International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: **Gazdasági Versenyhivatal (GVH - Hungarian Competition Authority)**
Date: **4 November 2009**

Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

   As an introduction to general legal framework we have to highlight the following. Hungary is a Member State of the EU, therefore the competition provisions of the EC Treaty are directly applicable in Hungary as well. The GVH, as a national administrative

body, has to duty to apply EC rules when required. According to Article 3(1) of Regulation 1/2003/EC where the competition authority of a Member State applies national competition law to any abuse prohibited by Article 82, they shall also apply Article 82. Furthermore Hungarian competition law is fully harmonized with EC competition law, therefore when the GVH investigates abuse of dominant position cases it takes utmost account of the case law under Article 82.

According to Article 82 EC a refusal to deal qualifies as an abuse of dominant position. The term refusal to deal is used in the same manner as in the introductory part above.

According to the Hungarian competition regulation a refusal to deal may be recognized as violation of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: Competition Act). The term of refusal to deal ("refusal, without justification, to create or maintain business relations" in the wording of the Competition Act) is used in the same manner as in the introductory paragraphs above. Refusal to deal and margin squeeze are covered by distinct subsections of Article 21 of the Competition Act. Refusal to deal is addressed by subsection c) of Article 21. The GVH "defines" the notion margin squeeze in its decisions treating this behaviour under certain general subsections of Article 21; namely subsections i) and j) which prohibit to hinder, without justification, market entry in any other manner; and to create, without justification, disadvantageous market conditions for competitors.

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

Article 82 of the EC Treaty:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As a general prohibition, Article 21 of the Competition Act considers abuse of dominant position as an infringement of the law. Subsections of Article 21 specify particular abuses. These subsections basically represent examples of the specific forms of abuses. As it has already been described above, the general prohibition concerning refusal to deal can be found under subsection c), while specific forms of refusal may be addressed by other subsections (basically subsections i) and j)).

Article 21 of the Competition Act:

"It shall be prohibited to abuse a dominant position, particularly:

a) in business relations, including the application of standard contractual terms, to set unfair purchase or selling prices or to stipulate in any other manner unjustified advantages or to force the other party to accept disadvantageous conditions;
b) to limit production, distribution or technical development to the prejudice of consumers or trading parties;
c) to refuse, without justification, to create or maintain business relations appropriate for the type of transaction;
d) to influence the economic decisions of the other party in order to gain unjustified advantages;
e) to withdraw, without justification, goods from circulation or withhold them from trade prior to a price increase or with the purpose of causing a price increase or in any other manner which may possibly produce unjustified advantages or to cause competitive disadvantages;
f) to make the supply or acceptance of goods subject to the supply or acceptance of other goods, furthermore to make the conclusion of contracts subject to the acceptance of obligations which, by their nature or according to commercial usage, do not belong to the subject of such contracts;
g) in the case of transactions which are equivalent in terms of their value or character to discriminate, without justification, against trading parties including in relation to the application of prices, periods of payment, discriminatory selling or purchase terms and conditions or methods thereby placing certain trading parties at a competitive disadvantage;
h) to set extremely low prices which are not based on greater efficiency in comparison with that of competitors and which are likely to drive out competitors from the relevant market or to hinder their market entry;
i) to hinder, without justification, market entry in any other manner; or
j) to create, without justification, disadvantageous market conditions for competitors, or to influence their economic decisions in order to obtain unjustified advantages."

3. Do the relevant provisions apply only to dominant firms or also to other firms?

   The relevant provisions apply to dominant firms. However, for example in case of a margin squeeze (supposing that the undertaking concerned is active in both of the upstream and downstream markets, and it is in dominant in the former), it is not necessary to establish dominant position in the downstream market as well.

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

   All forms of abuse of dominance are administrative violations. However, within the framework of private enforcement, damages actions can be brought before court.

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

From 1 January 2000 till the present, the GVH investigated 31 refusal to deal cases (Article 21 c). In this case, investigation means that a formal competition supervision proceeding was initiated ex officio or on complaint, so the proceeding went beyond the preliminary review phase. In the same period, 25 margin squeeze cases were investigated (Article 21 i) and j)).

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

In 7 out of the 31 refusal to deal cases the Competition Council (the decision-making body of the GVH) established the infringement of the Competition Act and a fine was imposed in 5 out of the 7 cases. Infringement was established in 5 of the 25 margin squeeze cases and fine was imposed in 4 cases.

	Case number	Sector	Anticompetitive effect	Judicial review
1.	Vj-184/1999	telecom	The dominant internet service provider (ISP) refused the cooperation concerning billing with other ISPs on its territories.	No.
2.	Vj-8/2000	telecom	The dominant firm sold spare parts only to services centers within its own brand network.	Upheld.
3.	Vj-21/2000	telecom	The undertaking concerned abused its dominant position with delivering iVoIP service only to concessions lessees.	Modified as regards the legal basis.
4.	Vj-82/2000	telecom	The company concerned refused to deliver some services to its clients who had a subscription to its “security package”.	Upheld.
5.	Vj-6/2002	telecom	The local government refused a new cable television provider (by refusing an authorization to use the public ground) to enter the market where the local government’s cable television provider was already active.	No.
6.	Vj-39/2002	telecom	The dominant firm abused its position with unduly refusing access to its cable network to another ISP.	Overturned.
7.	Vj-22/2005	railway	The incumbent railway operator had abused its dominant position inter alia by rendering difficult, delaying or impeding the access of private railways to certain tracks (including the servicing of trains) in its ownership or management;	Decreased the amount of fine.
8.	Vj-73/2001	cement	The undertaking concerned hindered	Modified as regards

			market entry without justification, it gave discounts if the purchaser undertook not to buy import cement.	the legal basis.
9.	Vj-100/2002	telecom	The infringement was – inter alia – that the interconnection fees were higher than some retail tariffs of fixed line telephone services.	Upheld.
10.	Vj-155/2002	energy	The dominant firm prescribed – beyond the essential technical and security conditions – unnecessary conditions for undertakings interested in building of gas pipelines.	No.
11.	Vj-118/2004	funeral services	The dominant firm determined unfair fees for using the mortuary. The fee was only partly applied by the funeral provider which hindered other funeral providers' market entry and created, without justification, disadvantageous market conditions for them.	Upheld.
12.	Vj-69/2005	telecom	Due to the pricing policy of undertaking concerned the entry of competing ISPs was endangered. The company also excluded carrier selection in its preferential tariff packages.	Annulled and ordered the GVH to conduct a new proceeding.

For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

See in the table above.

Please state whether any of these cases were brought using criminal antitrust authority.

Not applicable.

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

Refusal to deal

The MÁV case

In case Vj-22/2005 Magyar Államvasutak ZRt. (Hungarian State Railways, hereinafter MÁV) the GVH investigated the conduct of earlier railway monopolist in the period just before and after market liberalization. The Competition Council established in its decision, issued on 10 July 2006, that MÁV, the dominant undertaking on the railway

market, infringed the provisions on abuse of both the Hungarian Competition Act and the EC Treaty.

The Competition Council found that MÁV, which had a dominant position both on the upstream market of access to rail tracks and also on the downstream market of transporting bulk goods (freight transport market), had abused its dominant position:

1) by causing unreasonable additional costs to its competitors on the freight transport market, when it required bank guarantee as a prequisite for the conclusion of the 2005 network access agreements;
2) by hindering, impeding and delaying access to non public industrial sidetracks; and
3) by concluding long term transport agreements, containing exclusivity clauses, with the most significant bulk-shippers, thereby foreclosing access of new entrants to a significant part of the freight transport market.

The Competition Council fined MÁV HUF 1 billion (approx. EUR 4 million).[1]

MÁV is the successor of the earlier state undertaking[2] Magyar Államvasutak. The main activity of the undertaking is railway transport and in addition it pursues numerous other activities closely related to its core business. As of 1 January 2003, the organizational structure of MÁV has been transformed with regard to the provisions of relevant community law. The particular core activities have been organized in separate business units (branches). MÁV Pályavasút Üzletág (hereinafter MÁV PV) has been created for the management of the railway network and its accessories and for managing traffic on the track. MÁV Árufuvarozás Üzletág (hereinafter MÁV ÁFU) has been created to pursue the freight transport activities of the undertaking. Additional business units were established for passenger transport, engineering (traction) and real estate management.

As one of the infringements mentioned above, MÁV ÁFU refused to grant access to certain of its industrial sidetrack when requested by competing railway undertakings. Industrial sidetracks are the so-called 'last mile' of a railway network, i.e. tracks that connect the national public railway network with the premises of shippers (factories, power plants, mines, etc.). Without access to the 'last mile' track, competitors are unable to offer shippers railway transport services in competition with MÁV ÁFU.

MÁV ÁFU refused to grant access to its industrial sidetrack at Bükkábrány when requested by MMV. It referred to the fact that the usage and service of these tracks are governed by the framework agreement in force at that time, and concluded between MERT and MÁV. According to these rules the industrial sidetrack is serviced exclusively by MÁV ÁFU. The conduct of MÁV ÁFU is the consequence of the above mentioned framework agreement.

MÁV ÁFU had no acceptable reasons under competition law for the refusal. Access cannot be denied simply by the fact that this would be detrimental for the undertaking in economic terms. It is also not acceptable to refer to property rights over the industrial sidetracks, since competition law should prevail against ownership rights in the case of essential facilities.[3] Of course the owner, manager or main user of the essential facility can claim the economically reasonable and under the relevant regulation acceptable costs of

[1] Reduced by the court.

[2] State undertaking as not a commercial entity.

[3] See the decision of the Competition Council in case Vj-10/2002, or the judgement of the CFI in case T-63/98.

granting the access. Should regulation fail to determine this amount, then the parties have to come to an agreement on it. If the parties cannot agree, then it can be investigated from a competition law point of view whether the dominant undertaking has any responsibility for this outcome. In the case of the Bükkábrány industrial sidetracks it is not necessary to make this exercise, since MÁV ÁFU refused to grant access without giving any prior conditions, consequently MÁV ÁFU obviously has a responsibility under the competition rules.

With regard to the request for access to sidetracks at Eperjeske-átrakó and Berente stations, including the servicing of the trains, MÁV already did not refuse to cooperate but "asked for patience" to make an appropriate decision. It referred to the unclear internal decision-making competences concerning Eperjeske. MÁV cannot use as a defence with relation to third parties its unclarity of the internal competences. Thereby MÁV unduly delayed the performance of MMV's transport services. MMV was not granted access to the sidetracks for loading, only to the servicing services, which meant that it was MÁV who shunt the wagons to and from the siding although MMV had its on locomotive.

MÁV ÁFU explained its behaviour with similar reasons as in the case of Bükkábrány, therefore those are unreasonable under the same argumentation as applied there. The circumstances are aggravated by the fact that MMV practically did not objected to the fees MÁV offered for the services, consequently it was solely MÁV ÁFU's attitude, which hindered the agreement. Refusing access to the sidetracks for loading qualifies as a competition law infringement, even if MMV's transport contract was finally not terminated by the shipper because of the delay. In the absence of any regulation to the contrary, MÁV ÁFU cannot pick certain services to provide, from the package of access to industrial sidetracks and the ancillary services. The obligation to grant access under competition law encompasses the whole service package related to industrial sidetracks.

With regard to its request for access at BILK terminal and connected services (including towing), Floyd found the one-time offer from MÁV ÁFU too high, therefore initiated negotiations in order to arrange that it can use the own locomotive for shunting the train on the terminal, while using only the crew of MÁV ÁFU. MÁV PV did not refuse this possibility by saying that servicing trains is possible without the involvement of MÁV ÁFU. Although MÁV PV promised, it did not make an offer. Negotiations between MÁV ÁFU and Floyd had been remained unsuccessful. Based on the above mentioned facts it can be established that a solution for the access held possible by one of the business units of MÁV (MÁV PV) was hindered by the behaviour of another business unit, MÁV ÁFU. Floyd concluded the agreement with WLB for continuous transports, therefore the conduct of MÁV ÁFU could not impede the transaction however it made the performance of it more difficult. There is no acceptable reason for this behaviour under competition law, therefore it qualifies as an infringement.

It can be established that the access to the industrial sidetrack at Uzsabánya station was partly delayed by the inaccurate registry of VPE, since the station has no public tracks for loading, consequently the available sidetracks are all industrial sidetracks. Following the modification of VPE's decision, MÁV ÁFU informed Floyd that only they have a valid servicing agreement with Basalt-Középkő for the sidetracks for loading, therefore anybody else intending to use these facilities have to agree with MÁV ÁFU concerning the joint usage. According to the findings of the investigation, although the transports began on 1 June 2005, due to the loading difficulties at Adony station, problems were solved only after the intervention of MÁV PV. Practically MÁV ÁFU's conduct aimed

and served here as well the delay of the access of a competitor, therefore qualifies as an abuse of dominant position.

With the refusal to deal or constructive refusal to deal MÁV ÁFU intended to use its controlling position over certain railway infrastructure to foreclose competitors and deter entry on the downstream market thereby strengthening its position on that same market. The dominant position on the upstream market was leveraged to the connected downstream market.

When evaluating refusal to deal cases, one has to find the balance between two legally protected interests. On the one hand dominant undertakings have the right of disposal concerning the own property, while on the other hand competition law provisions prescribe a special additional responsibility to dominant undertakings in order to protect the public interest connected to the maintenance of effective competition. A dominant undertaking can be condemned for the refusal to create or maintain business relations provided it cannot come up with an objective and reasonable explanation and the conduct has an appreciable negative effect on competition in the market.

MÁV did not explain its refusal with any such objective and, from a business point of view, reasonable justifications. In fact in the case of Bükkábrány, it expressly highlighted the fact that it considers the access detrimental to its business interests and sees no legal constraints, which would induce MÁV to enter into business relations with the competitors. The intent to maintain a dominant position cannot be accepted as a reasonable justification.

Margin squeeze

Telecom margin squeeze cases

Telecom margin squeeze cases illustrate the GVH's approach to margin squeeze best, since the decisions on them resulted in quite general conclusions on certain issues. The GVH's approach and tests used are basically in accord with that of the European Commission's Deutsche Telekom (2003/707/EC) case (even before Hungary joined the European Union in May 2004). Right after the first steps of market opening in the telecom sector (2002-2004), the GVH launched several cases concerning the telecom markets (broadband internet access (ADSL) and fixed line telephone services markets) in which the GVH introduced the concept of margin squeeze into the Hungarian case law. The GVH found abuse in only one of these cases.

Regarding margin squeeze proceedings concerning regulated sectors (such as telecoms), in order to evaluate the applicability of competition law, it is essential to analyse sector-related regulation from the point of view of whether and to what extent it gives a room to manoeuvre (freedom for action) for the incumbent to freely develop its market practice and make its pricing decisions. In certain cases, the competition authority may come to the conclusion that the restrictive market practice may be derived from regulation, as it restricted the freedom for action of the incumbent to an extent, which did not allow it to avoid margin squeeze within the framework of the regulation. For instance one of the interconnection margin squeeze cases was ceased because the GVH found that squeezing was caused by the regulation itself: both wholesale and retail prices were regulated, but retail prices by price caps, which ensured some elbow-room, thus competition law was applicable in theory. The GVH however found that the dominant firm exhausted almost all its possibilities within the price cap to increase prices, even if this was not sufficient to avoid squeezing.

The way in which the wholesale level of the ADSL service works (due to the single-point access), ensures little choice for the Internet service providers to make their pricing decisions, therefore the suspicion of margin squeeze arose in several occasions. That time the prices of ADSL services were not regulated, so the competition law was applicable. The GVH pursued two formal procedures against vertically integrated incumbent telecom operators in 2002 and 2003. One of the DSL cases[4] was closed because the squeezing could not be proved. In the other case[5] the squeezing itself could be established, but the GVH taking into account the contestability of the market and the long-term effects of the conduct terminated the procedure, finding that the undertaking could not in the future be capable of raising and permanently maintaining its retail prices above the competitive price level (so the recoupment stage was unlikely).

In 2002 and 2003 the GVH had two interconnection margin squeeze cases: first,[6] related to the business (hereinafter: Matáv business case), second,[7] to the residential market (hereinafter: Matáv residential case) against the largest fixed line operator, Matáv (which owns 39 primary areas in Hungary out of the 54 and provides all retail and wholesale voice services, and mobile, Internet and cable TV services as well). The alleged infringement was – inter alia – that the interconnection fees were higher than some retail tariffs of fixed line telephone services.

As to the regulatory environment of this interconnection margin squeeze cases: the first stage of market opening (liberalization) took place from the end of 2001 (with a telecom regulation based on the "old regulatory framework" of the EU). Wholesale interconnection prices became regulated from July 2002 (from the regulatory approval of reference interconnection offer – RIO, and reference unbundling offer – RUO), actually there was a duty to deal, and from July 2002 the conditions and prices of this wholesale deal were also regulated. As it was mentioned the retail prices were under a price cap, which provided a certain amount of freedom for action, which is a prerequisite for the applicability of competition law.

In these cases excessive pricing was excluded because it was very difficult in the telecommunication sector to properly determine costs of individual services. Moreover, under national competition law the GVH had no legal possibility to examine RIO and RUO charges as they were approved by the Communications Authority and therefore had to be considered as cost based prices.

Predatory pricing also was rejected by the GVH. In the business segment, based on the testimony procured from rivals predation was not presumed. Moreover, Matáv's operating revenues were too high to assume that its retail prices were below costs, and actually most of the revenues came from the residential market, so in spite of the delays in tariff rebalancing predatory pricing applied by Matáv was not probable. On the other hand, future recoupment of a presumed sacrificed profit was not likely, either.

Recoupment in the form of price increase was unlikely in the margin squeeze framework too, but the potential harmful effect of squeezing could also be that it would maintain higher prices and postpone entries (and at the same time the pressure to decrease prices). So the margin squeeze between wholesale and retail tariffs proved to be the only proper approach.

[4] Vj-124/2003
[5] Vj-101/2002
[6] Vj-100/2002
[7] Vj-73/2003

The GVH followed a market-oriented approach in its price-squeeze tests in these telecom margin squeeze cases. This means that when facing with various retail and/or wholesale offers, or multi-component fee structures, it did not performed its analysis by types of services or by fee components, but it analysed the overall relationship between the services and/or fee components belonging to - from a competition law perspective - the same downstream market and their counterparts on the upstream market.

At retail level the GVH defined the relevant market as the one for fixed line telephone services offered to business customers comprising access, local and national long distance call services and another one for fixed line telephone services offered to residential customers. Although the GVH admitted that theoretically the different call services and access services created distinct markets, it found that in practice there was no individual demand for these services, costumers took them together in one package.

The GVH first had to identify the wholesale contents of the retail packages' service components, in order to make prices of retail packages comparable with proper bundle of wholesale prices, doing so the GVH created a model in which wholesale (infrastructure-related) costs of the concerned services were built up from RIO and RUO price-elements. The call origination, call termination (and call transit) services (as the wholesale counterparts of retail calls), and LLU (local loop unbundling as the wholesale counterpart of retail access) were the relevant services at upstream (wholesale) level, which were taken into account in the calculation of the costs incurred by Matáv due to providing these retail packages.[8]

Other tariffs and fees[9] determined in the commercial contracts or in the RIO were omitted from the calculation because they do not occur if Matáv as a vertically integrated operator provides the retail services itself. So the GVH applied in its margin squeeze cases the so called 'as efficient competitor test'. According to the GVH in a margin squeeze test created for competition policy purposes the synergies and cost savings deriving from vertical integration must be taken into account (which is favourable for the incumbent). Regulation can apply more easily tests that reflect the intention to encourage the creation of, and establish the conditions for competition, as opposed to maintain the competitive status quo.

In the margin squeeze test the GVH first compared Matáv's monthly total income stemming from providing retail voice services to business or residential customers (including monthly rental and revenues of local and national long distance call services) to the estimated monthly wholesale costs of these services (including the monthly fee of local loop unbundling and the sum of the various interconnection services, i.e. origination and termination).[10] This difference was named as Spread I.

In Step 2 the GVH calculated the downstream costs of providing retail voice services, which included the costs of marketing, product, sales and active debts managements, billing and customer service. The retail cost data came from the firm's ABC (Activity-

[8] Matáv's dominant position could be established regarding call origination, call termination and local access services.

[9] For example prices charged for collocation or for the interconnection link between the incumbent and the downstream rivals.

[10] The notions total income and total cost mean that GVH did not compare the prices and costs of individual services or of an individual customer to each other but it calculated total revenues as the product of call charges and monthly call minutes plus the product of monthly rental and the number of subscribers, while total costs were calculated as the product of estimated wholesale costs of the different call types and monthly call minutes plus the product of monthly LLU fee and the number of subscribers.

Based Costing) accounting system. The difference of Spread I. and these downstream costs resulted in the determination of Spread II.

The GVH in the Matáv residential case used the direct costs allocated to the downstream service submitted by Matáv.

Results of the tests in the interconnection margin squeeze cases (return on revenues):

SEGMENT	PERIOD	SPREAD I.	SPREAD II.
Business market	February – July 2002	Negative	not applicable
	July 2002 – April 2003	about 10%	not applicable
Residential market	2002	3-7%	less than 1%
	January – September 2003	less than 10%	5-10%

The margin squeeze test showed that revenues from the provision of the retail business packages and offers had not covered the wholesale, infrastructure-related costs occurring due to these services from February 2002 to July 2002. In this period the margin proved to be negative, but afterwards, following the approval of the cost-based RIO tariffs this margin turned slightly positive, for lack of information on product specific or retail costs (in connection with the business segment) the GVH could not assess whether this positive margin had been sufficient in the sense that it could have covered all Matáv's relevant costs and expenditures and profit expectations. This calculation however revealed that the former negative margins had been caused by the unduly high wholesale prices in the commercially negotiated contracts which problem was solved by the intervention of the Communications Authority, i.e. by the approval of the RIO and the cost-based prices therein.

In the Matáv business case in spite of the above-mentioned relatively short time period and the efficient intervention of the Communications Authority the GVH established that Matáv applied abusive margin squeeze from February to July 2002 and thus infringed competition law, because its behaviour was capable of excluding competitors or hindering them in entering the market (actual exit or harm was not proved).[11] By deciding so the GVH admitted that under its effects based approach, as a rule of thumb to find margin squeeze as an abusive behaviour under competition law it should be exercised over a longer period of time (or a perspective of that should be realistic). At the same time, the GVH held that right after liberalisation even a shorter time period could be crucial for the evolvement of the competition (and could contribute to maintain the positions of the incumbent), so in the market-opening context this strategy of Matáv had to be judged more severely.

In this case the GVH established the infringement, and imposed a fine (HUF 70 million – approx. EUR 265 thousand), but did not apply any other remedy (since the changes in the regulation from July 2002 solved the problems).

[11] The above mentioned Vivendi DSL case was terminated since the recoupment was not probable, in this interconnection case the GVH held that the consequence of margin squeeze is not necessarily the increase in retail prices, but the exclusion of competition may result in the hindrance of a latter price decrease (that would be forced by the pressure of rivals) as a potential harm.

As regards the Matáv residential case it was established without further or deeper investigation that in 2002 Spread II. was not sufficient to cover the cost of capital (profit) relating to these services and thus hindered new entry.[12] However, the GVH established no infringement because this situation was mainly caused by regulation (fixed wholesale charges and price caps for retail services). Though price cap regulation does not in itself preclude the applicability of competition law but in this particular case the freedom for action granted by the price cap was(had been) insufficient for the incumbent to put an end to this margin squeeze.

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

   Both EC and Hungarian competition law is directly applicable before national courts, nevertheless the GVH is not aware of any case where a private party challenged a refusal to deal in court.

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

   a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

      As a general rule, and in line with EC law, competition problems arise when the dominant undertaking competes on the "downstream" market with the buyer whom it refuses to supply. The unnecessary intervention of competition authorities and the unjustified interference with the undertakings' right to choose trading partners and incentive to invest could lead to the undesired outcome where the application of competition law actually discourages competition instead of strengthening it.

      Preferably the alleged refusal should relate to a product or service that is objectively necessary to be able to compete effectively on a downstream market; the refusal should likely to lead to the elimination of effective competition on the downstream market; and the refusal should also likely to lead to consumer harm.

      Nevertheless, taking into account the specific circumstances of particular cases, the examination of the above described conditions might be less important.

      On the other hand it is not an abuse of dominance if a dominant manufacturer sets up a wholesaler to supply retailers and at the same time refuses to supply other wholesalers or supplies them only with the partition of their margin, supposed the behaviour does not endanger the supply of end users and the manufacturer remains able to supply the consumers in a manner which is customary in the commercial practice (case Vj-63/1997).

[12] It is clearly understandable that if return on revenues is less than 1% it could no way come up to the company's profit expectations.

The exclusion of an undertaking from the market is anticompetitive only if due to the exclusion competition is also restricted. This does not happen if the consumers cannot expect direct or indirect effects because of the exit of a wholesaler. Competition law protects the effective competition, which produces the most beneficial effects on consumers and not the existence of market actors (case Vj-10/2002).

In a supplier-buyer relation none of the parties has a right or position defended by competition law to create or maintain a preferential or exclusive contractual relationship. The refusal to create or maintain such a relationship is justified if it aims for the increase of efficiency or the replacement of a previously malfunctioning business partner (case Vj-41/2002).

b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?

In order to establish an infringement of competition law, likely effects on consumers have to be shown, since the requirement to show actual effects would be a very high standard of proof, which would set the bar too high for competition authorities and could lead to a number of Type I errors.

On the other hand, EC case law on abuse of dominant position produced some judgements, which seem to suggest a 'per se' like approach to certain abuses, where no effects have to be shown. For example *Michelin v Commission* illustrate this:

'[I]t is apparent from a consistent line of decisions that a loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article 82 EC'

Later the CFI says that:

'[I]t may be inferred generally from the case law that any loyalty-inducing rebate system applied by an undertaking in a dominant position has foreclosure effects prohibited by Article 82 EC.'

The wording of the Community Courts in this, and some other cases suggests a 'per se' like approach, which seems to contradict the Commission's recent initiatives on the review of Article 82. It is ultimately for Community Courts to determine whether a 'per se' like approach is applicable in Article 82 cases or a more economic based approach should be followed.

c. Does intent play a role, and if so what role and how is it demonstrated?

Abuse is an objective concept, and the conduct of an undertaking may be regarded as abusive in the absence of any fault and irrespective of the intention of the dominant undertaking. The scope of provisions on the prohibition of abuse of dominant position would obviously be reduced if it would be applied differently.

d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

The relevant Hungarian and EC rules do not require a prior course of dealing between the dominant undertaking and its customer for finding a liability for a refusal to deal. Whenever the goods or services in question are 'indispensable' for an undertaking to operate on a downstream market, the refusal will be unlawful. It is not regarded necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified.

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

The concept of refusal to deal also covers the refuse to provide access to essential facilities, there is no different legal concept in this regard. The 'essential facilities' doctrine is a type of refusal to supply generally connected to new customers.

If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

The duty to give access to an essential facility should be appropriately concerned and should be invoked only where a clear detriment to competition would follow from a refusal, since the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles. Any incursions on those rights require careful justification.

For there to be an abuse, it would have to be shown that refusal to grant access to the essential facility would be likely to eliminate all competition in the downstream market and that the upstream infrastructure/product/service was indispensable to carrying on business in the downstream market. It is important to assess whether there are any technical, legal, or economic obstacles that make it impossible for other undertakings to create the infrastructure/product/service of their own. In order to demonstrate that the creation of such an infrastructure/product/service is not a realistic potential alternative and that access to the existing one is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small scale operation of the competitor. For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish that it is not economically viable to create a second infrastructure for a competitor with comparable scale of operations.

Consequently an essential facility must be something that is incapable of being duplicated, or which could be duplicated only with great difficulty. In some cases duplication may be physically impossible. The impossibility of duplication may be legal, or it may also be that a facility cannot be duplicated for economic reasons. Economic non-duplicability asks whether the market is sufficiently large to sustain a second facility. The requirement of indispensability means that it is not sufficient that it would be convenient or useful to have access, access must be essential.

Unless the refusal concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers, there could be no finding of an abuse of dominant position.

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

The GVH has no experience with essential facility cases involving intellectual property.

a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

The primary concern of granting unjustified access to essential facilities is the consequence it might exert upon the owner's incentives to invest and innovate. However it might be clear that in certain cases imposing an obligation to grant access is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream. Where regulation already imposes an ex ante obligation to supply on the dominant undertaking, it is clear that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation. Another case, which would alleviate the negative effects on essential facility owners' incentives, might be at hand when the investment of the dominant undertaking has been realised with the help of state resource and under the protection of special or exclusive rights.

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

See the last sentence of the answer to question 11 above.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

Constructive refusal to deal might be an abuse of dominant position as well, see in particular the case against MÁV, described in our answer to question 6. In that case MÁV abused its dominant position by inter alia hindering, impeding and delaying access to non public industrial sidetracks. In this way MÁV put its downstream competitors in a disadvantageous position, thereby rendering it more difficult for them to accomplish their ongoing rail freight services, and to attract new business. The final aim of MÁV was to obtain an unjustified advantage on the newly liberalised rail freight market by placing

rivals at a disadvantage. The GVH took into account all the circumstances of the case, the legal and economic environment in which the conduct of MÁV was performed.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

    You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

    See the telecom margin squeeze cases at question 6.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

    In our answer to question 8 we explained that certain elements of the case law suggests that there is a 'per se' approach concerning the application of Article 82 EC in relation to particular abuses. As we said, it is ultimately for Community Courts to determine whether a 'per se' like approach is applicable in Article 82 cases or a more economic based approach should be followed. Nevertheless, even if there would be a 'per se' approach in certain cases, the presumption of illegality can be rebutted by a defence of objective justification (see answer to question 17).

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

    There is no specific safe harbour for a refusal to deal.

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

    Abusive conduct may escape the prohibition of Article 82 if the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant

company. It is for the company invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied.

The Community Courts have considered that defending own commercial and economic interests in the face of action taken by certain competitors may be a legitimate aim. This is the so called meeting competition defence. The fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it. The meeting competition defence will only apply if it is shown that the response is suitable, indispensable and proportionate. This requires that there are no other economically practicable and less anti-competitive alternatives.

A dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

Besides the general types of decisions in which the Competition Council may establish that 'the conduct is unlawful' / 'order a situation violating to the Competition Act to be eliminated' / 'prohibit the continuation of the conduct which violates the provisions of the Competition Act' there is a 'specific' type of decision (point g) of Article 77(1)) which can be applied in refusal to supply cases. According to that point where the Competition Council finds that there is an infringement of the law, it may impose obligations including in particular the obligation of a contract to be concluded where an unjustified refusal to create or maintain business relations appropriate for the type of the transaction (point c) of Article 21) has been found.

Under the above-mentioned provision the Competition Council has the discretion to impose any kind of obligation which can remedy the infringement deriving from the refusal. There were several examples when the Competition Council imposed a case-specific obligation in a refusal to deal or margin squeeze case:

In case Vj-155/2002 the Competition Council obliged the infringing undertaking to eliminate the unnecessary conditions.

In another case the infringing undertaking voluntarily changed its behaviour during the proceeding, therefore the Competition Council did not have to prescribe special obligations.

In case Vj-118/2004 the Competition Council drew the infringing undertaking's attention to the fact that although the Competition Council does not have the possibility to determine the fair amount of the fee, if in the future, the infringer would not take into account the decision of the Competition Council when determining the fee, the proceeding can be repeated (and recidivism would be considered as an aggravating circumstance).

In another instance the Competition Council obliged – with setting a time limit – the infringer to react in writing to the contract offer it received.

On one occasion the Competition Council obliged the infringer to create the legal environment to supply its service to whomsoever (and against whom there is no justifiable reason for non-supplying) where it is technically possible.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

    Although the GVH has to pay great attention to the sectoral regulation when it investigates a case in a regulated industry, the available remedies are exactly the same as in the case of a non-regulated industry case.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.

    No. The remedies which can be used by the GVH are determined in the Competition Act. However, there is some room for discretion in prescribing the obligations under point g) of Article 77(1).

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

    See answers to questions 7, 9 and 11.

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.