduct frequently would address one of the underlying

<sup>12</sup> See also OECD/Hungary (2000) 175 (commenting that in respect to the treatment of vertical restraints, conforming Hungary's rules to the more restrictive rules of the EC would not necessarily improve Hungarian competition policy).

<sup>13</sup> This is a threshold the GVH uses in merger cases to identify transactions that are unlikely to raise competitive concerns and therefore should qualify for an accelerated review procedure.

<sup>14</sup> In some cases the GVH was able to establish infringements. In a recent case, for example, the GVH found that a cable-TV operator had abused its dominant position by putting popular television channels in a premium program package, thus forcing customers to subscribe to the more expensive package. The GVH reasoned that those changes were unlawful because they were opposed by the majority of customers. Changing the packages would have been lawful only after the cable operator's customers had the opportunity to comment on the proposed changes and the majority of them did not oppose them. Otherwise, the provider could force customers to buy a more expensive product which they do not need. Case VJ-31/2002, *Zelka*, 7 August, 2003, available at <http://www.gvh.hu/index.php?id=2875&l=e>.

<sup>15</sup> Hungary (2004) 5.

causes of market power (unlawful private firm conduct restricting access to markets), rather than the symptoms of market power (high prices). There is little doubt that cases exist in Hungary where firms with market power try to unlawfully restrict market access for competitors. The GVH, for example, has brought several successful cases where firms with monopoly power in a regulated market attempted to unlawfully extend their market power into adjacent markets. Examples of abuse cases in which the GVH successfully challenged unlawful exclusionary conduct include electricity distributors attempting to limit competition in the local market for street lighting, and exclusively licensed cemetery operators attempting to exclude competition for funeral services.

14. Under the current legal framework, the GVH’s ability to shift resources from “excessive” pricing cases to cases involving exclusionary conduct by dominant firms is limited because it is the only authority that can hear (the numerous) complaints by consumers about the pricing policy of cable-TV companies. Thus, legislative reforms would be required that would transfer jurisdiction over prices and contract terms and conditions in the cable-TV industry to a regulatory agency. Such a change potentially could free up significant capacity at the GVH that has been dedicated to investigations that have generated very few successful enforcement actions. The economics of the cable-TV industry would support such a transfer of jurisdiction: Cable-TV has the characteristics of a natural monopoly. Because satellite television has not become a credible alternative for lack of local content, and broadband Internet access is very limited in Hungary, it appears unlikely that other delivery platforms for audiovisual content will become competitive alternatives in the foreseeable future. In this situation, regulatory oversight could be more cost-effective than attempting to use competition law to limit the “abuse” of market power.

15. Mergers that meet the statutory thresholds must be notified to the GVH prior to closing, but the parties may consummate the transaction prior to an approval decision. The parties do so at their own risk, as the GVH retains the power to take enforcement action. The notification thresholds have not been revised since 1996, despite Hungary’s sometimes significant inflation in the years since then. This suggests that a review of the thresholds is advisable, given that presently a larger number of small mergers that are unlikely to appreciably affect competition must be notified than was initially intended when the thresholds were introduced.<sup>16</sup> Adjusting notification thresholds, as well as the effects of EU accession,<sup>17</sup> could help the GVH to reduce its case load and, by freeing up resources, accelerate the review of mergers. Amendments that would significantly raise the notification thresholds have been proposed and might come into effect as early as 2005.<sup>18</sup>

**Box 1. Merger Review**

**Correct the inconsistencies and anomalies that lead to unnecessary uncertainties in the merger notification and review process**

The 1999 Report observed that the competition law’s terms about the notification obligation created legal uncertainty about the status and enforceability of merger agreements and suggested resolving these inconsistencies, in coordination with other agencies and ministries.

<sup>16</sup> Periodic review would be in line with internationally recognized best practices. *See* International Competition Network (“ICN”), Recommended Practices for Merger Notification Procedures, Recommendation XI, Review of Merger Control Provisions, A.1.

<sup>17</sup> As a result of EU accession, the number of notified mergers can be expected to decline to some extent, as larger transnational mergers that meet the ECMR’s thresholds no longer will be notifiable under Hungarian law.

<sup>18</sup> Hungary (2004) 3.

While the issues discussed in the 1999 Report have been resolved, the duration of the review process has emerged as another issue that requires attention. The law does not provide for a formal two phase review system. Rather, the GVH determines at the beginning of a review whether a notified transaction is non-complex and therefore qualifies for expedited review. This, and the strict separation between the investigative and the decision-making parts of the GVH have resulted in review periods, that are especially in cases that are considered non-complex relatively long by international standards. Further reforms will be required to make the review process more efficient which also could free up resources of the GVH.

16. Hungarian merger control law does not provide for a formal two phase review system. Rather, different review periods apply depending on whether a transaction is considered to raise material concerns. The Act currently provides for a 45 day review period of transactions for which authorization may clearly not be refused. For other mergers the review period is 120 days. Either review period can be extended by 60 days. In principle, the determination whether a short or a long review period applies should occur shortly after notification. In practice, however, it can take considerable time until a formal decision about the applicable review period is made by the Competition Council, which may or may not agree with the preliminary conclusions of the investigative branch.

17. While a 45 day review period for non complex notifications could be seen as already relatively long by international standards, it apparently has been difficult for the GVH to reach decisions within this time frame. The *average* review period for cases qualifying for the short review period was 57 days in 2002. This suggests that numerous cases which clearly did not raise material competitive concerns were decided after review periods that exceeded two months. Given that mergers frequently are time sensitive, it should not come as a surprise that the private bar has raised concerns about the long review periods. The GVH itself also has acknowledged the problem.<sup>19</sup>

18. Earlier attempts to remedy the situation, in particular by encouraging closer cooperation between the investigators and the Competition Council throughout the review process, did not materially improve the situation.<sup>20</sup> A Notice published in 2004<sup>21</sup> provides for greater legal certainty and transparency with regard to the factors used to determine whether a notified transaction qualifies for expedited review. The Notice identifies mergers that are highly unlikely to raise competitive concerns (*e.g.*, because the parties do not compete, or their combined share is below certain thresholds) and explains that those cases normally will be subject to the shorter review procedure. Whether the new Notice will significantly reduce average review periods remains to be seen, considering that factors similar to those mentioned in the Notice have been internally used by the GVH in the past. Moreover, the possibility of a 60 day extension continues to exist even in “simple” cases. The benefits of the Notice also might be limited because of the strict criteria used to determine whether a merger qualifies for expedited review. Only cases where the parties can upfront demonstrate that the transaction clearly cannot raise competitive issues will qualify for the shorter

<sup>19</sup> The review period for simple transactions is relatively long by international standards. For example, ICN Recommended Practices for Merger Notification Procedures suggests that review of mergers that do not raise material concerns should be concluded in six weeks or less. *See* Recommendation IV, Review Periods, C.2 & D.1. In many other European jurisdictions, first phase reviews must be concluded in one month or thirty days. While the statutory deadlines in Hungary are reasonably close to the ICN guidelines, the review periods are considerably longer in practice.

<sup>20</sup> Reforms in 2001 provided for the possibility of contacts between the case handler preparing the file and the Competition Council before the case was handed over to the Council. This should have enabled the Council to provide the investigator early guidance about the Council’s views of a case. The law also required that the Competition Council in certain cases provide the party(ies) its preliminary view of a case under investigation after the report of the investigation has been sent to the Competition Council phase.

<sup>21</sup> Notice No. 1/2003 of the President of the Office of Economic Competition and the President of the Competition Council of the GVH, Considerations in Differentiating between Concentrations Subject to an Authorization in Simplified or Full Procedure.

review period. Cases where the parties exceed the market share thresholds even by a narrow margin, or are below the thresholds but cannot provide upfront unambiguous, objective, and controllable information to that effect, are automatically reviewed under the long review period where the average review period exceeded 150 days in 2002. This suggests that with respect to mergers that deserve a closer look, but could be resolved within a relatively short review period, additional efforts and reforms might be required to reduce the average review period.<sup>22</sup>

19. The GVH's strict separation between the investigation branch and the decision making Competition Council are in part responsible for the relatively long review periods. Keeping deliberations in the two bodies strictly separate has (at least in the past) delayed decisions about the applicable review period, and made it more difficult to expeditiously reach final decisions.<sup>23</sup> There can be a trade-off between maintaining a strict separation between the investigative and decision making functions of the authority to ensure independence of the decision making process and fairness to the parties, and an efficient review process that observes short deadlines. Should the new Notice not materially improve the situation, further measures to reduce the average review periods could be envisaged. First, given the experience of most European countries with formal two phase procedures, it might be considered whether the current system should be replaced with one that follows more closely the European Commission's model with a two phase review and relatively strict deadlines. Investigators could be given the power to terminate certain merger review procedures after a first phase review period without need to obtain a decision by the Council.<sup>24</sup> This reform would be based on the rationale that where a transaction does not raise material concerns, protecting the parties' procedural rights by strictly separating between investigative and decision making functions is relatively less important, compared to a timely and efficient review. Another option would be a further strengthening of cooperation between the investigators and the Competition Council at an earlier stage in the review process than is currently the case, combined with a tightening of the review deadlines.

20. Hungary follows the rules under EU competition law also in the substantive assessment of mergers. A merger can be prohibited only if it creates and strengthens a dominant position and, as a result, competition is restricted.<sup>25</sup> The new EU test prohibits a merger if it would significantly impede effective

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<sup>22</sup> The approach under the Notice compares unfavourably with the Commission's approach under the ECMR. The European Commission also provides for a "simplified" procedure where the parties do not exceed certain thresholds (the same thresholds that Hungary has used in its notice). However, the fact that a transaction does not qualify for a simplified procedure does not automatically mean that it will be subject to a second phase review. On the contrary, a large number of mergers that do not qualify for a simplified procedure are cleared by the European Commission within the one month first phase review period.

<sup>23</sup> In complex merger cases the two tier decision making structure also has raised concerns, for example when discussions with the parties of possible remedies are delayed until very late in the process because the Competition Council reserves the right to conduct these discussions and case handlers are not sufficiently, and not early enough, involved.

<sup>24</sup> Conferring on the investigators the power to terminate the merger review procedure would not be so much different from the power they have in non-merger cases when they decide not to open an investigation following a complaint.

<sup>25</sup> In one respect, Hungary's attempt to closely follow the EU model did not produce the desired outcome. Article 30(2) requires a determination whether a merger would restrict competition in "the relevant market or a substantial part of it." This phrase follows similar language in the EC Merger Regulation (ECMR) which refers to a restriction of competition in "the Common Market or a substantial part of it." The difference between the two sentences is small, but significant. The language in the Hungarian Act suggests that a dominant position could exist in "a substantial part of a relevant market." If, however, in any given case dominance were found to exist only in one substantial part of what is considered the relevant market, but not in other parts, the definition of the relevant market is too wide and the relevant market would have to be defined more narrowly.



competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. Hungary's statute explicitly recognizes an efficiency defence. It also permits the GVH to take the competitiveness of the parties in foreign markets into account when assessing the lawfulness of a merger, thus incorporating non-competition factor into the examination of a notified transaction. And the law contains a "failing firm" defence which adopts the standards developed under EU law. None of these provisions has been applied in the GVH's more recent practice.

## Institutions

21. The GVH is an independent antitrust authority with broad freedom and strong protection against any interference by the Government. The President has ministerial rank within the Government. The President and the two Vice Presidents are appointed for 6-year terms by the President of the Republic and can be removed only for cause. The GVH is not subject to government instructions, and reports only to the Parliament.

22. Independence and objectivity in the decision making process also are ensured internally by an organizational separation between the GVH's investigative and decision making functions. The GVH is divided in two parts, each of which is headed by a Vice President. The investigating sections are responsible for the investigation of complaints, assessment of whether cases should be initiated, preparation of a case file and report that forms the basis of decisions by the Competition Council, review of compliance with decisions, and competition law advocacy. All decisions must be adopted by the Competition Council, which by law has full independence within the GVH, following a trial type, public procedure, although the trial may be omitted if all parties consent.<sup>26</sup> The strict separation between investigators and decision makers has created challenges in practice, most notably in merger investigations, but also in other settings such as negotiating remedies in joint venture cases or considering leniency in cartel investigations.

23. The GVH's staff has remained constant in the recent past and currently consist of approximately 120 employees. Before Hungary's accession to the EU, this number appeared adequate. It is too early to tell whether Hungary's EU membership could create a need for more staff. Although the number of merger cases likely will decline to some extent, it is equally likely that decentralized EC competition law enforcement, which became effective at the time when Hungary joined the Union, will add to the GVH's workload.

24. The GVH also enforces the Competition Act's provisions against unfair competition, especially misleading advertising and similar deceptive business practices. This category of cases, which typically are considered "consumer protection" cases, traditionally represented up to one half of the authority's case load. More recently, however, the trend has been away from consumer protection cases to more antitrust enforcement, as suggested in the 1999 OECD Report. Consumer protection cases now represent approximately one third of the GVH's case load. Given that consumer protection cases may still occupy substantial time of a case handler, there has been discussion whether enforcement of these provisions of the Act should be transferred to another government agency.<sup>27</sup> On balance, however, several factors suggest that the GVH should keep jurisdiction over this type of consumer protection cases. In particular, letting the GVH deal with them creates some synergies in the appreciation of market dynamics — though it may be excessively mechanical to apply the identical analysis, to define the relevant market on which the alleged

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<sup>26</sup> The Council also is responsible for appeals from decisions by investigators (*e.g.*, decisions not to investigate a complaint).

<sup>27</sup> *See, e.g.*, OECD/Hungary (2000) 184, 204.

unfair practices occur and to analyse whether the practices “affect competition” in the market.<sup>28</sup> The GVH’s enforcement activity in unfair competition/consumer protection cases moreover may help to raise its profile in the public and create goodwill. The experience in other OECD member countries also suggests that combining consumer protection and competition law enforcement functions in one agency can be a useful institutional choice.<sup>29</sup>

25. Even though there appear to be good reasons for maintaining the current allocation of enforcement powers, it may be worth considering whether enforcement resources could be used more efficiently within the GVH. Currently, case handlers have to deal with both types of cases. Creating a separate unit within GVH for unfair competition/consumer protection cases would allow greater specialization of case handlers and enable them to better focus on developments in either area. At the same time the benefits of the current system could be maintained, in particular as the Competition Council could ensure that developments in both areas are consistent.

### **Enforcement process**

26. In recent years, the GVH’s enforcement activities have been stepped up in particular in the area of cartels. This is in line with a recommendation of the 1999 OECD Report which suggested greater focus on cases involving competitively most harmful conduct.<sup>30</sup> In 2001, the GVH created a cartel unit as a separate part of its investigation branch. At the same time, new investigative powers were conferred in the GVH. They include the rights to conduct dawn raids to secure incriminating evidence, investigate private premises of corporate officers, and take oral testimony. In late 2003, the GVH adopted a leniency program which follows the mainstream principles of leniency programs in other antitrust jurisdictions.<sup>31</sup>

#### **Box 2. Setting Enforcement Priorities**

##### **Shift competition policy focus and priorities toward enforcement against restrictive agreements (particularly horizontal ones) and anti-competitive mergers.**

The 1999 Report recommended that the GVH shift competition policy focus and priorities toward enforcement against restrictive agreements (particularly horizontal ones) and anti-competitive mergers.

There has been significant progress as regards prioritizing cartel enforcement. GVH resources have been exclusively devoted to cartel enforcement, the GVH’s enforcement tools have been strengthened, and the GVH has increased the fines in cartel cases. Recent data suggest, however, that even though fines have increased significantly, the level of fines is in many cases still too low to be an effective deterrent. Higher corporate fines, and possibly sanctions against individuals, should be considered in cartel cases to increase the deterrent effects of sanctions. They also would increase the incentives for cartel participants to seek amnesty.

<sup>28</sup> The GVH’s responsibility for enforcing these provisions of the Act also ensures that the “effect on competition” requirement is rigorously observed. Another agency which has no experience in the enforcement of general competition law likely might be more willing to soften this requirement and apply the law to situation where competitors might complain about aggressive business practices, but no harm to competition exists. In this case the law against deceptive business practices might prevent the development of efficient markets, rather than promoting it.

<sup>29</sup> Member countries in which the competition agency also enforces similar consumer protection laws include Japan, Korea, Italy, Canada, the United States, the United Kingdom, and Australia.

<sup>30</sup> OECD/Hungary (2000) 189.

<sup>31</sup> Notice No. 3/2003 of the President of the Office of Economic Competition and the President of the Competition Council of the GVH, The Application of a Leniency Policy to Promote the Detection of Cartels.

27. The creation of the new cartel unit has been a success. In 2003, for example, approximately 12 cartels were investigated, twice the number of cartel cases investigated in 2000. At the same time, the total number of cases before the GVH involving restrictive agreements has increased only slightly, thus indicating that the GVH has succeeded in shifting enforcement priorities to cartel investigations, and away from other restrictive agreements which are less likely to cause competitive harm. Cartel investigations covered smaller, local cartels as well as national cartels. The GVH decided to focus also on smaller cartels recognizing that the message about basic rules of competition law and competition law enforcement must reach all market participants in Hungary, including the smaller companies and individual entrepreneurs that act only on a local level. The GVH continues to see this as an important mission. Reportedly a trade association whose members had been involved in cartels requested a competition law seminar to help its members avoid future breaches of competition law.<sup>32</sup> There has not yet been enforcement action with regards to larger, international cartels.

28. The increased enforcement activities also have resulted in increased fines. In 2002, fines imposed in cases concerning restrictive agreements and abuse of a dominant position amounted to HUF 444.2 million, up from HUF 73.9 million imposed in the year before. Slightly less than 50% of these fines were imposed in cases concerning restrictive agreements. In 2003, fines in antitrust cases amounted to almost HUF 700 million. Fines of more than HUF 600 million were imposed on cartels, and a little over HUF 50 million in abuse cases. The sharp increase in fines marked the end of a “transition period,” during which the GVH was willing to treat infringements of the law more leniently to allow firms to adapt to the new legal requirements.<sup>33</sup>

29. The GVH’s stricter fining policy has been officially documented in the Fines Notice which was adopted in 2003.<sup>34</sup> The Fines Notice starts by defining 10% of a firm’s revenues in the market affected by the unlawful conduct as the maximum base amount. Various factors, such as the gravity of the infringement, the impact on the market, and the role played by the firm subject to fines, are used to determine where within the 10% figure the actual base amount will be set. The duration of the infringement will be taken into account by multiplying the base amount by the number of years during which the unlawful conduct occurred. The Notice also provides that the GVH may increase the fines to three times the unlawful gains, where such gains can be quantified. Ultimately, the fine must take into account the statutory maximum of 10% of a firm’s total revenues in the year prior to the decision.

30. Considering that the mark-up from unlawful cartel activity can easily exceed 10% of the relevant revenues, one could be concerned about the GVH’s policy to limit the base amount to 10% of annual revenues in the relevant product line. The deterrent effect of potential fines could be limited, especially if cartel members believe that the cartel could help them to raise prices by more than 10%. Nevertheless, the Fines Notice is an important development and could significantly contribute to more effective anticartel enforcement. First, applying the Fine Notice and imposing fines that come close to the Notice’s 10% revenue ceiling would be a significant step forward, compared to the GVH’s current practice. A review of the GVH’s 2003 cartel decisions suggests that fines typically have been between 1% and 2% of the revenues in the market affected by the cartel. Sometimes they have been less than 1% of the relevant

<sup>32</sup> Hungary (2004) 6.

<sup>33</sup> Drawn-out proceedings in the first major cartel case, the coffee cartel, also may have contributed to the GVH’s more cautious approach. In 1994 the GVH imposed a very significant fine of almost HUF 440 million on participants in the coffee cartel. The appeals process in this case has continued for many years. In 2003, *i.e.*, almost ten years after the GVH adopted the initial decision, the courts ultimately upheld the initial decision, although they reduced the level of fines.

<sup>34</sup> Notice No. 2/2003 of the President of the Office of Economic Competition and the President of the Competition Council of the GVH, The Method of Setting Fines in Antitrust Cases.

revenues. Thus, despite the significant increase in fines in 2003, compared to previous years, fines have been relatively low.<sup>35</sup> Moving the level of fines upward, and closer to 10% of the relevant revenues, already would be an improvement. Second, the GVH's policy of imposing higher fines than in the past has not yet been tested in court. It is hoped that the greater transparency created by the Fines Notice will help persuade courts to uphold fines imposed by GVH decisions.

31. Fines imposed in an administrative procedure are the only sanctions available to the GVH in competition cases. The law does not provide for the possibility of criminal penalties or any other sanctions against individuals. Sanctions against individuals can be highly effective as a deterrent, as they compensate for the insufficient deterrent effects of corporate fines, and they can support the effectiveness of a leniency program. The introductions of sanctions against individuals could therefore be considered to increase the effectiveness of Hungary's anti-cartel enforcement. They could increase the deterrence against cartels and also provide a substantial incentive for individuals to participate in leniency programs and to cooperate in cartel investigations of the GVH. Sanctions against individuals in parallel to the existing system of administrative corporate fines should not reduce the level of enforcement against cartels. Imposing criminal sanctions against individuals in case of business crimes is not unknown in the Hungarian legal system. Such sanctions already can be imposed in case of certain violations of the law against misleading advertising. Applying individual sanctions in the form of criminal penalties, requiring the involvement of other officials and agencies such as police and prosecutors could raise jurisdictional and procedural complications, of course, which would have to be worked out.

32. The Act provides for firm deadlines for investigations and decisions. General principles of administrative law in Hungary require that agencies respond to submission within a set time frame. For example, following an application the Council must reach a decision within 90 days. The President of the Council can extend the time limit by a maximum of 60 days. Following recommendations in the OECD Report, some deadlines have been expanded to enable the GVH to conduct a more thorough investigation. For example, as a result of the reform the 180 day deadline in cartel cases, measured from the ex officio initiation of proceedings, can now be extended twice by 180 days. The total review time of one year and a half has so far proven sufficient for cartel investigations. However, the authority has so far investigated only local and national cartels. A comparison with the enforcement practice elsewhere suggests that in particular the investigation of international cartels, which may require cooperation with other authorities, may take considerably longer than one year and a half. Adherence to strict deadlines generally is in the public interest. It encourages legal certainty and protects private interests where cases are based on applications and/or approvals by the GVH are required. No such interests are apparent in cartel investigations. This suggests that the duration of future cartel investigations should be carefully monitored. Should there be indications that time limits begin to affect the thoroughness of investigations, a further extension of deadlines in cartel cases should be considered.

### **Box 3. More Flexible Deadlines**

**Eliminate the deadlines for completing ex officio law enforcement matters, so that cartel enforcement will be more credible.**

The 1999 Report acknowledged that deadlines for completing administrative reviews and processing applications for exemption or negative clearance improve efficiency and increase certainty. It also observed, however, that applying the same deadlines to contested matters reduced the GVH's ability to enforce the law effectively, especially in cartel cases where the parties not only have not asked for authorisation or exemption, but are trying to keep their agreement secret. The Report suggested that some kind of deadline might still be valuable, both as an internal control and an external discipline, such as a different, longer deadline for ex officio matters, permitting the Council president to suspend the deadline as long as parties have not fully complied

<sup>35</sup> This also was mentioned in the competition chapter of the European Commission's 2003 Monitoring Report on Hungary's Preparation for Membership, <http://www.gvh.hu/index.php?id=3173&l=e>.

with requests for information, or greatly increase the administrative fines for failure to comply, so that delay is less attractive.

The deadlines for cartel investigations were extended a maximum of 18 months, as the initial 180 day period can be extended twice by a maximum of 180 days each. So far, the new deadlines have proven sufficient. However, future cartel investigations, especially those involving more complex, international cartels, should be carefully monitored so that further extensions can be considered should the current ones begin to affect the thoroughness of investigation. There is also a case for more flexible deadlines when the GVH receives individual complaints.

33. Deadlines are especially strict when the GVH receives complaints. For each complaint, unless obviously baseless, a separate matter must be opened and investigated and a decision whether to investigate must be reached within 60 days. Such a decision must be based on a relatively thorough examination of the case which leaves little flexibility for case handlers to prioritise their work. As a result, the GVH currently devotes a considerable portion of its resources to deal with a large number of complaints it receives. More than 800 individual complaints were filed in 2003. If the GVH decides against an investigation, individual complainants have the right to appeal first to the Competition Council, and then to the Budapest Municipal Court. While few appeals ultimately are successful, they require significant resources of the GVH. Dealing more efficiently with complaints therefore has become an issue for the GVH.

34. A first, modest step toward allowing the GVH to better prioritize its work load would be to extend the time limits to review complaints from the currently applicable 60 day period. This would not prevent the GVH from quickly taking up a complaint where justified. It would, however, enable case handlers to attribute lower priority to cases that do not raise important policy issues. More effective methods to increase the GVH's ability to prioritise would include more generous judicial standards of review so that courts would be more willing to defer to the GVH's decision not to take up a case. Persuading courts, however, to defer to a greater extent to the GVH's assessment of the importance of a case undoubtedly would be a challenging task. Ultimately, eliminating the individual complainant's statutory right to appeal GVH decisions not to take up a case might be considered. Any attempt by the GVH to broaden its discretion whether to follow up on an individual complaint would be more credible and probably more acceptable to lawmakers and/or courts if individuals had a right to litigate their claims before courts. For example, a court reviewing the GVH's decision not to follow up on a complaint might be more willing to defer to the GVH if the plaintiff has an alternative route to enforce its rights under the Competition Act.

35. Individuals who believe that they have been harmed by conduct that violates Hungarian competition law can only complain to the GVH. They cannot enforce claims based on domestic competition law before courts. Courts cannot independently find an infringement of the Competition Act, and they cannot grant interim relief to individuals based on such infringements. Individuals in theory can bring actions for damages resulting from violations of competition law, but such actions require a final decision by the GVH finding an infringement. This likely is one reason why such follow-up litigation after a decision by the GVH is virtually non-existent.

36. Introducing the right of individual action could strengthen the rights of individuals and potentially free up enforcement resources of the GVH. Hungary's EU membership provides an additional argument in favour of allowing private litigation, as Hungarian courts now have to deal with cases involving EC competition law. Giving them parallel jurisdiction under both national and European competition laws would help to avoid unnecessary jurisdictional disputes, as described above. It therefore continues to be advisable to consider introducing the right of individuals to bring cases under Hungarian competition law directly before Hungarian courts. If the courts were able to act expeditiously and provide a plaintiff injunctive relief (in addition to the opportunity to obtain damages in the same proceedings),

private action might become sufficiently attractive to lessen the burden on the GVH caused by the large number of individual complaints.

37. The 1999 Report expressed concerns about inefficient courts and the length of the appeals process following a final GVH decision. Hungary also has acknowledged that the court review process suffers from inefficient procedures and long delays.<sup>36</sup> More recent data suggest, however, that the appeals process has become more efficient, and that the average judicial review process has been cut by as much as 50% between 1997 and 2002.<sup>37</sup> The experience of the GVH, based on anecdotal evidence, supports these findings. Additional resources, and the introduction of a new Appeals Court which hears appeals from the Metropolitan Court and has lessened the case load of the Supreme Court, appear to be the principal reasons behind this apparent improvement.

#### **Box 4. Efficient Court System**

**Improve the efficiency of the court system, so that sanctions can be more timely and certain.**

The 1999 Report identified inefficient court proceedings as a general problem, affecting all kinds of rights and claims. The Report doubted whether the then proposed intermediate court would really expedite proceedings, or whether it could just mean additional delay, given that appeals from HCO decisions already take two stages, beginning with the administrative panel of the Metropolitan Court. It suggested that a single stage appeal under streamlined procedures to judges who are specially qualified about competition issues be considered.

Preliminary data for the period from 1997 to 2002 indicate improvement in the appeals process. The new Appeals Court as well as additional resources for the courts apparently are the major factors behind these developments.

Hungarian courts also will be challenged by the need to apply European competition law, as a result of Hungary's accession to the EU in May 2004. This has created asymmetries, as the GVH continues to have a monopoly in the enforcement of Hungarian competition law, whereas both the courts and the competition authority can apply EC competition law. To avoid confusion and the potential for unnecessary jurisdictional disputes, it should be considered to allow courts to hear also cases involving Hungarian competition law. More private enforcement also might free up resources of the GVH.

38. Even though the appeals process used to be characterized by long delays, the parties apparently considered the appeals process a relatively effective system. About 50% of cases finding an infringement of competition law were appealed. In a number of cases courts in the first and second instance reversed decisions by the Competition Council, reduced fines, or remanded cases for further proceedings to the GVH. The number of appeals against decisions rejecting complaints and terminating proceedings is much smaller (less than one quarter of these decisions are appealed), and the success rate of these appeals is very low.

39. The Act gives the GVH an interesting and rather unique enforcement tool in the form of a 6 month suspension of decisions. The Competition Council will thereafter terminate the proceedings if the infringement has come to an end. This "probation period" is designed as an encouragement for defendants to cease infringements of a minor nature without the need to reach a formal decision. The suspension of proceedings appears to be a well functioning tool, and in 2002 nine cases were terminated in this way.

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<sup>36</sup> OECD (2003) 6.

<sup>37</sup> Some of the more recent cases which were part of the data sample may be still under appeal, however, so that in reality in appeal time might have been reduced to a lesser extent.

## Coverage of Competition Law and Policy

40. Although competition law in principle applies to all sectors of the economy, certain exceptions apply where statutes directly impose regulations. None of these exceptions appear unusual by international standards. Examples include statutory price regulation in the Price Act. The scope of this Act has been substantially reduced over time, but it continues to cover prices of certain essential services such as utility and transport prices. Regulations which limit the effectiveness of competition law are pervasive in liberal professions sectors. Restrictions of competition can be directly imposed by statute, or indirectly, where a statute authorizes self regulation by a professional body. For several professions, including physicians and veterinary surgeons, statutes authorize their professional associations to recommend minimum fees. The medical profession is subject to additional restrictions, for example the right of the professional association to veto new contracts between a physician and an insurance provider. Competition among pharmacies is severely limited by a combination of government regulation and (government authorized) actions by trade associations. Government imposed maximum wholesale and retail margins, prohibition of discounts for subsidised products, and quarterly announcements of referential retail prices by the pharmacists' chamber (which government regulation authorizes) de facto prevent price competition among pharmacies.. A recent report by the GVH criticised the current system and persuasively argued that more competition among pharmacies could be introduced, which could improve the services provided by pharmacies without undermining the goal of universal access to affordable drugs.<sup>38</sup> Price competition is also excluded with respect to tobacco products. A law prohibiting sales below cost of agricultural products and imposing maximum 30 day payment periods was enacted in 2003, despite the GVH's opposition. Thus, to some extent price competition among retailers also has been softened. The law purported to protect suppliers of agricultural products, although the real beneficiaries may have been smaller retailers.

### Box 5. Anticompetitive Regulation

**Remove unjustified bars to entry in professional services, notably pharmacies and notaries. Repeal the special exemption that permits producers to fix prices for tobacco products.**

The 1999 Report was critical of the system of fixing the number of pharmacies and notaries without regard to their competence, which would inevitably dampen competition, elevate prices, and discourage innovation. The Report suggested that entry might be invited gradually, by permitting other providers to offer complementary and then similar products and services. It observed that achieving significant competition in the pharmaceutical sector would also require revising the system for subsidising or insuring drug expenses, to replace the then applicable system that virtually requires uniformity. Concerning RPM for tobacco products, the 1999 Report acknowledged that some supervision and control may be necessary to ensure tax collection, but observed that permitting RPM in this context would probably increase prices to consumers by preventing retail competition.

There have been no efforts to change the regime applicable to tobacco products. The GVH has focused its efforts on professional services, but did not have much success in terms of changing laws and regulations that restrict entry. A detailed study of the pharmaceutical sector, which recommended reforms to allow for more price competition and more entry by new pharmacies ran into strong opposition by various stakeholders. As in many other jurisdictions, promoting more competition in professional services remains a major task for the GVH.

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The Competition Policy Position of the Office of Economic Competition on the Key Issues of the Transparency of Subsidy System Regulation and Pharmacy Market Liberalisation, Competition Office Bulletin No. 6, July 2003 ("Pharmacy Market Liberalisation"). The Report focuses, in particular, on introducing more competition by allowing free price formation for OTC drugs, and by introducing a system of maximum prices for prescription drugs which would allow for some price competition on the retail level.

41. The GVH has had some success in this area, especially with enforcement actions against commonly-encountered attempts by professional associations to limit competition among its members. For example, it challenged minimum price recommendations for medical services where such minimum fee recommendation in fact became obligatory prices. Other actions were brought against advertising restraints imposed by professional associations that in fact limited competition. Overall, however, restraints on competition remain pervasive. Hungary's EU membership may facilitate the GVH's task to introduce more competition to some extent. Resale price maintenance for tobacco products, or recommended minimum fees of professional associations might be such areas where Hungarian competition law cannot effectively be enforced, but where the application of EC competition law could support the GVH's efforts to introduce more competition.

#### **Advocacy and policy studies:**

42. The GVH's powers and possibilities related to competition advocacy are strong. A notable, although infrequently used tool to promote pro-competitive policies is the GVH's power to sue administrative agencies and municipalities in court if they adopt anti-competitive decisions. This potentially strong instrument to prevent the adoption of anti-competitive regulation has been actually used only once, when the GVH brought a case against a municipality that denied a taxi license for an out-of-town entrepreneur. The mere threat to use these powers was effective in several cases.<sup>39</sup>

#### **Box 6. Advocacy**

**Maintain GVH advocacy concerning anti-competitive government action, in particular at the local government level, and concerning other typical subjects of anti-competitive rules and decisions, such as protections for incumbents in distribution and commercial aspects of professional services.**

The 1999 Report focused in particular on local government actions and observed that steps already were underway to strengthen national government oversight of local government actions, to reduce the risk that local government orders can impede competition for extended periods of time while the national government goes to court to try to undo them. The Report noted that at the ministerial level the government had called for reforms to improve the cost-benefit analysis of proposed regulations and that further enhancement of consultation process requirements, inside the administration and with the public, would also be welcomed.

The GVH has maintained, and probably increased, its advocacy activities, commenting on a remarkable number of proposed laws and regulations. There is a question whether the GVH should become more discriminatory in its advocacy activities, and focus on proposed legislation and regulation that is likely to have the greatest impact on the competitive process.

43. Another recent example of the GVH's advocacy efforts is its study of the pharmaceuticals market.<sup>40</sup> The Report urges that rules concerning retail trade in pharmaceuticals, especially through pharmacies, be reformed to take consumer interests into account. It recommends, for example, that limited price competition should be encouraged by establishing maximum retail prices and otherwise allowing price competition especially with regard to non-subsidised pharmaceuticals. It also recommends the

<sup>39</sup> For example, the GVH intervened when a municipality promised a retail chain that it would not issue new construction and establishment permits to competitors. In addition, the GVH has the right to challenge certain regulations before the Constitutional Court and has in two cases in the past successfully done so (preferential customs duty for the Ford Transit; discriminatory fee by the Hungarian Post Office for the establishment of newspaper kiosks by new entrants).

<sup>40</sup> Pharmacy Market Regulation, *supra* note 38. The Report finds that there is no need for pro-competitive reforms in other areas, such as production and registration of pharmaceuticals, intellectual property rights, and wholesale trade.



opening of new pharmacies as well as the distribution of certain OTC drugs should be liberalised. Not surprisingly, the Report ran into strong resistance by trade associations and other stake holders who lobbied against any reforms as soon as a draft of the Report became available. At present it does not appear that any of the reforms advocated by the Report will be implemented.

44. The GVH also has the right to comment on every draft statute. It has traditionally used this right extensively. For example, in 2002 alone it commented on more than 200 draft laws and regulations.<sup>41</sup> This large number of comments on draft legislation illustrates a concern about the GVH's advocacy efforts which appears to be shared also by some within the GVH. There is a question whether the GVH has spent its advocacy resources not selectively enough, at the cost of being not sufficiently effective with respect to key pieces of legislation. The 2003 Annual Report, for example, refers to several cases where the GVH was not able promote pro-competitive policies in areas it considered important.<sup>42</sup> It is conceivable that broad advocacy efforts were more appropriate when competition principles were introduced, or at least were relatively new, in a great number of industry sectors. It may well be that as a market economy matures, greater focus on key areas could be more effective, particularly if concentrating on fewer issues makes it possible to address each of them in more depth, with case studies and other empirical support. Thus, it should be considered whether the GVH could more effectively discriminate in its advocacy efforts and focus its resources on fewer projects that could have the greatest effect on competition.

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<sup>41</sup> Hungary (2003) 11.

<sup>42</sup> Hungary (2004) 26 (referring to the act prohibiting sales of agricultural products below costs; and the cable-TV provisions in the Telecommunications Act).