Competition Enforcement in the Recently Acceded Member States

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Keynote Address by Zoltán Nagy, President of Gazdasági Versenyhivatal

Good Morning, Ladies and Gentlemen, Dear Speakers, dear Participants,

Time is flying. It has been five years since Hungary and nine other countries joined the European Union, and more than two years have passed since the accession of Romania and Bulgaria. Now we have an ample perspective to look back.

In my speech I will first reiterate some of the general experiences of the accession. Then I shall elaborate on the challenges faced by the Gazdasági Versenyhivatal, the Hungarian Competition Authority, while showing some common characteristics of enforcement in the recently acceded EU members.

Let's look back to 2004. The EU accession did not come as a shock for competition authorities in the newly acceding member states. The transition was rather smooth, for a number of reasons.

First of all, the new EU members have used competition policy institutions and acquired an enforcement experience for a long time. Countries that switched a socialist economy to the market economy considered it natural to establish the institution dedicated to the protection of competition itself. It could thus happen that as the Bulgarian, Czech, Slovak, Hungarian, Polish authorities were established around 1990-1991, these authorities preceded some competition authorities in Western Europe. You may recall that the Italian competition authority was established in 1990, the Swedish Konkurrensverket in 1992, and the Dutch NMa in 1998.

Second, competition authority officials were well prepared for the change, they were aware of the EC enforcement standard. We owe that to a large extent to the diligence of the European Commission. The Commission devoted large efforts on getting acquainted the new member states with European competition enforcement, provided trainings, and involved the ten new member states that joined the EU in 2004 in the work of the European Competition Network as soon as it was set up in 2002.

Third, every candidate country made great efforts to align their national regulations with EC regulation. While various EC, German, American legal solutions were inspiring the first competition laws in the region around 1990, the single point of focus became EC law as soon as the accession agreements to the EU were signed. Law harmonisation between the EC and the new member states was not in fact a mutual approximation. Rather meant that the new member states adopted EC regulations as they were and EC competition regulations did not come closer towards the practices in new member states. This adoption had the interesting effect, that in 2004 the regulations of newly acceded member states were much more brought into line with EC regulations, than the regulations in many of the older member states.

Does competition policy in the recently acceded member states have special characteristics? It is certainly true that we face similar challenges, and our reactions are often similar. Let's see some of these challenges.

Building a competition culture is certainly a challenge for the new member states. There is a crucial difference between most Western European countries and some of the newly acceded member states. Although the competition policy institutions had been in place for quite some time in many newly acceding countries, something crucial

was missing in many places. That is the convenient level of competition culture and a culture of compliance. In some newly acceding countries, and I certainly mean Hungary, people have often been sceptical about the benefits of competition, and were ignorant of the competition regulations. Moreover, voluntary compliance of any regulation, let alone competition law, has often been lower. The need to explain that competition is beneficial is something that has been absent in many Western European countries. Or, I should say, had been absent until the financial crisis struck.

I heard on a conference John Fingleton, the head of the Office of Fair Trading, to complain that because of the crisis they face a totally new situation. The UK competition authority is forced to explain what was taken so far granted that competition is good. Well, I thought, we knew that, the constant need of explaining has been our life experience, and probably that's why the financial crisis has not yet brought a culture shock here.

It is understandable then that the Hungarian Competition Authority is doing everything to improve competition culture, and this is the reason why we established our Competition Culture Centre in 2005. This Centre funds competition related research, conferences, publishes books and articles on competition. I am sure that many of you directly benefited from this practice. Let's see some examples. Some of you may have already read Massimo Motta's Competition policy or The Power of productivity by Lewis, two books that we published in Hungarian. And you may be happy to hear that the Hungarian translation of "Competition Policy" by Richard Whish is expected to be published at the beginning of next year.

We know that other authorities in the region also take the development of competition culture efforts in their heart. Various authorities run information campaigns, organize conferences or hold essay-competitions for students. The Polish competition authority even rewards journalists who write outstanding articles on competition related issues.

Beyond that we can generally say that most of the challenges competition authorities face are universal. Now I would like to describe four such general challenges.

The first universal challenge: keeping the competition authority and competition policy transparent. We not only support competition related research, we do our best to explain, why and how we proceed. We publish each year an annual report that describes our activity in depth. The Hungarian report on year 2008 will be published in some weeks. Moreover, we disclosed the policy principles that we consider in our competition and consumer protection activities. If you are interested how we set priorities, how we decide on how to intervene, the fundamental policy principles is on our website for you. We also published notices on how we apply remedies, on how we differentiate between first and second phase mergers.

Remaining transparent is a never-ending exercise. And we try to live up to the challenge. Our notice on leniency will be updated soon, before the amendments to the Competition Act will enter into force in first of June. As a result you will see an invigorated leniency regime that will provide even more rewards for leniency applicants. And you may see the notice on fining updated soon, provided how the Supreme Court decides on a case where the Appeal Court of Budapest disproved some of what it saw as rigidities in the fining guidelines.

What else are we doing for transparency? Each year we publish the position statements of our Competition Council – a collection of the 'strong statements' from various decisions that help you know how we interpret various legal concepts. And as for the provision of soft information: the Competition Mirror (in Hungarian: Versenytükör) magazine we publish four times each year provides up-to-date

information on various competition policy related issues. This magazine serves as a real hub for information exchange. As every issue includes contributions not only from competition authority colleagues, but lawyers, university professors and other experts. You may find this, as all the previously mentioned documents on our website.

We are also open to dialogue, if you have suggestions how we should work, we are happy if you come and explain, and we will consider it.

We are of course not alone in our quest to operate transparently, as you may observe from the various notices published on DG COMP's website. Many of those notices help those of you, who represent companies before national competition authorities to prepare your views, as although DG COMP's notices may not be legally binding for the Member States, they are certainly considered, often in national cases as well.

The second universal challenge: achieving actual compliance with the regulations. We not only spread competition culture by the word. We do our best to motivate companies and lawyers to actively look for competition policy related information and to comply with the regulations. Companies that indulge in anticompetitive practices, who form cartels, who abuse their dominant position or who use unfair commercial practices have to face high fines and see their names on newspaper headlines.

As achieving compliance with cartel regulations is one of our top priorities. Written or tacit cartel agreements directly harm consumers, raise prices and reduce consumer choice. No wonder, that we impose fines that reflect the harmfulness of these practices. And it is not just the fines why it may be better not to engage in a cartel. The carteling company who was fined by the GVH may be excluded from public procurement. That happened already to some companies in some cases.

Adding another piece. A prison cell is surely not a very lucrative opportunity. Hence it may be important to know that the company manager responsible for bid rigging in a public procurement tender may end up in jail, serving a prison sentence of up to five years.

I read an article in The Economist two weeks ago. It is entitled "White-collar prisoners. How not to get stuck in jail. A service from some of our readers?". It is about a man who founded a firm, which teaches white-collar criminals how to survive prison. His rate starts at 999 US dollars. I have not heard about similar consultancy services in Central and Eastern Europe, but as criminal enforcement of competition regulations in the EU is on the rise. English managers are extradited from the US to face trial in the United Kingdom, this time may not be far away. The GVH itself reported a crime three times to the police, and will do its best to inform the police about individual managers' responsibility.

Fines, exclusion from public procurement, bad publicity, prison – at least four reasons why participating in a cartel results in much larger long run costs than the small gains in the short run. And even now, a company manager who was responsible for cartel activity will have to renounce certain jobs with a high public profile.

Every Hungarian here knows what happened to Mr. Tamas Vahl, who had to renounce to become Minister of Economy just this April. His company, SAP Hungary, was fined three times for cartel activity, bid rigging of IT tenders while he was the CEO. But for the biggest bashing he had to wait until now. As soon as he was appointed to become Minister of Economy, and his responsibility for cartels became widely known, such a public uproar followed that he had to withdraw just after two days. I would like to express my gratitude for the Prime Minister to accept the cartelist manager's

withdrawal. With his prudent decision he set a good example for the business community, sending a clear message: cartels are not to be tolerated.

All these negative consequences for companies and for managers who engage in cartels are real. We have uncovered many important cartels since 2003. So far all these cartel decisions have been upheld by the courts in their substance, and there was not significant reduction in the fines.

Hence it is most profitable for companies not to cartel. And if a company already participates in a cartel, it is best to tell about it to the competition authority in a leniency application. Any firm participating in a cartel may apply for immunity from the fine if it provides meaningful information on a cartel, but only the first informant will get full immunity. Moreover, filing a leniency application properly also defends the responsible manager from the jail, and a leniency applicant who received full immunity also does not have to fear exclusion from public procurement! If a lawyer wants to save his client's money and time, he encourages it to apply for leniency. Provided that the lawyer does not want to see that client in prison.

Leniency applicants will also receive stronger protection in private damages claims after the amendments of the Competition Act enter into force in June. A firm making a leniency application will only have to pay damages if the plaintiffs cannot seek compensation from the other cartelists. If the company received full immunity, the damages procedure against this leniency applicant will be suspended until final judgement has been pronounced in the case. This will be a very valuable feature, as carteling companies will likely face more private damages, as from June plaintiffs will be helped by a legal presumption that the hardcore cartel has caused a price increase of 10%. Hence, cartelists will have to face a high level of public and an increased private enforcement.

The institutional machinery behind cartel policy is similar all over the world: leniency policy is introduced almost everywhere. In 2008 and 2009 leniency programs were renewed or introduced in Bulgaria, Lithuania, Poland, Slovakia and of course Hungary. In fact, all European competition authorities accepted to introduce a leniency program along the lines of the ECN leniency model program. Moreover, cartel enforcement expertise is often concentrated within the authority. Competition authority departments specialising on cartels became more and more widespread – similarly to the GVH for example the Bulgarian, Czech or Lithuanian authority also have a specialised anti-cartel unit, just as the European Commission.

Not only agreements between competitors are unlawful of course, agreements between producer and seller, the vertical agreements, may also seriously harm competition. To cite a harmful example, last year the Polish authority found that paint producers concluded prohibited agreements fixing minimal prices of paints.

Although cartels are our and many competition authority's number one priority, we do not only act against cartels. You will hear other lecturers about our abuse of dominance policies later in this conference.

The third universal challenge: reducing cost of compliance and enforcement. We do not primarily aim at punishment. As I said previously, we provide information to help companies and their lawyers to acknowledge what is legal and what is prohibited. Moreover, we provide leeways for companies to escape the negative consequences for what they have done, provided that they cooperate with us. I have already mentioned our leniency policy that is under review now. Another field we offer cost reduction is our openness to settlements. Companies that offer undertakings during the proceeding to rectify the harm they have done can shorten the duration of the legal battle, spare

paying fines and can avoid their name tarnished by ‘having found to have abused the law’, as commitment injunctions do not mean that abuse was established. In 2008 out of 116 Competition Council resolutions 62 established infringement and in 10 cases commitment injunctions were issued without establishing infringement.

In general, a uniform application of competition law in the whole EU creates legal certainty and reduces cost of compliance for business. Hence a good international cooperation between national authorities and the European Commission is also in the interest of the companies, and on our part we are doing our best to promote good cooperation.

The fourth universal challenge: making the right decisions. The competition authority’s actions must stand the public interest test: they have to improve and not reduce social welfare. To make sure that this will be the result, we have put more and more emphasis on making our decisions well founded in economics, to adopt an effects based approach. In this line, in 2006 we have appointed a Chief Economist, who has been very active in the investigation of numerous merger, abuse of dominance and even in some cartel cases. In order to improve the economic foundations, with the amendment of the Hungarian Competition Act entering in force on the first of June this year, the dominance test in mergers will be replaced by the SIEC/SLC test. Once again, it is the strengthening of our economics based approach that explains the change in the legal standard for merger assessment. The change is, in short, that after the adoption of the amendment the GVH will apply the Significant Impediment to Competition or SIEC (otherwise known as Substantial Lessening of Competition or SLC) test instead of the so far applied dominance test. The most important thing is that with the SIEC test the focus of merger investigation will move to the direct merger effects, to the effects on prices and consumer welfare. The so-far applied dominant dominance test was much more centred on market structure and change of market structure.

All the European competition authorities moved toward a more economic approach, following DG Competition, appointing chief economists and applying better economic analysis. This led to a change in legal practice and in regulations as well. For example, the way market shares are looked upon is considerably different now. Earlier, a high market share was considered almost as a proof for dominance. Some countries even had legal presumptions that a market share above a moderate value identifies a dominant position – in Bulgaria 35% market share, in Latvia 40% market share led to a presumption of dominance. Now instead of seeing high market shares as evidence of dominance, low market shares are considered as strong indications of non-existence of dominance. The European Commission noted in its guidance on Article 82, that a company with a market share below 40% is unlikely to have dominance. Although it is maintained that market shares give a good first impression of whether dominance exists, now changes in market shares, and existence of barriers to entry and expansion are also considered with an important weight.

A well operating competition authority has huge benefits for consumers. And these benefits do not stop at the border. Hungarian consumers benefit from not just the Hungarian competition authority’s actions. If a competition authority cracks down on a cartel, prices decline, and consumers in other countries benefit as well.

Making the right decisions also mean making the decisions that are appropriate in the actual legal framework, in other word decisions that are upheld by the courts. In this respect the Hungarian Competition Authority fares well, as well over 80% of our appealed decisions are upheld by the courts.

We need to tackle all the one plus four challenges I have mentioned. And with cooperating with other competition authorities, and with consumer organisations, lawyers, academia, we certainly can do a better job.

All these challenges arise for different competition authorities, but their experiences and their capacity to deal with the problems differ widely. I think that authorities that are in a relatively better position shall help others that are less lucky, be either new EU members, or authorities which operate in not yet EU-member countries. This follows also from what I have explained earlier, efficient and fair competition in all our trading partners is in our common interest. We have to do competition policy on the right way so that it really should be competition policy and not anti-competition policy. This is why the Hungarian Competition Authority established in 2005 a Regional Centre for Competition together with the OECD. This Centre helps to improve competition policy and spread best practice in the region. Since the inauguration of the Regional Centre, we have organised events for more than one thousand participants: judges, officials of competition and regulatory authorities in the East, South-East and Central European region. I am sure at least a handful of you have already participated on these events.

I have enumerated some common challenges all competition authorities in the region face. The global economic crisis requires global solutions. The existence of the European Union and the Community institutions help coordinating national actions and provide a supranational venue for action. We have an excellent institutional framework with the European Competition Network. The European Commission noted in a report published on the 30 of April that “Five years of experience of work-sharing within the ECN have clearly demonstrated and confirmed the well-functioning of the flexible and pragmatic approach introduced by Regulation 1/2003”.

Ladies and gentlemen, we are on the right road, but we need to go further, and building competition culture, focusing on authority enforcement capacity, on deterrence and using the opportunities of international cooperation and cooperation with other stakeholders in our countries are certainly key for success.

I think this conference offers a wonderful opportunity to promote these aims.

I am very happy to be here with you and I look forward to the interesting lectures and ensuing discussion.

Thank you very much for your attention.