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COMPETITION COMMITTEE**

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**POTENTIAL PRO-COMPETITIVE AND ANTI-COMPETITIVE ASPECTS OF TRADE/BUSINESS
ASSOCIATIONS**

-- Hungary --

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To be held on 16 October at the International Energy Agency (IEA), 9 rue de la Federation, PARIS 75015, starting at 10 am.

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1. Introduction

1. Trade and business associations have important legitimate and illegitimate role in competition. They are active in the representation of their members, submitting legislative proposals, lobbying for favourable regulation or the maintenance of preferential rights, defending particular interests in proceedings initiated by or against the association etc. On the other hand these entities have a significant role in the organisation of hard core cartels, in the maintenance of anti-competitive ethical and other internal rules or in the sanctioning and repressing attempts of their members to effectively compete with competitors. According to the experiences of the GVH in the latter case members of the associations generally have a more active role, while in the former instances it is rather the single face of the association itself that appears behind the initiatives. However as there was only one cartel case in which the association itself was not aware of the infringement, it cannot be said that associations were only abused by their members for illegal purposes.

2. Article 11 of the Competition Act, similarly to EC 81(1), involves/covers the decisions of associations of undertakings under the title of restrictive agreements. Even if the association itself does not engage into economic or financial activity, it is covered by the scope of the Competition Act if its members are undertakings, and the decision brought by the association qualifies as a restriction of competition. A decision restricts competition if its aim or actual or potential effect is the undue restriction, or elimination of competition between competitors, or the free choice of consumers, or if the aim or effect of the association is to become a factor determining the formation of competition in respect e.g. prices.

3. Acts of associations, chambers or similar entities do not have to meet specific formal requirements to be qualified as decisions. The Competition Act covers not only formal recommendations and decisions but any manifestations (e.g. informal expression of objectives) reflecting the intention to restrict competition through the coordination of the activities of its members, without regard to actual effect such acts might have.

4. Activities of associations are therefore generally covered by the Competition Act, unless specific legislative authorisation expressly provides otherwise.

2. The role of trade associations in legitimately petitioning the government: examples of lobbying activities and legislative activities by trade associations

5. A number of associations of business entities, from civil law societies to legislatively established chambers aim the promotion of the interest of their members and the respective segment of the economy. Though unconnected to Competition Law in its strict sense, they perform widespread activities influencing the development of competition either to a positive or a negative way. Many of their legitimate initiatives target the creation of competition friendly market circumstances, better regulation, greater transparency and consciousness of market actors. On the other hand legitimate initiatives can also relate to the restraining of the competitiveness of the market, mainly through lobbying for “worse” regulation.

6. An example for efficient cooperation is the Forum of Industrial Energy Consumers, a society established in 2000. The society is aiming the promotion of the establishment of competitive energy markets thereby serving the interest of consumers, and acting as a civil organisation, to facilitate consultation among governmental bodies, regulators, market actors and consumers. Before the partial liberalisation of the energy markets the society actively participated in the framing of the model of the future market. It submitted recommendations and opinions concerning the draft legislation. It organised conferences on which it discussed certain elements of liberalisation with the regulators, expressing the needs of consumers. It also invited foreign experts who presented their experiences with liberalisation and

raised attention to possible failures and problems. After the initial periods of the opening up of the market, it presented first experiences and the developments of competition. It informs consumers on legislative changes, and other developments of the market. In some instances it consulted members of the government and officials of regulatory authorities representing the interests of certain members. The GVH also consulted the society in cases affecting the energy sector.

7. A similar society in the banking sector is the Hungarian Bank Association. Established in 1988 when the two-tier banking system was introduced, and aims the representation of the interests of its members. It establishes working groups consisting experts of the member banks in order to formulate the professional view of the members, and the Association subsequently represents those views before the Government, regulators and other third parties. Besides opining draft legislation, it actively contributed into the establishment of a number of institutions necessary for the proper functioning of the market, like: the deposit insurance and credit guarantee institutions, the debtor registry, the credit rating institution and the Giro system. It also conducts projects aiming the information of the general public about the functioning of the bank sector. In recent recommendations prepared by a governmental working group in which as independent expert an official of the GVH has also participated, it was suggested that certain issues of the sector should be regulated by market actors themselves, instead of legislative initiatives. The Association took on the initiative and prepared proposals for self regulation that is now submitted for approval.

8. The Federation of the Hungarian Leasing and Financing Association (HLFA) a professional representative body for financial institutions dealing with funding, has contacted several authorities with market supervisory and regulatory functions concerning the leasing market for personal vehicles. The HLFA expressed its concerns about certain trends in the market, in particular about extensive duration of the contracts, and the limited necessity of own funds. The HLFA emphasised prudential risks arising from high-risk loans granted for personal vehicles, and wished to establish some regulation in the issue. However, from a competition point of view such regulation would have put some restraints on firms, the necessity of which was not proven. As a result of this, the Hungarian Competition Authority did not support the initiation, which has found some support at the Hungarian Financial Supervisory Authority.

9. The Hungarian Publishers' and Booksellers' Association is one of the oldest civil organisation. Its members represent 92% of the books published in Hungary. It makes efforts to promote the interest of the members, e.g. lobbies for public subsidy, fights for the reduction of VAT duty imposed on books, or to retain the status of intellectual creative work as an activity exempt from social security payment. In relation to competition it should be mentioned that the Association is lobbying for years for the adoption of an act, allowing the right to resale price maintenance by publishers. While these efforts remained fruitless, the GVH initiated proceedings and established that the Code of Ethics of the Association prescribing RPM was illegal.

10. Associations were active in competition law procedures as well, aiming the protection of the rights of their members or to ensure legal certainty for them. In one case the national association of sugar beet producers successfully challenged a decision of the GVH refusing to assess the allegedly abusive behaviour of sugar producers. The court established that the reasoning of the refusal was not sufficient and that the GVH should enter into a more in depth assessment of the case.

11. Regional associations initiated a number of procedures aiming the benefit of individual exemption for agreements concluded in the electricity sector. The agreements in question were concluded between the regional electricity supplier and associations of electricians and related to the establishment of a qualification system for electricians. According to the agreements only those professionals were allowed to perform certain activities, who have participated on courses and were listed by the electricity supplier. The system aimed to ensure the appropriate quality of the affected services, and no undue restrictions were

imposed as a condition for participation. The agreements were cleared mainly without conditions. A regional body of the chamber of advocates has also tried to acquire individual exemption to its tariff system but the GVH rejected its notification.

3. Experiences with industry self-regulation, codes of conduct, standard setting and the promotion of industry-wide business practices

12. Codes of conduct of different chambers and associations were closely analysed by the GVH. The chambers of vets, accountants and advocates applied general restrictions on advertising. In its procedures the GVH established that the restriction was not justifiable in any of these cases, and quality, nature, product security and other defences raised by the parties were not eligible to avoid the application of the prohibition of the Competition Act. In a case in 1999, however a code of the chamber of physicians, containing restriction of advertising was given individual exemption by the GVH. The provisions in question did not contain a general prohibition of all advertising, only restricted it to a minimum level, allowing only the indication of the name, field of speciality or address of premise. The GVH considered that the code not suppressed, only regulated competition and exempted it from the prohibition of the Competition Act. In a later procedure however it established that due to the changes in the regulatory and factual background, the exemption can not be maintained. New regulation introduced the notion of entrepreneur physicians and individual medical activity, the number of private medical firms has increased and competition generally became a more significant characteristic of medical activities. The role of private capital has significantly increased.

13. Price related rules were also established by industry wide codes of conduct. The national association of paprika producers prohibited for its members to make purchases with the aim to make prices rise. It also prohibited the application of “unjustified discounts” causing damages to other market participants. The national association of book publishers applied a general RPM rule, establishing that the publisher has the sole right to determine the final price of its product. Discounts were allowed only under strict conditions. Severe sanctions were envisaged for the infringement of the rules on “fair competition”. The chamber of pharmacists prohibited the use of targeted discounts.

14. Determination of recommended, fixed and minimum prices, or tariff zones was also common. The code of the association of real estate agents prescribed that fees under the established minimum level might only be applied in exceptional cases. Minimum tariffs were also established by the chambers of physicians, vets, accountants or the association of ambulances. Recommended prices were set by the association of producers of ornamental plants, graphic artists, hunting societies.

15. Non-price related naked restrictions were also applied in certain cases. The association of ambulances prescribed to its members that in the case of an area covered by a competitor refrain from providing services unless it is done in cooperation with the local supplier.

4. Examples of trade associations organising naked restrictions of competition and examples of trade associations facilitating collusion

16. Chambers and business associations were in many cases the instigators, or constituted formal frameworks for the setting up of hard core cartels of their members.

17. In a case concerning the pharmaceutical sector, prices of the different producers were negotiated with the Government annually. In the given year, as the Government slowed down the process the negotiations did not lead to an acceptable result for the producers in time. The producers signalled to their respective associations that the situation threatened their business interests. The three affected associations discussed the matter and agreed in a coordinated action, suggesting a uniform 8,5% price rise to their

members. The associations undertook to arrange the introduction of the new prices into the pharmacies' IT database and to cover the respective costs though normally that should have been covered by the Chamber of Pharmacists. The three associations were fined for the fixed price rise, but it was also taken into account as an attenuating factor that the behaviour of the Government introduced uncertainties into the situation on the market.

18. The association of cement producers besides fulfilling other, legal activities served as a channel to exchange sensible business data, and to coordinate pricing among the members. Similarly the association of bee-keepers was used as an institutional background for the agreement of the members. Though with only 60% of the members present, the general assembly was not quorate, those who were present agreed that a single position of the association would suffice to remedy the problems deriving from the need of price rise. A new price adjusted to the rate of inflation was accepted, and established as a recommended price. The agricultural sector experienced a number of other coordinated price determinations as well, the instigator of which were usually the representative associations of the producers. Such was the situation with the target price for apple, the notice to rise the price of bread, the fixed price of pig, the reduction of output and the determination of a desirable price level of grains, or the case when the representative society of car dealers entered into a vertical agreement with car insurers which inter alia contained uniform fees for repair services.

5. Examples of members using trade association activities to cover unlawful collusion, without the knowledge of the trade association

19. In Hungary it seems to be rare where members of an association use the coverage or the institutional background provided by their association for the organisation of anticompetitive practices without the knowledge of the association itself. The only example similar to such a situation was where the national association of bakers was not aware of the cartel of its members, but even in that case the head of the regional body did participate on some meetings.

6. Examples of trade association antitrust compliance procedures

20. As it was mentioned above an important form of compliance conducted by associations was when agreements of its members were submitted to the GVH for approval. This way the associations could provide legal certainty and avert possible negative consequences of illegal agreements entered into due to the lack of knowledge of legal prohibitions.

21. Being sentenced by the GVH for price fixing, the association of bakers was obliged to submit to an antitrust compliance program, which consisted of courses provided by an expert on competition law matters. A result of this program was that the next time when bakers were forced by market changes to increase prices, instead of entering into a price fixing agreement, they have notified to the GVH an agreement laying down the method of calculation of the price of the four most popular types of bread. The notification also contained a request to be allowed to hold meetings two times a year to discuss the cost structure of bakery products. Though the notification was dismissed, it nevertheless indicated an important change in the thinking of a sector of the economy that previously provided work for the Cartel Unit of the GVH.

7. Membership rules and restrictions on access

22. In many cases the infringement of Ethical Codes and Codes of Conduct was to be sanctioned with exclusion from membership. Such a punishment could mean the loss of the right to continue a given profession (normally in the case of Chambers, where membership is a precondition to the exercise of the

profession), or may result that the sanctioned undertaking is excluded from certain advantages, like access to governmental contributions lobbied by the association.

23. In a case the local association of taxi drivers had the right to determine the conditions of access to taxi-ranks and it established that those drivers who were not members of the association had to pay the double of the normal fee. This evidently constituted a pressure on professionals to enter the association.

24. In the case of the planned opening of a new pharmacy the Chamber of Pharmacists had to be asked by the licensing authority for its consent. Should such a consent not be given, the authority had to refuse the establishment of the new pharmacy.

8. Sanctions that have been applied to trade associations

25. According to Article 78 of the Competition Act the maximum fine imposed on social organisations of undertakings, public corporations, associations or other similar organisations shall not exceed ten per cent of the total of the net turnover in the preceding business year of undertakings which are members of them. Concerning however the imposed sanctions a distinction should be made between two different scenarios.

26. In many cases where the infringement was constituted by codes of conduct, or ethical codes the GVH did not impose financial penalties, or imposed only insignificant fines (generally 1 million HUF equalling app. 4000 EUR). One of the reasons was that until the 2005 amendment of the Competition Act, though the maximum amount of the fine could have been determined up to 10% of the turnover of the companies which were members of the association, the fine was imposed and could have been recovered solely from the association itself. At the imposition of the fine the GVH therefore had to take into consideration the financial situation of the association if it wanted the fine to be collectable. Another less practical reason was that the associations were generally not aware of the anticompetitive nature of their codes as the incriminated rules were considered traditional and often as indispensable having regard to the “special character” of the service in question. Besides they usually proved to be cooperative during the investigations.

27. In other cases where the infringement consisted in the organisation of a naked price fixing cartel or the association qualified as a recidivist, the GVH imposed more substantial fines, representing a different degree of magnitude. The highest fine imposed was 150 million HUF (app. 700.000 EUR). In these situations the GVH considered that there was no room to rely on the lack of competition culture or on traditional solutions of an industry.