

## Unilateral Conduct Working Group Questionnaire

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to [ekraus@ftc.gov](mailto:ekraus@ftc.gov) and [arno.rasek@bundeskartellamt.bund.de](mailto:arno.rasek@bundeskartellamt.bund.de), and provide a contact person who can answer possible questions on your response.

### **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
- b. Statutes: Act LVII. of 1996 on the prohibition of unfair market behaviour and the restriction of competition (“the Competition Act”)
- c. Regulations: All EC regulations on the subject matter are directly applicable in Hungary
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law: The decisions of the Hungarian Competition Council are only binding on the persons to whom they are addressed, however, they can be instrumental in developing arguments in other cases
- f. Other (please identify): Government decrees, which establish block exemptions (following the EC model) in certain business sectors (*i.e.* insurance, motor vehicles, R&D, etc.)

As it is already apparent from its title, the Competition Act not only incorporates the aims and instruments contained in Articles 81 and 82 EC, but goes further than that, as it also prohibits unfair competition in general (be that multilateral or unilateral conduct). The category of unfair competition has a very broad scope; it includes for instance the prohibition of competing by unethical means (*i.e.* negative advertisement), or the prohibition to deceive the final consumer by any means whatsoever. Indeed, most of the cases dealt with by the Hungarian Competition Council concern instances of unfair competition mainly to the detriment of consumers.

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.
3. If there are multiple objectives, how are these balanced or reconciled?
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?

At present, the risk of over-intervention does not present a problem in the framework of competition rules in Hungary. On the contrary, still being an economy in transition (obviously, if compared to the highly developed Western European countries, such as the UK or Germany to that matter), competition law is an instrument of modernization, inasmuch as it can be used to restrain the large/est market players (many of whom are still vested with legal monopolies) from engaging in harmful market behaviour. In light of this, it is not surprising to see that a big proportion of the cases coming before the Competition Council relate to abuse of dominant position (mostly in regulated industries, by gas and electricity providers, TV service providers, or the national railway company), and to cartels (many of them established to influence the outcome of public procurement procedures). It is also worth noting that the number of cases in which the Competition Council has established the infringement of Article 81 or 82 EC is still very low, but shows a progressive trend (in 2005 there were 5 cases in total with a Community dimension, of which 2 related to Article 82 EC – abuse of dominant position; by way of comparison; and up until November, 2006 there were 10 cases so far tried on the basis of those two Articles). The phenomenon can be attributed to the very simple fact that Hungary first joined the EU a little over two years ago. Therefore, further increase in the number of these type of cases can be expected.

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 following areas are covered by block exemptions in Hungary (all of them established by government decree):

- Certain categories of agreements in the insurance sector
- Vertical agreements in the motor vehicle industry
- R&D agreements between undertakings
- Certain specialization agreements between undertakings
- Technology transfer agreements
- Certain categories of vertical agreements

As it is apparent from the above list, block exemptions follow the scheme (and aims) of the system of block exemptions adopted at EC level. Obviously, where a threshold is defined (for the exemption to apply), these in Hungary are considerably lower than those defined at Community level.

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.

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.
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.
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?

## **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 definition of dominance is contained in Article 22 of the Competition Act, which describes it (following the EC model) as a position of economic strength, which enables the undertaking enjoying it to behave independently from its competitors, buyers, customers and other business partners. It is worth noting that the literal translation of the Hungarian word indicating dominance could be better translated as 'market leadership', which in a way lends itself to an assessment mainly based on the power of the competitors of the dominant undertaking.

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/no
- Acquisition or creation of dominance/substantial market power yes/no
- Attempt to acquire or create dominance/substantial market power yes/no
- Other (please identify)

Why did your jurisdiction choose these stages?

The Competition Authority can intervene *ex officio* at any stage it deems appropriate.

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"? yes/no

The Hungarian Competition Council very closely follows EC case-law in this regard. It could therefore be said that the Commission decision in *Coca-Cola* is followed in

Hungary (with its no-dominance presumption below 40% market share). However, as it is the case in the EC, no clear-cut rules exist.

If so, please respond as applicable:

- What is the market share level of the dominance presumption? \_\_\_\_\_
- Is the dominance presumption rebuttable? \_\_\_\_\_ yes/no
- What is the market share level of the safe harbour? \_\_\_\_\_
- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)? \_\_\_\_\_ yes/no
- What is the legal basis of the presumption \_\_\_\_\_ statute /case law/guidelines
- What is the legal basis for the safe harbor? \_\_\_\_\_ statute /case law/guidelines

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? yes/no

If so, please explain why and in which circumstances.

See the discussion on the 'unfair business behaviour' under Hungarian law above.

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

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?<sup>1</sup>

- Market share of the firm and its competitors yes/no
- Market position and market behavior of competitors yes/no
- Durability of market power yes/no
- Barriers to entry or expansion yes/no
- Economies of scale and scope/network effects yes/no
- Buyer power yes/no
- Access to upstream markets/vertical integration yes/no
- Access to essential facilities yes/no
- Market maturity/vitality yes/no
- Financial resources of the firm and its competitors yes/no
- Profits of the firm yes/no
- High prices (at absolute or comparative level) yes/no

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

<sup>1</sup> 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.

the influence of the undertaking concerned on the working and structure of the market, barriers to entry (technical, legal etc.)

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

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

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power? They are taken into account as possible barriers to entry.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/no (in certain cases only)

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.]

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-owned<sup>2</sup>, state-controlled<sup>3</sup>, state-enabled or facilitated<sup>4</sup>, recently privatized and/or liberalized, regional monopolies,<sup>5</sup> etc.

Typically, regulated industries are the sectors where monopolies still exist.

Electricity distribution to private consumers is the monopoly of the Hungarian Electricity Works Company (HEWC), an undertaking closely held by the state. Power generation however, has undergone a liberalization process some years ago. Furthermore, pursuant to the Electricity Directive, the opening up of the electricity market is ought to be accomplished by 2007. In order to achieve this, a handful of long-term power purchasing agreements (PPAs) concluded in the early and mid-1990s between HEWC and various power generating plants (largely owned by foreign investors) need to be renegotiated and modified, a task capable of generating lengthy litigations and disputes.

The state monopoly in the telecom sector no longer exists. However, it is an undeniable fact that the biggest telecom provider (which is the successor of the former public enterprise) still enjoys a dominant position (or at least a strong market leadership) attributable to the start-up advantages it enjoys over new entrants (namely, ownership of infrastructure).

Interestingly, official translation is also a sector, where the state has established a monopoly. Official translations (required in a number of official procedures before courts and other authorities and in some cases, in public procurement) can only be provided by the Hungarian Translation and Attestation Office, an entity wholly owned by the state.

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.<sup>6</sup>

The accession of Hungary to the EU entailed the full adoption of the *acquis communautaire* in a relatively short period of time. The provisions of the EC Treaty related to state monopolies of a commercial character (Article 31 EC) and those establishing the rules on competition applicable to undertakings and the state itself (Articles 81 – 86 EC) are directly applicable in Hungary (along with all the free movement provisions). As a consequence, many national instruments that had vested (public) undertakings with special or exclusive rights had to be revised or, in some cases,

<sup>2</sup> Those undertakings that are 100% owned by the State.

<sup>3</sup> The control belongs to the State, without taking into consideration the amount of the % of the State share.

<sup>4</sup> E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

<sup>5</sup> Includes public/private undertakings that are granted exclusive rights within a certain region.

<sup>6</sup> 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.

completely abolished. Nevertheless, it would be premature to conclude that all segments of the Hungarian market have been opened up for competition (even if the legal framework would allow this, it will definitely take some time for the market players to react to the changed framework). In addition, taking into account some new Community initiatives (for instance, the aforementioned electricity market liberalization project), dramatic changes are expected in the coming years.

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.

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

## 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) ?

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

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

8. Please summarize the advocacy role of your agency in the privatization 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 privatization and/or liberalization proposals?

- To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.

**D. General**

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

**See Annex**

## **THE EFFECT OF EU ACCESSION ON COMPETITION LAW APPLICABLE TO UNDERTAKINGS IN HUNGARY**

The EU-accession of Hungary have a bearing on both the activity of the GVH and the enforcement of the competition law in this country. The [description](#) below gives a brief summarisation of the changes. On this page, you can also find a survey of the most important [connection-related contents](#) put on our website.

### **I. The effects of the accession**

EU accession will bring about considerable changes in the competition law applicable to undertakings - the rules of Community competition law will be directly applicable to Hungarian firms as well. On the other hand, these rules are not completely unknown to the Hungarian undertakings and law enforcement institutions. In the framework of the law approximation requirement imposed in the Association Agreement, the Hungarian competition law has continuously followed and transposed the key norms and principles of EC competition rules.

Consequently, the accession will hopefully not result in any shock in this area. The changes will result more from the law enforcement system, because the Gazdasági Versenyhivatal will also have to apply the Community system of the rules.

### **1. The effects of accession in respect of restrictive agreements and abuse of dominance**

As a result of the accession, in the field of competition rules relating to undertakings, the GVH will have to apply the Community rules, rather than the Hungarian competition law, to all the anticompetitive practices - restrictive agreements and abuses of dominance - which fall under the scope of the Community competition rules due to their [effect on trade between Member States](#) . (In the competition law of the EC, rules applicable to restrictive agreements are set forth in Article 81 and rules applicable to abuse of dominance in Article 82 of the Treaty establishing the European Community (ECT)). The GVH may also apply the Hungarian and Community competition law simultaneously.

Under the procedural law of the Community, the Commission as well as the Gazdasági Versenyhivatal (GVH) or the competition authority of any Member State may apply Community competition rules. When applying the substantive rules of Community competition law, the law enforcement institutions must proceed in accordance with the procedural rules of their national laws.

When applying Community competition rules, the Commission and the competition authorities of the Member States must closely co-operate with each other in accordance with the procedural rules of the Community (Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and the

Commission Notice on the co-operation between the competition authorities of Member States). In this framework it is possible, inter alia, to [allocate cases](#) and [exchange information](#) between competition authorities. The information exchanged in proceedings launched by the competition authorities of Member States may also be used to prove the infringements of competition law. In the course of the co-operation, the competition authorities may assist each other in their investigations by performing procedural acts on behalf of the other authority.

## **2. Effects in the field of merger control**

In the field of merger control, as a direct effect of the accession, concentrations subject to a notification requirement under the EC Merger Regulation (Council Regulation (EC) No 139/2004) and simultaneously reaching the thresholds specified in Act LVII of 1996 on the prohibition of unfair and restrictive market practices (Competition Act) need not be notified to the GVH after 1 May 2004. Such concentrations (mergers and acquisition of control) will have to be notified only to the Commission, under the EC Merger Regulation. It is to be expected, however, that in the future, pursuant to Regulation (EC) No 139/2004, cases may be referred under the [referral system](#) between the Commission and the competition authorities of Member States.

## **3. Effects on the law relating to the unfair manipulation of consumer choice**

In respect of the rules set out in the Competition Act and the Act on Advertising, falling within the competence of the GVH and protecting competition taking into account the economic interests of the consumers, no direct effects of the accession after May 2004 can be identified. However, there is a regulation in preparation that envisages closer co-operation in this field as well between the Commission and the law enforcement institutions of the Member States to address cross-border problems.

## **II. Accession-related new contents**

As a consequence of the accession, our homepage has been substantially broadened and the information, it displays to you, updated. In order to make your orientation easier, the most important new contents can be reached from a single starting point below. Just to mention some of these new contents:

- [Legal acts of the Community](#) which are also applied by the GVH in its proceedings, [Communications of the Community](#) which are observed or taken into account by the GVH in its proceedings
- On the page "[Brussels News](#)", developments in Community legislation are described and information about cases with Hungarian relations of the Community legal practice is given.
- Answers to the [frequently asked questions](#) inform you on the application of the law of the Community too.
- [Websites accessible](#) from our homepage are a. o. those of all the competition authorities of the Member States, the competition authority of the Community and institutions and pages with competition law relations.

### **III. Accession-related questions - in detail**

#### **Effect on trade between Member States**

After May 2004 the competition authorities of the Member States will also be obliged to apply the Community competition law; therefore in Hungary the Gazdasági Versenyhivatal has the responsibility of applying the competition rules of the EC. The applicability of Articles 81 and 82 of the EC Treaty hinges on the effect on trade between Member States (ETBMS). The establishment of ETBMS in individual cases is governed by the legal practice of the Community and the Commission Notice relying on that practice and providing guidance on the establishment of the ETBMS. Accordingly, such affectedness can be interpreted rather broadly. There are clear cases where the existence of ETBMS can be established easily, for instance where the competitive act affects the movement of goods from one Member State to another, or where the undertakings of several Member States participate in a restrictive agreement. ETBMS also clearly exists where the effects of a competitive conduct are exerted in the markets of more than one Member States (for instance, in the case of a cartel allocating markets). However, depending on the specific circumstances, the existence of ETBMS can be established even if the undertakings of a single Member State participate in a restrictive conduct but the competitive conditions are such that the cartel covering the territory of a single Member State (or even a part thereof) changes the conditions of trade between Member States. In accordance with the Commission Notice on the effect on trade between Member States, certain conducts, depending on the extent of perceivability, may be deemed to be incapable of exerting a perceivable effect on trade between Member States; therefore they cannot be regarded as conducts falling under the scope of Community competition law. These are conducts which affect a turnover of 40 million EUR at most and, at the same time, cover no more than 5% of the relevant market.

#### **Referral**

Pursuant to Council Regulation (EC) No 1/2003 and the Commission Notice on the co-operation of the competition authorities of Member States, cases may be referred between the members of the European Competition Network (ECN), comprising the competition authorities of Member States and the Commission, in the course of their proceedings. Pursuant to Council Regulation (EC) No 1/2003, the members of the ECN must closely co-operate with each other and, in that framework, inform each other without delay about the commencement of a case. Thus, having been informed of the procedure, the competition authority of another Member State may also initiate proceedings in the same case that is already subject to proceedings by the first one (this option is not available if the case was opened by the Commission). It is also possible for the competition authority which originally started the case to suspend or even terminate the procedure if it finds that the competition authority of another Member State has also commenced proceedings. It is an important aspect in referring (allocating) cases to assure that the competition authority that will eventually take action should be affected in some manner (the practice should have an effect on

competition within its territory or originate within its territory), and that it should be able to effectively bring to an end the infringement (with the active participation of the competition authority of another Member State, if need be).

**Exchange of information**

Council Regulation (EC) No 1/2003 allows the members of the European Competition Network (ECN), comprising the competition authorities of Member States and the Commission, to exchange information and data obtained in the course of their proceedings for the purpose of applying the Community competition law, and to use such information as evidence. This is also applicable to the exchange of confidential information. However, certain safeguards must be observed when exchanging information, such as:

- the competition authority obtaining the information under the information exchange arrangement may use it only for the purpose of applying Articles 81 or 82 of the Treaty. If the authority also applies its national competition law in parallel to Community law, it may also use such evidence in its proceedings under the national law. For the latter, however, the proceedings conducted under national law must not lead to an outcome which is contrary to that of the proceedings under Community law;
- the information may only be used in the proceedings conducted in respect of the original subject-matter for which it was collected;
- if the recipient competition authority intends to use the information obtained for the imposition of sanctions, it can do so only if the sanction imposed by the recipient authority is of a similar kind as may be imposed by the competition authority transmitting the information,
- there are special rules applicable to the exchange of information acquired under the leniency policy.

**System of referrals**

Under the EC Merger Regulation (Council Regulation (EC) No 139/2004), it is possible to refer cases between the Commission and the competition authorities of Member States. Such referral happens essentially in two directions:

- in respect of cases with a Community dimension notified to the Commission, the competition authorities of Member States may, pursuant to Article 9 of the Merger Regulation, initiate in the course of the mandatory coordination applicable to the merger proceedings of the Commission that the Commission refer the concentration, which has a Community dimension, to them, with a view to the application of that State`s national competition law. This requires the concentration to
  - = threaten to create or strengthen a dominant position in a market of the Member State in question, which presents all the characteristics of a distinct market, or
  - = affect competition in a market of the Member State in question, which presents all the characteristics of a distinct market and which does not

constitute a substantial part of the common market,

- in the case of mergers notified to one or more Member States, the competition authority (authorities) of the Member State(s) may, in accordance with Article 22 of the Merger Regulation, request the Commission to appraise, based on the Merger Regulation, the market impacts of a concentration which has no Community dimension.

It is also possible for the undertaking(s) affected by the concentration and responsible for obtaining a competition law authorization to initiate the referral of the case in either direction. This is a new option in Community competition law, its detailed rules being set out in Article 4 (4) and (5) of the Merger Regulation.

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