

Unilateral Conduct Working Group Questionnaire

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – e.g., rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (e.g., consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

a. Constitution

The unilateral conduct rules or more generally the competition rules cannot be directly derived from the Hungarian Constitution. Article 9 of the Constitution only states the following:

(1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law.

(2) The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy.

b. Statutes

The essential rules concerning the prohibition of abuse of dominant position are laid down in the Hungarian Competition Act.¹ However, there are no objectives assigned specifically to the unilateral conduct rules, they are incorporated in the general objectives of the Act. These objectives are set out in the preamble, which articulates the intention of Parliament as to the purposes of the Act. The wording of the preamble is as follows:

The public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers require the state to protect by law fairness and freedom of economic competition. To this end it is necessary to adopt competition rules prohibiting market practices that are contrary to the requirements of fair competition or restrict economic competition and preventing concentrations of undertakings that are disadvantageous to competition, at the same time providing for the necessary institutional and procedural background. In order to attain these objectives - also taking into consideration the requirements of the approximation to the law of the European Community and the conventions of domestic competition law - Parliament passed the following Act.

According to this, the main objective of competition policy is the protection of the competitive process in order to achieve efficiency and to promote consumer interests.

¹ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, http://www.gvh.hu/data/pdf/jogi_hatter_mj_tpvt_2005nov1_a.pdf

The objectives of the jurisdiction's unilateral conduct rules can be derived from these general goals.

c. Regulations

There are no such regulations.

d. Agency enforcement policy (*e.g.*, guidelines, speeches)

The Hungarian Competition Authority (GVH) is currently working on its draft policy guidelines², in which it explains the most fundamental principles underlying the general practice applied during its activities and operation. In this guidance paper the GVH describes the principles and goals of competition policy, which can be derived directly from the wording of the preamble of Competition Act, and also interprets these principles by detailing the underlying considerations.

The main objective of competition policy is the protection of the freedom of competition, because competition is the best mechanism to mediate the society's needs and the driving force for efficiency to the companies. Therefore, the ultimate goals are long-term consumer welfare and efficiency, which is expected to increase competitiveness as well, and the instrument for achieving these goals is competition. The task of the GVH is to safeguard the proper operation of this mechanism and to prevent its restriction or distortion. Here, the objectives of the unilateral conduct rules can also be observed, because the draft paper states that "the harming of the freedom of competition means an unreasonable restriction of competition", and "the activities of the GVH are aimed at protecting competition".

e. Case law

In the wording and reasoning of most cases analysed by the GVH there is an overview about the goals of competition policy in general and the potential individual abuse in particular.

f. Other (please identify)

None.

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

The objectives are based solely on the abovementioned general competition policy goals. However, in unilateral conduct cases, similar advantages (or efficiency defences) can be assessed as in merger or agreement decisions (for example: the improvement of the protection of the environment), but in the view of the GVH, this factors are not considered different compared to the general policy objectives.

² Principles related to the freedom of competition followed by the GVH. (Draft Paper)

3. If there are multiple objectives, how are these balanced or reconciled?

Not applicable.

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

As indicated previously, there are no specific objectives applicable to the unilateral conduct rules, and the issue of over- or under-deterrence was not considered in the wording of the Competition Act either. The draft policy paper of the GVH handles the issue, but in a general way, not in a direct connection with the unilateral conduct rules. According to this, the GVH is more concerned with the possible over-deterrence, than under-deterrence. This means that the GVH proceeds more carefully in those cases, where the possibility of over-deterrence is high. In the wording of the draft paper:

“In cases where, during analysis, it is difficult to assess whether a behaviour is competitive or, conversely, restricts competition, the GVH considers the behaviour in question to be competitive. In other words, the GVH would rather risk considering the behaviour in a borderline case competitive (even if it is anticompetitive), than to risk considering it anticompetitive (even if it is competitive), to avoid unnecessary interventions in the market processes.”

Naturally, there could be some exceptions to this general approach, for example in reference to unilateral conduct, in recently liberalized markets it is important to take a “more activist” role in dealing with the incumbent company’s potentially abusive behaviour.

“...behaviours in the context of market opening are exceptions from this approach, as in these cases the risk that the GVH disturbs spontaneous market processes is significantly smaller.”

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

The GVH is not aware of this kind of exemptions or exceptions.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.

In the view of GVH, the objectives of unilateral conduct rules are independent of such factors. However, as indicated previously, there are some recently liberalized sectors, where the GVH interprets the protection of competition as to some extent cover the emergence and intensification of competition as well.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

There were no significant changes in this regard during the revisions of the Hungarian Competition Act.

8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

The GVH is a highly independent agency, so generally there are no such institutional features that affect the decision making of the Competition Council in achieving the objectives of competition rules. Accordingly, there are no legal requirements to consult with other governmental agencies, but the GVH concluded agreements with various sector regulators, which cover the framework and merits of cooperation between the GVH and the regulator. In certain cases the GVH contacts agencies or ministries, if they are responsible for the information relevant for the ongoing proceeding.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

The main difficulty with the objectives of competition (or unilateral conduct) rules is that it is often very hard to establish the direct connection between the various objectives (such as consumer welfare) and the relevant details of the case at hand at the level of empirical analysis, rather than at the level of doctrines.

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

The relevant provision (Article 22) of the Hungarian Competition Act is as follows:

"Article 22

- (1) *A dominant position shall be deemed to be held on the relevant market by persons who are able to pursue their business activities to a large extent independently of other market participants substantially without the need to take into account the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct.*
- (2) *In assessing whether a dominant position exists, the following factors shall be considered, in particular:*
 - a) *the costs and risks of entry to and exit from the relevant market, and the technical, economic and legal conditions that have to be met;*
 - b) *the property status, financial strength and profitability of the undertaking or the group of undertakings (Article 15(2)), and the trends in their development;*
 - c) *the structure of the relevant market, the comparative market shares, the conduct of market participants and the economic influence of the undertaking or the group of undertakings on the development of the market.*
- (3) *Dominant positions may be held by individual undertakings or group of undertakings or jointly by more than one undertaking or more than one group of undertakings.”*

Accordingly, the provision resembles the relevant provisions of the Treaty. The jurisdiction of the GVH does not make a distinction between dominance and super dominance, though extremely high market shares or other market characteristics make it easier to find a dominant position in some cases.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- | | |
|---|-----|
| - If dominance/substantial market power is present | yes |
| - Acquisition or creation of dominance/substantial market power | no |
| - Attempt to acquire or create dominance/substantial market power | no |
| - Other (please identify) | N/A |

Why did your jurisdiction choose these stages?

The Hungarian competition rules (including unilateral conduct rules) are based on EU competition rules (Article 82 of the Treaty), mostly because of the law approximation during the years before the accession of Hungary to the European Union. The Competition Act currently in force was issued in 1996, and although there were some amendments until now, the main objectives remained the same.

Accordingly, the competition agency can only intervene if dominance is present, and the firm holding it is abusing its position at the same time, because it is not prohibited to hold a dominant position in the relevant market, it is only prohibited to abuse this position.

Naturally, the Competition Council takes into account the possible creation of a dominant position in its merger control decisions, but these considerations do not belong to the unilateral conduct rules.

3. Does your law contain or do you use a market share threshold at

which you presume single-firm dominance/substantial market power and/or as a “safe harbour”? no

The Competition Act does not contain a market share threshold for either presuming single-firm dominance or a “safe harbour”. However, the Competition Council uses a 20% threshold for “safe harbour” in its merger control decisions, when it considers the difference between mergers subject to authorisation in simplified or full procedure.³

If so, please respond as applicable:

- What is the market share level of the dominance presumption? N/A
- What is the market share level of the safe harbour? 20%
- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)? yes
- What is the legal basis for the safe harbour? guideline

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? N/A

If so, please explain why and in which circumstances. N/A

5. Does your jurisdiction’s analysis of dominance/substantial market power first require that a relevant product and geographic market be defined? no

The requirement is not explicitly stated in the Hungarian Competition Act, but in most of the cases it is a logical way to proceed in the investigation by first defining the relevant product and geographical market.

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?⁴

- Market share of the firm and its competitors yes
- Market position and market behaviour of competitors yes
- Durability of market power yes
- Barriers to entry or expansion yes
- Economies of scale and scope/network effects yes
- Buyer power yes
- Access to upstream markets/vertical integration yes
- Access to essential facilities yes
- Market maturity/vitality yes
- Financial resources of the firm and its competitors yes

³ Notice No 1/2003 of the president of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority about the Considerations in differentiating between concentrations subject to authorisation in simplified or full procedure

⁴ The answer “yes” should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer “no” should be provided if in practice you have not ever used that criterion.

- Profits of the firm no
- High prices (at absolute or comparative level) yes

Please specify any other criteria that you use to assess single-firm dominance/substantial market power. Access to inputs

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

- Market share of the firm and its competitors
- Market position and market behaviour of competitors
- Barriers to entry or expansion

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

The authority uses a case-by-case approach, because the relevance of each criterion can vary enormously according to the specifics of each case. That said, the market share of the firm and its competitors, the market behaviour of each players, and the entry barriers of competitors play a very significant role in assessing single-firm dominance, as already indicated above (Answer B/7).

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

The Hungarian Competition Authority has no experience in this issue so far.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? No, at least not in itself.

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. **[NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]**

The way of analysis does not differ in principle, but the results could be different because of the size of the country and the free trade agreements. In a small but open economy, free trade agreements can among other things increase the size of the market and the number of players.

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms, energy, water, and railways* sectors.

I. State-created Monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned⁵, state-controlled⁶, state-enabled or facilitated⁷, recently privatized and/or liberalized, regional monopolies,⁸ etc.

Besides the abovementioned sectors, where network economies exist, and which have explicitly been excluded of this questionnaire, important sectors in which state-created monopolies exist are mainly the following: mail services and lottery.

Mail services

The Hungarian Post Office Ltd. (Magyar Posta Zrt.) is a 100 % state owned company, which is currently the only provider of services within the scope of the so-called universal postal service throughout the territory of Hungary. The services outside the scope of the reserved area could be provided by licensed providers as well, but to date there are no licensed operators.

Courier post, express mail, integrated post and exchange of documents do not fall within the scope of the universal postal service, and in these market segments global players (such as UPS, FedEx etc.) have already entered the market. Services outside the scope of universal services may be provided without individual licence after a general authorisation.

At this time, the so-called reserved postal services, which are part of the universal postal service, can only be provided by the Hungarian Post Office. According to the Post Act⁹, from 1 January 2004 only services relating to domestic and/or international letters and direct mail weighing up to 100 grams fell within the scope of reserved postal services

⁵ Those undertakings that are 100% owned by the State.

⁶ The control belongs to the State, without taking into consideration the amount of the % of the State share.

⁷ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

⁸ Includes public/private undertakings that are granted exclusive rights within a certain region.

⁹ Act CI of 2003 on the Post

(http://www.posta.hu/kepek/upload/2005-03/01%20-%20postatorveny_angol.pdf)

(provided that the fee for the service is lower than three times the fee for letter post items falling within the first weight step of the fastest standard category within the universal range of services). From 1 January 2006, the Post Act further restricted the scope of reserved postal services to conform with European Union requirements (up to 50 grams and two and a half times the fee for letter post items falling within the first weight step of the fastest standard category within the universal range of services).

The full liberalisation of the postal market is expected in 2009.

Lottery

Szerencsejáték Zrt. is the largest gambling service provider in Hungary, and according to the Gambling Act¹⁰, it has exclusive rights to distribute number draw games, sports bets and prize draw tickets throughout the entire territory of the country. Since its foundation, the company has been fully owned by the Hungarian state, while the owner's rights have been exercised by the Hungarian Privatization and State Holding Company (ÁPV Zrt.).

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.¹¹

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?
- Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

The Competition Act (as described in Article 1) applies to market practices by all kinds of firms (natural and legal entities as well) except where otherwise regulated by statute. In that sense, the nature of the firm's ownership does not matter, so the law applies to publicly owned firms as well as private ones. The intent behind this is that public and private ownership receive the same competition policy treatment.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

¹⁰ Act XXXIV of 1991 on the Gambling Operations

¹¹ The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

There is no difference in the assessment of state-created monopolies compared to other dominance cases. Intrinsically, the assessment could be even less difficult due to the fact, that it is a monopoly. Proving the actual abuse could be naturally less straightforward, than the assessment of dominance, primarily because of the various regulations accompanying these monopolies.

II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law)?

The Hungarian Privatisation and State Holding Company (ÁPV Zrt.) is the main proprietor of the entrepreneurial assets of the Hungarian State. The company's task is the sale and market based management of state assets determined by law as well as rendering accounts and the controlling of earlier privatisation transactions.

The large-scale privatisation of state property was made possible in Hungary by the change of the political system in 1990, and most of the public property has returned to private ownership in a very short period of about ten years. Privatisation played a determining role in the re-establishment and development of the market economy. At the beginning of the process the state sector made up more than 85% of the Hungarian economy. Since then the situation has turned around completely, with almost four-fifths of the Hungarian economy now in private hands.

As for privatisation itself: in 1990, a total of 1,859 state-owned companies awaited privatisation. By 30 June 2006, only some 117 companies with a book value of HUF 774.35 billion (USD 3.8 billion) operated under the supervision of ÁPV Zrt., according to preliminary, not audited data¹². From this group, 36 companies with a book value of HUF 594.84 billion (USD 2.95 billion) are to remain in long-term state ownership with a hundred percent, majority or minority stake, as stated in the Privatisation Act, which is designed for the privatisation and liberalization process in Hungary¹³. Smaller or larger state-owned companies are awaiting sale to domestic and/or foreign investors. At the same time there is no precise information on the other key component of the public assets held by the local government.

6. What are the objectives of your government in the privatisation and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

Hungary is a recently liberalized economy, which went through a transition process from a state-controlled economy to a market economy, and this is reflected in the objectives of the Privatisation Act as well. According to the wording of its preamble it was adopted “with a view to strengthening the economic environment built on private ownership, to

¹² Source: <http://www.apvrt.hu/english/m1.html>

¹³ Act XXXIX of 1995 on the Sale of State-Owned Entrepreneurial Assets

accelerate the process of abolishing state ownership appropriately, to transfer state-owned entrepreneurial assets to private ownership based on market conditions, and to reduce the role of the state in the economy". Besides these goals the maximisation of the income of state budget was in most cases also a priority, but the abovementioned objectives varied during the years of privatisation considerably.

7. Is competition law applicable to privatisation transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

There is no special rule to privatisation transactions in the Competition Act, so the general merger rules apply.

8. Please summarize the advocacy role of your agency in the privatisation and liberalization of state-created monopolies, including as applicable:

- What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatisation and/or liberalization proposals?
- To what extent does the advocacy role of your agency have impact on privatisation and liberalization? Please provide examples of successes or failures if available.

During the whole privatisation process, the competition authority had only an advisory role about most acquisitions in privatisation settings, as a "permanent invitee" at the privatisation body's decision-making meetings. The advocacy of the GVH was in general more successful in those cases, where the authority was involved in the early phases of the privatisation process as well.

D. General

1. From among the following, how would you characterize your jurisdiction:
developed / developing / transitioning?

The legal framework can be considered as developed, but there is a lot to do on the level of analysis in individual cases.

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatisation.

The Hungarian Competition Act is available on the website of the GVH:
http://www.gvh.hu/data/pdf/jogi_hatter_mj_tpvrt_2005nov1_a.pdf

The summary of major decisions of the Competition Council can also be reached on the website of the GVH:

<http://www.gvh.hu/index.php?l=e&id=143&m=4>