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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON TECHNIQUES AND EVIDENTIARY ISSUES IN PROVING DOMINANCE/MONOPOLY POWER

-- Hungary --

This note is submitted by the Hungarian Delegation to WP3 FOR DISCUSSION at its forthcoming meeting to be held 7 June 2006.

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1. What is monopoly power/dominance?

1. According to Article 22 of the Competition Act a dominant position shall be deemed to be held on the relevant market by persons who are able to pursue their business activities to a large extent independently of other market participants substantially without the need to take into account the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct.

2. In determining whether or not an undertaking is dominant the authorities should, therefore, seek to identify whether there are any competitors capable of constraining the undertaking's behaviour and preventing it from behaving independently of effective competitive pressure. A dominant position does not mean that an undertaking deemed to be in a dominant position has no competitors; it simply means that an undertaking is in a position to have an appreciable influence on the conditions under which conduct in the relevant market will develop. In assessing whether a dominant position exists, the following factors, shall be considered, in particular:

- the costs and risks of entry to and exit from the relevant market, and the technical, economic and legal conditions that have to be met;
- the property status, financial strength and profitability of the undertaking or the group of undertakings, and the trends in their development;
- the structure of the relevant market, the comparative market shares, the conduct of market participants and the economic influence of the undertaking or the group of undertakings on the development of the market.

3. Dominant positions may be held by individual undertakings or group of undertakings or jointly by more than one undertaking or more than one group of undertakings.

4. The jurisdiction of the competition authority of Hungary (GVH) has not made a distinction between dominance and super dominance, though extremely high market shares facilitated the establishment of dominance in cases. However in certain cases market power deriving from even such high shares was considered to be eroded by the lack of exit barriers of its customers.[1]

5. The dynamics of the market was also taken into account. Constant decrease of market shares was a factor in the justification of the non-existence of a dominant position.[2] Circumstances favorable for the allegedly dominant firm should be present for a significant period and short term advantages can not lead to the establishment of dominance.[3] On the other hand short term power on the market could also form the basis of the establishment of dominance in a situation where contracts were long term and market entry of competitors was uncertain and unforeseeable. This situation arose relating to cable TV and ADSL services in small localities where one provider was already present and the small number of potential consumers made market entry less likely.[4]

1 Case Vj-45/2004 para. 20

2 Case Vj-155/2004 para. 14

3 In case Vj-124/1998. para. 56 it was established that the temporary oversupply of agricultural products in itself does not justify the establishment of the buyer's dominance.

4 Case Vj-37/2005 para 54

2. Evidence used to prove market power in monopolization/abuse of dominance cases

6. Dominance or market power exists only in relation to a particular market and not in the abstract. The possibility of dominance on the market is generally determined with a view on the market share of the undertaking concerned. Though no legal presumptions are established in the Competition Act, the GVH has analysed the level of market share as an indicator. In a case[5] the undertaking had 10% market share on the chemical market that the GVH did not consider enough to form the basis of dominance. Similarly market shares of 20 and 30% were not eligible.[6] Even a share ranging from 30% to 50% was not enough to establish a dominant position.[7] However a similar share and the relative size of the firm, together with other conditions justified the establishment of dominance. The market leader shipping company at lake Balaton had a share of 50% and competitors were not even close to that share. Furthermore high entry barriers restricted the effects of potential competition as well. Upon such circumstances dominance was established by the GVH.[8] The 79% share of Magyar Telekom was enough in itself to establish its dominant position on the relevant market of interconnections.[9]

7. On the other hand even high market shares are rarely considered independently as an indicator of dominance. As it was mentioned above due to extremely low exit costs a newspaper wholesaler was not considered dominant despite its monopoly position as retailers were free to exit the market in case of the application of abusive practices.

8. Concentration measures were also taken into account at the evaluation of post-merger dominance. In a merger concerning the already oligopolistic sugar market the pre-merger HHI index was 3414. The GVH considered that the merger would strengthen the existing close relationship of the three sugar producers and would create structural links as well further reducing the already weakened competition on the market. The merger was therefore cleared only subject to structural conditions.

9. As mentioned above the lack or existence of barriers to entry can be crucial when determining whether or not a firm has a significant market power. Even an undertaking with a high market share would not be able to hold a dominant position, if the barriers to entry are so low that the undertaking, who engages into anti-competitive activity, has to face the competition of new competitors. The undertaking will be protected from the other potential competitors, if the barriers to entry are high. As it was presented in Hungary's submission for the roundtable of the Competition Commission (DAF/COMP/WD(2005)65) there is no strict definition for entry barriers and practically any impediment that has the effect of reducing competition constitutes an entry barrier.

10. A provision of the internal rules on price setting of an electricity company was considered as an evidence of dominance. The said provision established the calculation of final prices but indicated that in case of need deriving from the pressure of competition a lower profit rate can be applied in order to reach the level of market price.

11. Concerning dominance the GVH also analyses the principles of the establishment of price, especially cost calculation methods and the applied cost allocations.

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[5] Case Vj-141/2004 para. 41

[6] Cases Vj- 26/2005 para 12 and Vj-155/2004 at para. 14, respectively

[7] Case Vj-60/2004 para. 132

[8] Case Vj- 69/2002 paras 20-22.

[9] Case Vj-66/2004 para. 116

12. As regards misdiagnosing monopoly power it should be noted that the GVH rarely follows the effects of its decisions. It mainly happens when conditions were imposed or undertakings were submitted. In general however it can be said, that the GVH is cautious in establishing abuse of dominance. In case of doubt the established policy prefers not to intervene. On the other hand decisions can be appealed providing a second supervision of the effects of the decision and securing feedback to the authority on improper conclusions.

3. Case examples

3.1 The acquisition of control by the Ringier Group over the political daily, Népszabadság

13. In the present case summary the merger of two undertakings active on the newspapers market would be presented. A strong market actor, the Ringier Group intended to buy the market leader national political daily, Népszabadság. The merger was prohibited by the GVH on the basis of portfolio effects, but the court overruled the decision on the basis of a different market definition. In its second procedure the GVH repeated its conclusions drawn in its previous decision and submitted further evidence supporting it. On the other hand it also incorporated some views of the court. The merger was finally cleared subject to conditions intending to remedy the negative effects deriving from the merger's portfolio effects.

3.1.1 The parties

14. Tabora a property managing company seated in the Netherlands is in the property of the Swiss Ringier AG which itself is owned by Ringier Holding AG. Undertakings owned by the group are directly and indirectly involved in the newspaper market in many countries of Europe and in the Far-East.

15. Népszabadság is a market leader political daily.

3.1.2 Particularities of the media market

16. Due to the privatisation process of the early nineties beside several national, regional and local radios and television channels more than 10 national, 22 regional dailies and around 300 monthly and more than 400 other type of newspapers and magazines are present on the market.

17. Printed media is a particular product as it shall meet the needs of the readers and the advertisers at the same time. The market is therefore consisted of two segments.

18. The readers' segment of the printed media market

19. On the market of printed media there are different kind of products

- daily and periodical,
- regional and national,
- general, and specialised papers

20. National dailies and their market shares are as follows (Papers belonging to the Ringier Group are in **bold**):

- political papers (**Magyar Hírlap**, Magyar Nemzet, *Népszabadság,* Népszava)

	2000	2001	2002
Népszabadság	59%	59%	55%
Magyar Hírlap	10%	10%	10%
Népszava	12%	11%	9%
Magyar Nemzet	19%	20%	26%

- economic dailies (Világgazdaság, Napi Gazdaság)
- free dailies (Metro, Esti Hírlap (the latter ceased to exist in September 2003))
- tabloids (**Blikk -** 69%**,** Színes Mai Lap, Mai Nap)
- sports dailies (**Nemzeti Sport** - 100%)

21. The advertisers' segment of the printed media market

22. The turnover of the overall advertisement market is growing year by year. In 2002 it was around 1.200.000 euros. Around 85% of this amount was spent for advertisements on TV and printed media. Counted on actually paid prices which differs from list-prices the shares of the different media in the amount spent on advertisements is as follows:

Media	2000	2001
Television	39.5	38.8
Printed media	39.5	41.6
Radio	7.9	5.9
Posters est. on public domain	9.7	9.8
Cable TV	1.9	2.2
Internet	0.8	1
Cinemas	0.7	0.7

23. The share of the Ringier group and the Népszabadság on the different levels of the market of advertisements in per cent is approximately as follows:

Market level	Ringier group	Népszabadság	Together
All media	1.5	1.9	3.4
Printed media	6.1	7.8	13.9
Dailies	12.5	15.9	28.4
National dailies	26.6	34.1.	60.7
National political dailies	60.4	12.8	73.2

24. Incomes deriving from advertisements are essential for newspapers. In the case of Magyar Hírlap, Népszabadság and Magyar Nemzet around 40, 50 and 25% of the overall revenues derived from advertisements, respectively.

3.1.3 The notification

25. The parties submitted in their notification that the merger did not create or strengthen a dominant position even on the narrowest possible market, on the market of political dailies (national and regional papers).

26. They also submitted that that advantages of the merger were:

- more efficient printing and supply resulting in lower prices,
- more efficient administration, finances, logistical co-ordination,
- co-ordination of the marketing and market research activities of the four dailies of the Ringier group,
- efficient use of experts' knowledge and its share among editorial boards,
- possibility for faster development of connected media activity (Internet, magazines),
- enlargement of brand names of existing papers

27. Alleged advantages for the consumers:

- continuous development of quality,
- increase of the number of editorial pages,
- investments for better quality of photos,
- new products (Népszabadság books, sport and fitness events, special magazines, online services etc.)
- adaptation of developments of the European market

28. Alleged advantages for the parties:

- more competitive prices for advertisements,
- creation of a viable alternative for TV advertisements,
- greater financial stability

29. The acquirer also submitted undertakings to

- make investments to the new design and marketing of Népszabadság,
- exploit the possibilities for co-operation within the Ringier group,
- optimise the activity of the administration.

3.1.4 The opinion of third parties

30. The common position of all the national and regional political dailies was that the merger would have negative effects, namely:

- the exclusion of competition on the market of national political dailies,
- further strengthening in the positions of Ringier in relation with distribution, access to paper and printing facilities,
- the merger could cause the liquidation of certain papers,
- the merger would result in a significant increase of the concentration on the market of national dailies,
- through its portfolio Ringier could acquire a much larger share on the market of advertisements.

31. The national political daily, Magyar Nemzet submitted that the free daily, Metro competes with the other dailies for the advertisements but not for the readers. It also indicated that regional papers, due to the emphasis they add to news of local nature can not be considered as competitors of the national dailies.

32. An other national political paper, Népszava upheld the opinion of Magyar Nemzet relating to the role of Metro. It further underlined that due to the political affiliation of the readers the market of national political dailies is further segmented into two sub-markets, namely that of right wing-conservative and left wing-liberal papers. On this latter market after the merger Népszava, with its share of 12 per cent, would remain the only competitor of the Ringier papers.

33. Metro, in relation to its own position on the market, supported the market definition of Magyar Nemzet and Népszava.

34. The opinion of the publishing houses of the regional papers was not uniform. One submitted that it considers the national political papers as competitors, while an other cares them only in the competition for advertisers.

3.1.5 The decision

35. Relating to the relevant product market of readers the GVH established that printed media is not substitutable with other forms of media. It also made a distinction between political and non-political

papers and between dailies and periodic papers. The GVH considered furthermore that national dailies can not be substituted with regional ones nor with the free daily, Metro.

36. The Council also identified some peculiarities on the market of national political dailies but its further subdivision was not necessary for the analysis. The relevant product market was therefore the three (or four) national political dailies. The geographical market was Hungary.

37. The GVH established that the share of the parties on this market would have risen from 13 to 87 (or from 10 to 55 per cent).

38. Relating to the market of advertisements the GVH established that although undertakings had great discretion to select the appropriate media for their advertisements, the majority of advertisement campaigns are organised through the so called ‘media mix’ which includes the use of all kinds of media, including printed media as well. Through the merger Ringier would have created a large portfolio of national dailies, on the market of advertisements in the printed media.

39. The GVH established that the Ringier group was in a dominant position on the markets of national sports dailies and tabloids and that it would have become a dominant undertaking on the market of national political dailies. Such a strong portfolio covering the printed media market would have reinforced its position on the market of advertisements and this latter position would have reinforced the former.

40. The GVH did not question the benefits deriving from the increasing competitiveness as it characterises all mergers. However these benefits remain available if competition is not restricted unduly. In this case a restriction of this kind was likely. The GVH also established that the undertakings of the parties were not sufficient to remedy the negative effect of the increasing concentration. Even the divestment of Magyar Hírlap would have been less than desirable.

41. The GVH prohibited the planned concentration on these grounds.

3.1.6 Appeal

42. On appeal the Metropolitan Court accepted that a strong portfolio in the printed media market for advertisers has a reinforcing effect on market power on the readers’ side of the same market.

43. It considered however that such an effect could result only slowly, in several steps the starting point of which should be a dominant position in face of advertisers of the printed media market. The court considered however, that such a dominance would not be established by the merger. On the other hand portfolio effects resulting on the long term were to be significantly influenced by the possibility of supply side substitutability and the level of entry barriers. The question to be decided according to the court was whether portfolio effects could in fact appear after the merger or would be extinguished by the entry competitors.

44. The court established that the GVH did not take into account the plaintiff’s argument that portfolio effects are highly restricted by the segmentation of the market of national political dailies. Consumers loyal to a given political wing would not easily change from one paper to an other simply because of lower prices. What’s more, the readers’ market is narrowing in time, which further reduces the likeliness of portfolio effects. In the case of political segmentation the market exit of certain papers, due to the low level of incomes from advertising, would not increase but reduce entry barriers as consumers were unwilling to buy papers of differing political disposition and instead they would be willing to buy the product of a new competitor having the same political views.

45. According to the court, in such a market situation where changes happen in several steps and stretched out in time, participants of the printed media market for advertisers are competitors on the readers' market too. This is because any publisher would be able to react in time and appear on the market of national political dailies. Entry barriers relating to the time of entry identified by the GVH are important in the case of quickly realised horizontal effects but considered low in the case of slowly appearing portfolio effects, based on strategic behaviour.

46. Upon the available data the court considered that dominance would not be created by the merger and therefore the GVH was wrong considering that portfolio effects would result in such an increase of market power. Relating to alleged portfolio effects it noted that if supply side substitutability was correctly taken into account than the relevant market would comprise of all the undertakings and publishers active on the market of printed media. In such a situation, having in mind that the market is not further segmented no dominance could have been established on the basis of the therefore non-existing portfolio effects. The court therefore annulled the decision of the GVH and ordered the re-investigation of the merger.

3.1.7 The second decision of the GVH

47. In its second decision the GVH established that concerning the market of national political dailies no supply substitutability can be identified. The GVH did not argue against the allegation of the parties that the publishers of Metro and the regional papers are well-capitalised undertakings, owing the technical and professional background to issue a political daily. However, first, such a change would cause significant costs and second, the issuing of a political daily is not simply a matter of technical capabilities. A successful and viable market entry requires the attainment of a size of circulation comparable to those of the competitors within a short period of time. Taking into account the characteristics of the market, the lack of such a possibility excludes the existence of supply side substitutability as timely entry is unlikely. Publishers of papers other than the national dailies can therefore only taken into account as potential competitors and not as supply side substitutes. So the relevant product market can not be extended to a market wider than that of national political dailies and so dominance can be established. From the point of view of readers Ringier would therefore acquire a dominant position on the market of national political dailies while it is already dominant on the market of daily tabloids and daily sport papers. In its conclusion the GVH established again that the merger would have significant portfolio effects in face of advertisers.

48. The GVH finally cleared the merger subject to conditions. The parties were obliged to separate their advertisement management activities and not to provide bundled offers for advertisers for two years. Népszabadság was allowed to increase its prices for advertisements only according to the average increase of such prices on the market. It was also obliged to provide regular information to the GVH on its pricing and on the average market price changes for three years.