The Hungarian Competition Authority
Budapest, Hungary

Annual Report on Competition Law and Policy Developments in Hungary (January – December 2004)

According to Article 36(2)(c) of the Hungarian Competition Act, the President of the Gazdasági Versenyhivatal ("GVH" – the Hungarian Competition Authority) submits an annual report to Parliament on the activities of the GVH on the basis of the law-enforcement practice of the year concerned.

The Report

2004 was the fourteenth year of the operation of the Gazdasági Versenyhivatal and proved to be particularly important in several respects. It saw some landmark decisions of the authority, the accession of the country to the European Union – bringing in its wake all the concomitant changes in the competition law enforcement field – as well as the commencement of a number of essential competition advocacy actions.

As regards enforcement in 2004, the GVH concentrated on hardcore cartels. Seven competition supervision proceedings were closed in the category of bid-rigging with a public procurement background in the construction industry. The Competition Council (the decision-making body of the GVH) made several decisions resulting in fines, with the highest fine (HUF 7 billion – EUR 28.6 million) being imposed in one of these cases. The leniency policy elaborated by the GVH also entered into force in this year and the first leniency applications resulted in a few proceedings for the authority.

The accession of the country to the European Union brought new responsibilities for the GVH. The direct application of EC competition rules by the national competition authority is clearly the most important of the changes generated by the accession. Through a process of awareness preparation conducted during previous years, the first few months of the year were dedicated to the fine-tuning of this preparation and, from 1 May, the GVH began to apply EC law. During the rest of the year, four cases were commenced under EC rules. Given the fact that the violations in each of these cases began before 1 May 2004, these cases were

brought on parallel legal bases – the proceedings were conducted under both EC and Hungarian competition laws.

Being additionally responsible for the enforcement of rules on consumer fraud, the GVH in 2004 faced several instances of misleading advertisements concerning the curative effects attributable to certain medical products.

In the advocacy field, there were two actions to which attention should be drawn. One of them concerned professional services. The self regulations of several interest groups were surveyed and this exercise led – in some of the professions – to a voluntary adjustment of their rules. However, in the case of some of these interest groups, the GVH had to initiate competition supervision proceedings since the consultations on their self-regulatory rules did not achieve the expected results. The other example for the competition advocacy activities of the GVH was in the field of communications. The GVH closely co-operated with the National Communications Authority, through which the GVH participated in the analysis of the electronic communications markets and in the identification of significant market powers ("SMPs") for the purposes of an *ex ante* regulation.

More information may be found in this Report which is based upon the 2004 Annual Report of the GVH prepared for Parliament on the Authority's activities.

1. Brief introduction about Hungarian market developments and related issues

1.1. Summary of major market developments in 2004

In 2004 the strong national currency and generally the EU accession contributed to the increase of **import competition**, as this made foreign products more accessible and more easily tradable. This was especially felt on the agricultural and food-products' markets. In particular producers from Eastern Central Europe gained markets at the expense of Hungarian producers, which indicates structural problems in the industry.

In the **electricity industry** the ongoing market opening continued. From July 2004 all non-residential customers have had the possibility of buying electricity either from the market supplied by public utilities or from the liberalised market. Motivated by the slowness of the market opening and in order to understand better the functioning of the market, the GVH initiated a sector investigation into the electricity market in 2004.

Also in 2004 the **natural gas market** was liberalised. As from 1 January gas power plants and large customers, and, as from 1 July all non-residential customers, were allowed to choose their source of supply. On the tender for the partial disposal of MOL's (Hungarian Oil Company) subsidiaries dealing with the wholesale, transport and storage of natural gas, E.on, a vertically-integrated energy company gave the most favourable offer. The European Commission will assess the deal due to the Community dimension of the transaction.

With EU accession, partial liberalisation commenced in the **railway industry** as well. Shortly after the date of accession, three new private railway companies entered the Hungarian market. The new entrants faced difficulties on the market which could make it necessary to modify the regulatory environment.

In the **air transport** sector, the number and traffic volume of no-frills airlines increased substantially during 2004, which also had a beneficial effect on the traffic volumes of the Hungarian flag carrier Malév. Both the number of passengers at and the cargo volume of Budapest Ferihegy Airport increased well above the European industry average.

In the financial sector, the process of establishing a bank affiliate and the provision of cross-border services were largely simplified. As a result, nearly 50 credit institutions announced their intention to offer their services on the Hungarian market: nevertheless the effects of actual service provision were still not perceptible in 2004. Due to mergers in the sector, concentration increased. On the market of products used by the corporate sector, market players are in close competition; competition concerning retail services is, however, less intense. The growth of **insurance markets** continued owing to increased real estate and car purchases and also due to increasing **private** savings.

In the segment of daily newspapers within the market of **printed media**, market conditions changed substantially in 2004. The Axel Springer Group, which had had interests so far only in county newspapers and magazines, appeared in October 2004 in this segment with "*Reggel*." The publisher Ringier Kiadó decided at the end of the year to sell *Magyar Hírlap*, while its **attempt** to acquire control over *Népszabadság*, the biggest newspaper on the market, was still pending due to the authorisation proceedings of the GVH. In short, market participants are in close competition on the printed media market.

Although growth in the **retail trade sector** continued, the structure of the sector was transformed. The number of retail food outlets substantially dropped, while the number of shops selling books, newspapers, furniture or building materials increased. As a result of a change in consumer purchasing habits, the role of hypermarkets and specialised department stores was enhanced.

On the **market of fixed-line telecommunications**, with the appearance of a new entity, the Swedish Tele2, competition became fiercer as the new entrant managed to gain over 200.000 customers. Nevertheless the tendency of falling subscriber numbers in respect of fixed-line services remained unchanged, and the operators' strategic aim was to retain customers. The latter task has become increasingly difficult since, in addition to the challenge from competing mobile phone services, the largest cable network operator, UPC, launched its voice telephony services, thereby entering the market.

Mobile phone penetration reached 85%, competition is still lively on the market. Operators used aggressive advertising campaigns to gain new customers, which often resulted in investigations by the GVH for alleged unfair manipulation of consumer choice.

Broadband **Internet services** are rapidly spreading while the significance of narrowband services is continuously falling. Finally, the cable TV infrastructure is becoming a real alternative both for broadband Internet and for voice telephony services.

1.2. Changes to the legal environment

The changes in the legal environment in 2004 were dominated by **EU accession**, the primary source of new legislation in the field of competition law. Before accession, during the first four months of the year, the Europe Agreement[1] was still in force. In this period, as a consequence of the **law harmonisation** obligation of Hungary and as the last development in the harmonisation process, two block exemption Regulations were enacted in the form of government decrees (on the exemption from the prohibition on restriction of competition of certain groups of insurance agreements, and on the exemption from the prohibition on restriction of competition of certain categories of vertical agreements in the motor vehicle sector).

The provisions of **Act XXXI of 2003** amending the Competition Act also entered into force. The amendment contained rules allowing the GVH to perform its tasks as a competition authority of a Member State, and were therefore mainly of a procedural nature.

Pursuant to Article 36(6) of the Competition Act, the President of the GVH, together with the President of the Competition Council, may issue Notices explaining the foundations of the law-enforcement practice of the GVH. The first three of such Notices (on considerations in differentiating between concentrations subject to authorisation in simplified or full procedures; on the method of setting fines in antitrust cases; and on the application of the leniency policy of the GVH) were adopted on 15 December 2003. Such Notices have no binding force: their function is to state how the law enforcer will apply the legal provisions, summarising past experience and outlining the practice to be followed in the future. This explains why they do not explicitly indicate the date of their entry into force (and even the Leniency Notice says it will also be applied "to competition supervision proceedings pending at the time of its publication"). It follows, however, from the date of the adoption of the three Notices mentioned above that, in effect, businesses and the general public only became aware of their message from the beginning of 2004.

In 2004, besides the developments resulting from EU accession, the President of the GVH together with the President of the Competition Council issued a Notice by which the GVH temporarily relaxed the conditions of its leniency programme announced in 2003. The GVH expected undertakings to be ready to reconsider their activities and restrictive practices pursued before Hungary's accession in order to enable them to start with a clean sheet. The temporary relaxation of the conditions therefore only concerned agreements concluded before 1 May 2004 and revealed before 1 October 2004. Based on the Notice, undertakings giving information as second or third in the row could still obtain reductions in fines greater than those under the normal leniency programme.

Finally, the GVH published a **draft Notice on the method of imposing fines in cases of unfair manipulation of consumer choice**. The document will be finalised, taking into consideration the comments received.

[1] EC/Hungary Europe Agreement – the association agreement of Hungary to the EC

1.3. Direct effects of EU accession

With EU accession, the competition rules contained in the EC Treaty and the relevant secondary legislation became directly applicable to Hungarian undertakings. Simultaneously with accession, the reform of the EU procedural rules also entered into force enabling the decentralised application of the competition provisions. Since 1 May, the GVH must apply Articles 81 and 82 of the EC Treaty in every case where it applies the Hungarian Competition Act and the alleged infringement is liable to have an effect on trade between Member States. Of course, it is possible to apply only Articles 81 and 82 or, in cases without any effect on trade, only the Hungarian provisions.

EU accession also brought changes in the field of merger control. As a consequence of the EU having jurisdiction in cases with a Community dimension under the EC Merger Regulation, these transactions do not have to be notified to the GVH, even if they would exceed the thresholds given by the Competition Act. Under the "one-stop shop" principle, cases with a Community dimension are dealt with by the European Commission without the need for national competition authorities to proceed.

After Hungary's accession to the European Union and under the circumstances of membership, the law harmonisation obligation of the country was replaced by the approximation rationale. This means that unless national interest otherwise justifies, it will also be worth aligning national norms to those of the EC in the future. Legal certainty is best promoted by further ensuring national and European competition laws are the same or at least very similar to each other.

2. Enforcement of competition law and policies

In 2004, 186 **competition supervision proceedings were closed by the GVH**, all except one of which were closed by a decision of the Competition Council. These decisions concerned 63 cases brought against unfair manipulation of consumer choice, and 121 antitrust and merger cases. There was one mixed case, too.

In its decisions on the substance of the case, the Competition Council of the GVH imposed **fines** in 48 cases. These fines amounted to HUF 8,888.9 million (EUR 36 million), rising significantly above the fines of the preceding years (HUF 444.15 million equal to EUR 1.8 million and HUF 792.4 million equal to EUR 3.2 million, imposed in annually40 cases in the period of 2002-, respectively).
The outstanding high amount of fines can be attributed in the first place to the fact that the motorway cartel case (Vj-27/2003) ended with the imposition of a HUF 7,043 million (EUR 28.6 million) fine. However, the total amount of the fines imposed in the other cases was also a record in itself.

Due to Hungary's accession to the European Union, in addition to the application of competition law as a part of Hungarian law, the GVH also fulfils duties in connection with the **application of Community competition law**. None of the four competition supervision proceedings launched in 2004 on the basis of Community competition law have been closed

yet. Through the co-operation within the European Competition Network ("ECN"), the GVH receives direct and up-to-date information about the cases launched by the Commission and by other Member States, and supplies information about its own cases.

In connection with Community mergers, the GVH may give an opinion on **concentrations**, especially regarding their effect on the Hungarian market and, when market effects focus on the Hungarian market, the GVH may express its intention that it would like to have the case transferred to it from the Commission. In 2004, the GVH did not request any cases to be referred back to it.

Through accession, the GVH also became a member of the two **advisory committees** operated by the European Commission and comprising the competition authorities of the Member States, which assume responsibilities in respect of cases of mergers, restrictive agreements and abuses of dominant positions.

2.1.Restrictive agreements

In 2004, 28 decisions were made on restrictions of competition. Twenty proceedings were initiated *ex officio* and eight were based on applications for exemption. The GVH intervened in 12 cases and it imposed fines in 8 of those cases. The total amount of the fines was HUF 8397.7 million (equal to EUR 33.59 million), an amount almost 13.5 times greater than that imposed in the preceding year.

Based on the Joint Notice No. 3/2003 of the President of the Hungarian Competition Authority and the President of the Competition Council on the application of a leniency policy to promote the detection of cartels, leniency was applied for in a few cases. One of these cases was already closed by the decision of the Competition Council.

In 2004, the most important cases concerned public procurement proceedings in the construction sector where bidders concluded restrictive agreements. Seven competition supervision proceedings were initiated in order to discover restrictive agreements concluded prior to the submission of a bid between potential bidders.

In 2002, four public procurement procedures had been published for the road and tramway **reconstruction of the junction at Bartók Béla street and Bocskai street** in Budapest in connection with the preparation of Line 4 of the Underground. The GVH commenced competition supervision proceedings[2] against eight construction firms after the suspicion had arisen that they had displayed conduct, which had restricted economic competition in the offering phase of these tenders. The bidders had submitted their bids in different capacities: either in the capacity as competing bidders or as lawfully co-operating partners (e.g. as main or subcontractors or consortium members).

The Competition Council established unlawful concerted action in relation to the bidding process among bidders, because it was proven that three of the eight undertakings (Strabag, Ring and EGUT) had used the legal forms of co-operation in order to give and receive information to/from each other; moreover the three undertakings mentioned had contacted

[2] Vj-138/2002.

each other directly before submitting their bids in a way that was apt to influence the market conduct of competing bidders. In the view of the Competition Council business interest, which creates and governs competition, presupposes that each bidder of a tender (the competitors), where they observe the provisions of the law, decide their market conduct independently. That is to say, they preclude all direct or indirect connections which, by their object or effect, influence or may influence or are intended to influence the market conduct of competitors.

Considering all these aspects, the Competition Council found the abovementioned conduct to restrict economic competition and hence to infringe the Competition Act. Therefore it imposed a fine, totalling HUF 245 million (equal to EUR 0.98 million) on the three parties to the case.

In 2002, public procurement procedures were conducted, in the framework of which the National Motorway Co. ("NM") invited undertakings to submit offers for the **construction works for particular motorway sections** which concerned, in total, a length of 59.91 km and a growth value of HUF 160 billion (approximately EUR 64 million). After the invitational public procurement procedure published in July 2002 had been declared inconclusive, the NM started four open pre-qualification public procurement procedures in August 2002. As a result of these procedures, different bidders won each of the tenders.

The GVH commenced *ex officio* proceedings in February 2003[3] in order to establish whether those undertakings submitting bids (Betonút, Strabag, EGUT, Hídépítő and DEBUT) had colluded during the open pre-qualification procedure (with a qualitative preliminary selection of the candidates). The proceedings were later extended to include the invitational procedure in which the same works had been put out to tender in July.

Based on evidence, the Competition Council established that the abovementioned firms had previously agreed between themselves as to the identity of the tenderer acquiring the construction works contract for the particular motorway sections and of the tenderer which would be let in by the general contractor as a subcontractor into the construction works. The market distorting effect of the collusion was significant since every large undertaking had participated that could have been expected to meet the conditions to be fulfilled by candidates set out in the invitation. The Competition Council imposed a fine totalling HUF 7.043 billion (equal to EUR 28.17 million) on the parties to the case, since cartels of this type are considered as such to be subject to sanction in the most severe way and it was also taken into consideration, in compliance with the earlier decisions of the Competition Council, that the infringement concerned the utilisation of public means.

In April 2002 the Ministry of Education published a call for public procurement for the construction of a **multifunctional centre** – including educational and service buildings and an IT centre – **for the students of Kaposvár University**. Among other undertakings Középületépítő and Baucont also made a bid. Baucont made its bid in a consortium with Klima-Vill.

During the competition supervision proceedings[4] it was found that, before they would have made their final bid, Baucont and Középületépítő had made an agreement that, if either of them won, the winner would compensate the loser by concluding a subcontract with it or by

[3] Vj-27/2003.
[4] Vj-154/2002.

granting financial compensation to it. The GVH obtained the subcontracting "mirror-contracts" of this agreement which had the same content but with the position of the same parties to them reversed. The Act on Public Procurement does not prohibit undertakings from making bids in the same tender procedure and involving each other in the completion of the project if technological or capacity utilisation aspects make this rational and this practice in itself does not violate competition law. However such an involvement can only be initiated after the publication of the public procurement decision. These secret mirror-contracts concluded during the public procurement procedure or before the publication of the decision could not be justified from the viewpoint of either technological or capacity utilisation. Consequently their aim was clearly to reduce the risk of losing. Therefore the Competition Council imposed a total fine of HUF 149 million (equal to EUR 1.19 million) on Baucont and Középületépítő.

The GVH found a similar infringement in connection with the open pre-qualification public procurement procedure for the complete reconstruction, renovation, building contractors' and sub-construction works of the seat of the **Hungarian Pensions Insurance Authority**.[5] The first public procurement procedure was conducted in January 2002 but it was declared inconclusive and a new tender was announced later in the same year. Four undertakings put forward their application for the tender, three of which (Középületépítő, Baucont and ÉPKER) were invited to submit their bids. However the company KÉSZ, the fourth participant of the first round of the public procurement procedure, objected to the decision at the Public Procurement Arbitration Committee.

The investigation found that Baucont and ÉPKER had concluded an agreement before the second round of the tender, which provided the losing party, in case the other party would win, with a subcontract assignment and financial compensation. Later, Baucont and ÉPKER also involved KÉSZ in their agreement which, in return, withdrew its objections; thereby it became a party to the agreement. Finally, Baucont won the tender and it involved KÉSZ and ÉPKER in the realisation of the project. The investigation also discovered that there had been intensive communications between Baucont and Középületépítő during several tenders. However, such communications could not be proven in connection with the abovementioned tender and therefore the competition supervision proceedings were terminated in respect of Középületépítő.

The Competition Council established that the collusion of Baucont, KÉSZ and ÉPKER in the bidding process seriously infringed economic competition. Therefore, the Competition Council imposed a fine of HUF 590 million (EUR 2.36 million) on the undertakings.

The local government of **Budapest's Sixth District** conducted a public procurement procedure for the construction of a **block of flats** in 2002. The GVH suspected that bidders had colluded in the course of the public procurement procedure and therefore it initiated competition supervision proceedings.[6] The investigation found that Construm and Royal Bau, two of the bidding companies, had agreed that Construm had to withdraw its bid in order to allow Royal Bau to win the tender. In return, the two undertakings required each other to co-operate during the construction work and they also agreed about the sanctioning of the infringement of the agreement. Later, a supplemental agreement was also made between them in which they mutually required themselves to involve the other undertaking in the realisation of the project where any of them would receive a new order for construction works from the

[5] Vj-28/2003.
[6] Vj-74/2004.

local government of the Sixth District. The parties put their agreement in a notarial document; moreover they opened a common bank account. Later, Construm infringed the agreement and therefore Royal Bau brought an action against it before the civil courts. In addition, it revealed their agreement to the GVH and applied for immunity from fines. The immunity application of Royal Bau was accepted. On the basis of the testimony and the evidence submitted by Royal Bau, the Competition Council could prove the infringement of the law and imposed a fine of HUF 16.5 million (EUR 66,000) on Construm.

As a consequence of the abovementioned competition supervision proceedings, the conclusion can be drawn that more effective competition could have been generated by inviting the tenders more prudently. If bidders have the possibility to submit their offers in consortium with their competitors, the possibility of illegal information exchange and market sharing by the bidders increases. Moreover, restrictive agreements concluded in these circumstances might be more difficult to prove. Therefore a contracting authority, when announcing a tender, has to strive to determine such projects and conditions and apply such procedural rules, which make it more difficult for bidders to collude.

On the basis of the competition supervision proceedings, the following circumstances can be summarised as facilitating collusion in the course of public procurement procedures:

- the number of potential bidders is low (if the contracting authority reduces the number of the undertakings which are allowed to submit bids during the procedure, the chance of collusion becomes even higher);
- several tenders, where the potential bidders are almost the same undertakings, are announced at the same time;
- a larger project is divided into several smaller projects and undertakings can submit bids in parallel for the smaller tenders;
- the contracting authority does not exclude certain forms of co-operation (such as consortia) from the tender;
- similar/same groups of companies submit bids for similar tenders invited by the same contracting authority.

Likewise, it can be observed that undertakings try to reduce or eliminate the risk of competition in the following ways:

- they submit bids in the same tender in different capacities, e.g. in the capacity as a main contractor, as a subcontractor or as a member of a consortium;
- companies submitting bids for tenders, the subject-matter and the date of announcement of which are similar, form interest groups of different composition.

Another issue concerning public procurement procedures frequently raised before the courts was that the agreement in question was of minor importance and therefore it was covered by the *'de minimis'* rule. According to the practice of the GVH, the relevant market is determined by taking into consideration the undertakings which have actually submitted bids for the tender. If the agreement was made before the submission of bids (e.g. the companies agreed that one/some of them would not submit a bid in the tender), the relevant market would be determined more broadly because the GVH would take into account the undertakings which would have been able to participate in the tender. This interpretation of the relevant market was frequently challenged by parties to the cases.

2.2.Abuse of dominant position

Thirty decisions on the substance of the case were made during 2004 in proceedings conducted against suspected abuses of dominant positions. In 19 of these cases, the existence of a dominant position was, and in 7 of the latter an abuse of the position could also be, proved which made an intervention of the GVH necessary.

Out of the 19 proceedings, which concerned service providers, 9 were initiated against cable TV companies. As in previous years, complainants objected to the amount of increase in monthly subscription fees and to changes in the composition of programme packages which they said were disadvantageous to them.

In **FiberNet** (Vj-42/2003) the Competition Council found that FiberNet Communication Company abused its dominant position by setting an excessively high call-out fee, and by clause 7(2) of its Business Terms/Standard Contractual Terms. It therefore imposed a fine of HUF 5 million (EUR 20,000) on the company.

FiberNet is the third largest cable TV operator in Hungary having more than 120,000 subscribers. In this case the relevant product market was the market of the programme packages provided by cable TV operators. The Competition Council found that the cable TV network as a programme package provider could not be reasonably substituted by other broadcasting techniques, regarding prices, quality and choice. In some parts of FiberNet's operating territory (the relevant geographical market), there were also other cable TV operators but FiberNet was nevertheless in a dominant position on the relevant market due to its integrated price policy, the low share of overlapping networks, the large number of captive consumers, the high costs of creating a new network (as a barrier to entry) and the switching costs.
The abovementioned clause of the Standard Contractual Terms proved unlawful because it entitled the company to place expensive channels into the packages at its own decision, without its subscibers' approval. The Competition Council prohibited the further application of this clause.
The call-out fee (the company charged this one-off fee for repair work unless such repair work became necessary to be done as the result of a fault caused by service provider itself) was found abusive (unjustifiably high) compared (by using the benchmark technique) to other operators' call-out fees.

The Competition Council found that **MATÁV** had infringed the law by applying a price squeeze (in Case Vj-100/2002) and, in this way, had hindered the market entry of other service providers.

The investigation into **Invitel**, a communications service provider, started in connection with the "HUF 45 summer lump-sum fee offer" (Vj-121/2003). In that offer, the service provider in question announced that it would automatically charge, during a two-week period, a uniform fee of HUF 45 for weekend and holiday calls within the primer district, irrespective of their duration. Should the subscriber nevertheless have wished, in accordance with his/her usual way of phoning, to choose the tariff of the original programme package, he/she first had to dial the four-digit dialling code 1767.

The method raised competition concerns, in particular taking into consideration that, as it was generally known, consumers are not well informed about communications-related issues. This was proved once again by the developments in the period of the offer in question. Though consumers had received comprehensive information about the offer, only 1.7% of them made use of the possibility by dialling code 1767.

According to the standpoint of the Competition Council, the defendant reckoned with certainty on the low-level awareness of subscribers when it set the terms and conditions for the offer (i.e. the duration, the method of utilisation and the amount of the lump-sum fee) in a way that resulted in an unjustifiable increase of its income and in the disadvantage to its subscribers in paying increased amounts for their calls. This conclusion was supported by the fact that, during the offer, the average length of the calls made without using the four-digit dialling code (i.e. at the lump-sum fee of the offer) was significantly shorter than that of the average weekend calls, that is consumers acted perfectly against rationality; on the other hand, during the two weeks in question, the turnover in the primer districts doubled as a result of which the benefits derived from the infringement amounted to HUF 18 million. The fine imposed by the Competition Council was three times as high, i.e. HUF 55 million.

An old case was recommenced in competition supervision proceedings against **MOL** (Magyar Olaj- és Gázipari Rt, Hungarian Oil and Gas Industry PLC) (Vj-33/2004) which the GVH was obliged to renew by a judgement of the Supreme Court. The Court ordered the GVH to examine in the new proceedings – brought with the involvement of an expert – whether the difference between the wholesale price charged by MOL and a wholesale price, which would have been set based on the actual costs, was disproportionately high and had in this way brought unjustifiable advantages to MOL. In the next step, an assessment was to be made as to whether MOL, by setting that excessively high price, had abused its dominant position. The GVH turned to an independent expert to obtain an assessment of the cost accounting prepared by MOL. The expert came to the generally valid conclusion relating to the price-setting method, that it would be an undue measure to prescribe cost-based price-setting in respect of fuels where the fact that the Brent crude oil price – which decisively influences the cost of fuels – moves in parallel to the fuel prices quoted and thus automatically ensures that fuel prices are proportionate to costs. In the period under scrutiny, the wholesale prices for MOL fuels closely followed the quotation prices based on the price of Brent crude. Hence there was no doubt they could be considered as competitive prices. It was economically reasonable that MOL, in setting its prices, also set world prices for its self-produced crude oil, the expert said. As a consequence, it was not possible to "**drain",** based on competition concerns, incomes deriving from self-produced oil being cheaper in comparison to world market-priced crude oil. The State could "**drain"** such incomes by other means e.g. in the form of mining royalties. The expert and the Competition Council were of the same opinion that in view of the difference between the competitive price and the cost-based price, additional incomes deriving from increased efficiency could not be regarded as being unjustified advantages, from the point of view of competition law. Therefore the Competition Council did not find the method of price-setting applied by MOL to be unlawful and so terminated the proceedings.

Based on complaints from newsagents, competition supervision proceedings were commenced against newspaper wholesalers. The complainants expressed their grievances against practices of **Buvihír, Északhír** and **Pelsohír,** for these wholesalers, not taking into consideration the demands of the newsagents, regularly delivered to them printed matter for sale which they had not demanded or delivered to them such a wide assortment of newspapers which increased their current assets requirements.

The Competition Council terminated the three proceedings (Vj-45/2004, Vj-46/2004 and Vj-122/2004) after having established that, though the defendants had practically no competitors on their respective markets, they were not dominant on those markets. They namely concluded agreements with the newsagents, which could be seen as a kind of agency agreement and as a consequence of those agreements, newsagents did not run the usual risks other entrepreneurs did. (The newspapers delivered were not transferred into the ownership of the newsagents and the wholesalers took back all the unsold copies; newsagents were not forced to make investments as a consequence of which they would have had to incur sunk costs; newsagents were not obliged to contribute to transport or promotion costs.) Hence, a possible termination of their agreements with the wholesalers did not mean a considerable risk to the newsagents.

2.3.Control of concentrations

In 2004 the Competition Council reached decisions about concentrations in 65 cases. In two of these decisions, the Council made authoritative statements.

In the framework of a concentration between K&H and K&H Equities, **Kereskedelmi és Hitelbank** (Commercial and Credit Bank) was a minority owner of the securities trading company that acquired further shares of K&H Equities from ABN Amro (Vj-170/2003). It was an interesting aspect of the case that **the proposed transaction had already been authorised** when ABN Amro integrated into K&H, but the parties did not implement this transaction. As the Competition Council held, in such a case where the parties have entered into a new contract in order to implement an earlier non-implemented part of an authorised concentration, a new authorisation from the GVH would be needed under the Competition Act, supposed that the conditions provided for by the Act are otherwise met.

The Competition Council proved once again that **market shares are of only secondary importance in the case of bidders' markets.**

Situations may arise in bidding processes in which even a market player with a high or a low market share cannot be considered as being dominant or can be considered as having a significant market power, respectively. According to the established practice of the GVH, for the assessment of concentrations that result in market shares much higher than 25% in markets which are characterised by purchases through bidding processes, high market shares have only secondary importance. For instance, in the case of Group 4 Falck/Securicor, the Competition Council came to the conclusion that, although the undertaking created by the concentration would have high market shares in respect of certain activities, it would not be able to pursue its economic activity to an appreciable extent independently from the activities of the other market players due to the fact that contracts were typically **concluded** in the framework of bidding procedures (Vj-55/2004).

2.4.Consumer fraud

Articles 8 to 10 of the Competition Act prohibit the deception of consumers. Consumer deception is presumed, for example, if false declarations are made with respect to prices or essential features of goods, or if the fact that goods fail to meet legal requirements is concealed or if a false impression of an especially advantageous purchase is created. It should be underlined that these provisions do not aim at consumer protection in general but are rather restricted to those deceptions which may influence the process of competition. The interventions of the GVH insure the appropriate functioning of the market as well. In 2004, 64 decisions were made, in 50 of which an intervention of the GVH was necessary. This meant a considerable growth as compared to 2003.

The number and weight of proceedings initiated in the healthcare sector increased even further.

In the advertisements for the prescription drug **Coverex** (Vj-86/2004), the producer EGIS Rt. committed consumer fraud, as the descriptions stated that the drug was suitable to prevent certain **cardiovascular** and vascular diseases although no such proven effects were indicated in the official register on the drug. The GVH considered that the fraud was apt to mislead doctors as well. Coverex is a drug that has been used for a long time but the preventive effects of which are not yet clear although significant research is currently being conducted.

The majority of the advertisements, despite the lack of scientific proof, stated that preventive effects were attributable to the drug concerned. Due to the advertisements, even the professional consumers were unable to make a distinction between proven effects included in the official register and benefits not yet proved but attributed to the drug by the advertisements. In addition to the analysis of the information gathered during the investigation and the allegations of EGIS, the GVH found it necessary to conduct a consumer survey on the actual effects of the advertising campaign. Based on the survey conducted by a professional firm, the GVH was in a position to find that the advertisement was apt to mislead consumers, as a great number of doctors answered that preventive effects were attributable to the drug and that they prescribed it for such purposes. Taking into account all the circumstances, the GVH fined the advertiser EUR 400,000.

In analysing the development of markets of products having an effect on human health, the GVH takes into account the fact that prevention and a healthier lifestyle is an increasing priority for consumers. The basis for evaluating the marketing of health products founded on changing lifestyles still remains the differentiation between products with and without a curative effect.

Though the regulatory background has changed significantly since May 2004, a curative effect may be attributable to a product if it was registered either as a drug or as a product with a curative effect not qualifying as a drug. The precondition for such registration is the acceptance by the relevant authority of the results of an examination that has proved the beneficial effects of the product. Cases were conducted against the advertisements of the products of the company **Forever Living Products** (Vj-3/2004), as well as the yoghurts **Danone Activia** and **Danone Actimel** (Vj-90/2004), **AB Kultúra** (Vj-108/2004) and **KYR** (Vj-107/2004).

2.5.Experiences of the judicial reviews of the decisions of the GVH

By the end of 2004, all the 290 appeals against decisions brought under the previous Competition Act of 1990 had been decided. The last of these cases was the **coffee cartel case** (Vj-185/1994). The first step in the long-lasting judicial procedure was the decision of the Municipal Court of Budapest which upheld the decision of the GVH establishing the infringement and imposing fines. At second instance, the Supreme Court also ruled – though with a reduction of the fine – in favour of the GVH. However, in a subsequent revision decision, the Supreme Court overruled its previous judgement and ordered the recommencement of judicial review at the Municipal Court. The revision decision maintained that the Supreme Court's previous judgement had provided insufficient reasoning as to why the opinion of the expert, hired by the parties, had not been accepted. In its second proceedings, the Municipal Court dismissed the decision of the GVH. On appeal, the Appeal Court – established in the meantime as a forum for the revision of judgements of the Municipal Court and county courts – upheld the decision of the GVH and ruled in favour of the GVH but reduced the level of the fine. On an **extraordinary** revision appeal against this judgement, the Supreme Court overturned the Appeal Court judgment and held that the decision of the GVH was not well founded.

Of the judgements made in 2004, one of the Municipal Court is especially worth mentioning. In its judgement, the Court dismissed the decision of the GVH declaring the **concentration of Tabora, a member of the Ringier group, with *Népszabadság*, a political daily,** as being incompatible with the Competition Act. The Court ordered the recommencement of the proceedings. In order to speed up the proceedings, the GVH has not appealed against the decision. By its decision reached in 2004, the Competition Council terminated proceedings against MOL because, in respect of the period 1997 to 1999, it could not establish the existence and the abuse of a dominant position in setting the resale and wholesale prices of fuels, respectively. (See also in Section 2.2 above.)

3. Investigations into sectors of the economy

Two sectoral investigations were conducted in 2004, one into the electricity sector and another concerning mortgage loans. The very first sector investigation was conducted in 2001-2002 in the field of mobile telecommunications.

3.1.The investigation of the electricity sector

The investigation was initiated with the aim of clarifying the effect of the partial liberalisation of the market in January 2003. An answer was to be found to the question why so few eligible consumers had left the regulated market for the free market and why many of those who had left had returned. It was also unexpected that suppliers made available only small capacities on the liberalised segment. The data collected is still under analysis, the outcome of the investigation is expected by the end of Spring 2005.

3.2.Mortgage loans

The examination of mortgage loans for flat purchasing started in July 2004. The aim of the investigation is to analyse credit conditions, costs, credit assessment, value-estimation, options, consumer information, etc. from the point of view of competition.

During the investigation, the GVH distinguished between three main products: loans with a government-subsidised interest rate; mortgage loans with a maximised interest rate; and loans provided under market conditions. The investigation aimed at comparing the changes in the interest rates and other conditions of these products. The first results of the investigation are expected by May 2005.

4. Competition advocacy

The **pharmaceutical industry** is a regularly recurring issue in the annual reports of the GVH. It was in the summer of 2002 that the GVH began to analyse the pharmaceutical industry and, after considerable discussion with the participation of many professionals, the results of this analysis were published in July 2003 in the form of a *Competition Authority Bulletin* under the title: "Key Issues of the Transparency of Subsidy System Regulation and Pharmacy Market Liberalisation." In this *Competition Authority Bulletin*, the GVH suggested the termination of several interventions by the State which interventions were made in the retail trade of pharmaceutical products and reduced efficiency. At the same time, in this *Bulletin*, the GVH stated that the complex nature of the healthcare system left very little room for manoeuvre for the reforms and any progress could only be made with due foresight and on a step-by-step basis.[7]

The GVH repeatedly drew attention to the fact that, in view of the ad-hoc measures being taken as an established practice, it was high time to systematise and review the operation of the regulatory regime and to elaborate corrective measures based on this exercise. It was a particular concern of the GVH that the ad-hoc changes in the pharmaceutical industry usually did not take into consideration the fundamental economic rules under which this special industry operated. Consequently, these changes mostly resulted in effects which conflicted with targeted aims and they did not lead the system to effective functioning. The GVH has made several suggestions concerning how to regulate the system.

In the framework of its annual work plan, the GVH overviewed as one of its goals for 2005 the regulations and practices of interest groups of **professional services**. The main goals of this work were to explore potential anti-competitive provisions (e.g. the setting and demand of mandatory fees, undue restrictions in advertising, etc.) and to reach the elimination of these restrictions. . Within the framework of this exercise, the rules on self-regulation of several interest groups were analysed and bilateral discussions were held with representatives of several chambers. The overviews and the discussions led to voluntary changes being made by some of the interest groups, or at least to changes that might be expected in the near future

[7] To find the Bulletin follow the path GVH → Publications → Competition Office Bulletins → Bulletin No 6 (Pharmaceuticals Market) on www.gvh.hu.

(engineers, pharmacists, physicians). In the case of some other interest groups, like attorneys and auditors, the GVH was compelled to initiate proceedings, while in other cases the competition advocacy seemed to be successful. In the framework of this project, the GVH also aims to initiate discussions with the relevant regulatory authorities in order to dismantle regulations, which might give rise to competition concerns and which cannot be supported by the public interest.

In its competition advocacy (by exercising its powers to provide opinions to draft pieces of legislation), the GVH always focuses on the competitive conditions of the market as they are affected by the regulation. Where – as a result of the planned regulatory step – market entry possibilities would change, the GVH ponders whether the regulatory intervention would be in compliance with the regulatory means and whether these would bring about disproportionate competition restrictions compared to the expected results. Regrettably, on several occasions, the GVH may only have the possibility of expressing its views at a later stage of the preparatory work of the regulation, when the basic concept targeted by the regulation cannot be modified. Consequently a positive influence in expressing its opinion can rarely be reported.

Commenting on the draft of the Act on the **Activities of Bodyguard and Security Services,** the GVH drew attention to a Communication of the European Commission.[8] According to the Communication, recommendations concerning the minimum level of fees can be interpreted as practices having an anti-competitive character, and the restriction of price competition in this way is unjustified. As a result of the comments made by the GVH, this authorisation disappeared from the final version of the draft which was discussed by Parliament.

Concerning the bill on the **activity of forensic experts** and the amendment to other related regulations, the GVH managed to have its earlier comments built into the version which was submitted to Parliament. As a result of this, the direction of the amendments are pro-competitive in nature in the regulation of this kind of services.

Extensive competition advocacy was carried out by the GVH in the field of **infocommunications**. In order to safeguard competition consistently and to promote the uniform application of legislation in this particular area, the Act on Electronic Communications requires close co-operation between the GVH and the National Communications Authority ("NRA"). In the framework of this co-operation, the GVH participates in the examination of communications markets and also in the identification of service providers having significant market power ("SMP"). The GVH expressed its concerns *inter alia* regarding the draft measure of examining the retail markets of fixed-line telephony services since, due to the problems of the methodology, improper identification of service providers with SMP might occur in the GVH's view. The basic problem stemmed from the fact that the NRA had not made an in-depth analysis of each relevant geographical market, and thus it necessarily could not make an adequate assessment on dominance. The GVH therefore proposed to the NRA that it conduct a more detailed analysis separately in respect of each of the relevant markets.

An even more significant part of the statement of the GVH concerned an obligation contained in the draft measure. The NRA intended to prevent SMP operators from aplying excessive prices in the **retail market of fixed-line telephony** access for residential customers by way of

[8] Communication from the Commission: "Report on Competition on the Professional Services" COM(2004) 83 final.

a regulation, which was similar to a price-cap regulation. However the GVH found, in competition law proceedings against one of the undertakings concerned by the draft measure, that prices of this type of access service were lower than the respective prices of local loops (due to the lack of tariff rebalancing in Hungary). Hence the GVH proposed that the NRA rethink imposing the obligation, which might lead to a price squeeze situation in the retail and the respective wholesale markets (which is the local loop unbundling market). The NRA did not follow the GVH's propositions.

In its earlier annual reports, the GVH repeatedly made recommendations to the Parliament on how to remedy certain anomalies experienced on the markets of **cable TV service**. There are repeated complaints of the consumers year by year, which cannot be efficiently resolved by the means available to the GVH. The problems in this area stem from the specific structure of the market, since the service providers are typically in a monopolistic or dominant position. Ordered by the Parliament, the Ministry of Informatics and Communications jointly with the Ministry of National Cultural Heritage (and with the involvement of the GVH) began to analyse the scope of the necessary regulation. In the planned framework, the GVH is willing to support the idea of self-regulation (e.g. in respect of general contractual terms). The GVH considers that passing a separate Act on broadcasting is not really timely at the moment, but the whole question should be regulated under the general rules on communications, in a regulation which would be necessarily neutral as regards different technologies.

The GVH basically supported the draft of the Act on **Rail Transport,** which aimed at further liberalising this sector. Commenting on the bill, the GVH supported the planned structural separation of the infrastructure management from the train operators. At the same time, the GVH objected to the vague definition of the legal status of the Capacity Allocation Body, since entrepreneurial and regulatory elements were mixed in the planned solution concerning the activities of this body. Further, the GVH stressed that the capacity allocator should be able to operate independently, having sufficient power to fulfil its tasks, and the same applies to the sectoral Regulatory Body. As a consequence of the comments made by the GVH and also by some governmental organisations participating in the co-ordination of the preparation of the bill, the submitting Ministry withdrew the bill for revision.

5. Competition culture

The GVH also attached great importance to its activity pursued on scientific fora and in the **education** of competition law and policy in 2004. Several staff members of the GVH regularly tutor or lecture on competition law- and policy-related subjects in university level education, or give lectures to interested professionals.

The GVH is one of the founding members of the **Hungarian Association of Competition** Law ("HACL"), which is the Hungarian branch of the "Ligue Internationale du Droit de la Concurrence" ("LIDC"). The GVH further contributes to the development of competition culture in the framework of the activity of the HACL, by hosting regularly the events of the Association. In Autumn 2004, the LIDC organised its Annual Conference in Budapest, and the GVH supported this event in many ways (among others, financially).

Adjusting itself to the changes in law-enforcement conditions due to EU accession , the GVH supplemented the informative and the legal background pages on its **website**.[9] In this way the homepage provides a comprehensive overview of the rules relating to Hungarian undertakings under both national and European competition law. Visits to the homepage have dynamically increased, with 90,000 registered visitors in 2004 meaning double the total compared to 2003.

The organisation of an international conference about the application of Community competition rules in Hungary was an outstanding event in March 2004. Mario Monti, the then European Competition Commissioner, also participated and, by underlining the importance of competition law and its consistent enforcement with his lecture, he attracted wide professional interest on the eve of accession.

The Inquiries Service of the GVH has an important role in providing information about the operation and approach to market competition of the authority. The Inquiries Service informs enquirers about substantive law questions, procedural issues and also about how the authority interprets certain professional topics – in this way it contributes substantially to the improvement of the efficiency of competition-law enforcement. During 2004, more than 1600 inquiries were made to the Service through electronic mail and direct contacts.

In 2004, based on an assignment from the GVH, the research institute TÁRKI prepared a survey about to determine the extent to which Hungarian competition law was known by the public. The research aimed at mapping the opinion of the general public, journalists of the economic press, businesses and the legal profession. Almost all the interviewees among the lawyers and journalists of the economic press had already "encountered" the Competition Act. Nine out of ten lawyers were able to recognise the most serious infringements of competition law (consumer fraud, market sharing, price cartels, abusive practices). The awareness of CEOs was also good in general, with more than 80% or almost all of them having already heard about the Competition Act or the Competition Authority, respectively. At the same time, many of them were not informed in respect of the detailed rules of the law. Consequently, there is much to do for the further improvement of competition culture. This seems to be an extremely important task for the years ahead, since the private enforcement of competition law presupposes that attorneys and businesses have a broader knowledge about this enforcement possibility of competition law.

6. Co-operation

6.1. Co-operation with national institutions

In 2004 the GVH co-operated – e.g. in the process of drafting legislation; in obtaining information in antitrust or merger cases, etc. – with a number of institutions at the national level: with the Hungarian Communications Authority; the Ministry of Information Processing and Communications; the State Secretariat for Infocommunications Regulation; the Hungarian Energy Office; the Parliamentary Commissioner for Data Protection and Freedom of Information; the Hungarian Financial Supervisory Authority; the General Inspectorate for Consumer Protection; the Council for Public Procurement; the Hungarian Privatisation and

[9] http://www.gvh.hu

State Holding Company; the Association of Advertisers; the Council of Self-Regulatory Advertisers; the Forum of Industrial Consumers of Energy; as well as with several associations active on the various markets.

6.2. Co-operation at international level

In 2004, one of the most important parts in the international co-operation activities of the GVH was its participation in the European Competition Network ("ECN"). However, it must be mentioned that the GVH already took an active role in preparing the detailed rules of the EC competition law enforcement reform before 1 May 2004. After the accession of Hungary to the European Union, the GVH has taken and continues to take part in the activities of the EC working groups which deal with the interpretation and the development of law.

In the framework of the co-operation between the GVH and the OECD, the OECD Regional Centre for Competition was officially inaugurated in Budapest in February 2005. This Centre of the OECD is built on the expertise of the GVH, acquired in the last 15 years, in order to develop competition policy and competition advocacy in the Central, Eastern and South-Eastern European region, thus contributing to the advancement of competition law as well as to the overall economic welfare of countries in the region. In order to realise these aims, the Centre will mainly organise seminars and training programmes for experts of the competition authorities in the region. Moreover, the organisation of larger conferences is on the agenda, in which other Hungarian economic specialists will also be invited to participate. The establishment of the Centre in Budapest is a significant international recognition for the expertise of the GVH since, in addition to the OECD Centre in South Korea, which aims to assist the competition authorities of the Asian region, the Centre in Budapest is the second such centre established by the OECD.

Further, the GVH takes an active role in the working groups of the OECD Competition Committee.

The practice has continued, dating back to the past few years, according to which an expert of the GVH works for a year for the OECD Competition Committee.

After the establishment of the Central European Competition Initiative ("CECI"), which is a form of co-operation of the competition authorities of the Czech Republic, Poland, Slovakia, Slovenia and, as a "fellow traveller," Austria, the active role of the GVH played in CECI has continued. Within the CECI framework, workshops, seminars and conferences are organised on topics which are of common interest. These events are mostly initiated by the GVH and they often take place in Budapest. Two workshops, one on cartels in public procurement procedures and the other on supermarket-related issues, such as sales below cost and buyer power, were held in Budapest in September 2004 and in April 2005, respectively. In these events not only the CECI countries participated but also other competition authorities – such as the German, Austrian, Dutch, British and Irish – were represented.

During 2004 the GVH took an active role in the work of the International Competition Network ("ICN"). The manifestation of this was that the co-chairmanship of the Working Group on Cartels, established in April 2004, was given to the GVH together with DG COMP

of the European Commission,. Apart from chairing the meetings of this working group, the GVH also participates in other working groups of the ICN.

7. Organisation and resources of activities

As of 1 November 2004, the **President** of the Republic of Hungary nominated Dr. Zoltán NAGY, after the expiry of his first tenure, to be the President of the GVH for the next six years.[10]

From September 2004, the **Consumer Protection Section** was created as a new unit within the GVH. The reason for the establishment of this section was, on the one hand, the large number of consumer cases and, on the other hand, the different (i.e. from those in the area of antitrust) character of these cases.

a) **Annual budget** (in million HUF and EUR)

2000	million HUF	576.4
	million EUR	2.3
2001	million HUF	950.2
	million EUR	3.8
2002	million HUF	1179
	million EUR	4.7
2003	million HUF	1196
	million EUR	4.8
2004	million HUF	1164
	million EUR	4.7

b) **Number of employees** (persons-year)

2000	**2001**	**2002**	**2003**	**2004**
104	120	121	120	119

[10] See Decree 154/2004. (XI.2.) of the President of the Republic of Hungary