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Competition Enforcement and Regulatory Alternatives – Note by Hungary

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm>

Please contact Ms Federica MAIORANO if you have any questions about this document
[Email: Federica.MAIORANO@oecd.org].

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Hungary

1. Competition enforcement and its impact on economic regulation

1. In this section we focus on examples taken from the financial sector, as these illustrate a number of ways in which competition enforcement may provide invaluable inputs to regulation.

1.1. Enforcement actions preceding regulation in the bank card market

2. Enforcement proceedings of the GVH with respect to card payments played an important role in the evolution of domestic interchange fee regulation in Hungary.

3. Between 2005-2010, payment cards developed into an important instrument in domestic payments. However, certain anomalies emerged in the development of the market, especially on the acquiring side: while the proliferation of bank cards increased rapidly, the number of POS terminals necessary to perform card payments only increased slowly. Consequently, a number of market problems and competition issues arose in relation to payment cards, especially concerning multilateral interchange fees (MIF) and card acquiring. This resulted in the market being subject to both enforcement actions (competition investigations) by the GVH and regulation.

4. Firstly, the GVH investigated the conduct of the banks that set the MIF in a uniform manner.¹ The investigation concluded in 2009 that the agreement of the banks supported by the card schemes (Mastercard and Visa) was unlawful. It is worth noticing that besides several EU antitrust enforcement procedures on interchange fees, a lengthy appeal procedure – involving a preliminary ruling by the European Court of Justice² – followed the infringement decision of the GVH. As a result of the proceedings, the Supreme Court of Hungary referred the case back to the GVH at the end of 2020.³

5. The GVH also carried out proceedings against MasterCard in order to establish whether it had breached the prohibition against the abuse of a dominant position when it set the MIF at a considerably higher level than its main competitor (Visa).⁴ This infringement decision was repealed by the Supreme Court of Hungary⁵.

6. As these examples illustrate, several obstacles had to be overcome to solve the issues related to the MIF. The main concern with the MIF was its perceived high level and its adverse effects on card acquiring and the overall cost-efficiency of the payment systems.

¹ For an English language summary of the case, see:

https://www.gvh.hu/pfile/file?path=/sajtoszoba/sajtokozlemenyek/sajtokozlemenyek/2009-es_sajtokozlemenyek/sk_18_2008_lezart_MIF_hatteranyag_a_pdf.pdf&inline=true

² C-228/18 – Budapest Bank and Others

<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-228/18>

³ For the judgment of the Supreme Court of Hungary, see (in Hungarian language):

https://gvh.hu/dontesek/birosagi_dontesek/archiv/birosagi_dontesek_2008/vj-182008680

⁴ For an English language summary of the case, see:

https://www.gvh.hu/en/press_room/press_releases/press_releases_2016/mastercard_abused_its_dominant_position

⁵ For the judgment of the Supreme Court of Hungary, see (in Hungarian language):

https://www.gvh.hu/pfile/file?path=/dontesek/birosagi_dontesek/birosagi_dontesek/birosagi_dontesek_2012/vj046_2012_kuria&inline=true

As a two-sided market, the bank card industry has several peculiar features; in particular, it is primarily driven by the issuing side, and competitive forces may drive prices up instead of having a downward pressure on price levels.

7. To ease the above-mentioned problems with respect to MIF, several regulatory initiatives were introduced regarding card payments. As early as 2009, the Hungarian Parliament planned to adopt a law capping both interchange fees and merchant service charges, but the law with respect to MIF did not enter into force (while the regulation on merchant service charges failed and was swiftly repealed). In 2011, the Hungarian National Bank (MNB) became increasingly aware of the problems on the payment card market. The MNB – with the support of the GVH – approached the government with a proposal to cap interchange fees. After several rounds of consultation between the GVH, the MNB and the Ministry for National Economy, a law was proposed and later passed to cap the domestic interchange fees at a level of 0.2% for debit card transactions and 0.3% for credit card transactions. The European Union later introduced similar regulation, which replaced the Hungarian law on interchange fees.⁶

8. Following the entry into force of the Hungarian (and later the European) interchange fee regulation, the GVH carried out a sector inquiry into the card acquiring market.⁷ One of the main aims of the sector inquiry was to investigate the effects of the MIF regulation on the costs of card acquiring. The extensive data gathering and analysis clearly demonstrated that regulation decreased the costs of merchants; therefore, it had positive effects on card acquiring.

9. The example of interchange fees illustrates that certain market failures may be addressed by regulation more effectively compared to competition enforcement when the latter – due to market specificities or other factors – cannot successfully (or at least not in a timely manner) address the underlying issues. It must be added that even in such scenarios, competition enforcement may provide invaluable inputs to the formulation of the regulatory solution.

1.2. Sector inquiry – customer mobility in retail banking⁸

10. The card market is not the only segment of the financial services sector in which the GVH played an active role in identifying competition problems and recommending regulatory solutions.

11. In the wake of the financial crisis the GVH was in the process of conducting a sector inquiry on customer mobility in retail banking. Of particular interest were unilateral modifications of contractual terms and asymmetric benefits in long-term contractual relationships, which took on increased importance when consumers were faced with swiftly increasing mortgage payments and deteriorating contractual conditions.

12. The GVH identified four factors that distorted competition and made it more onerous to have ample information about financial products and to switch between service providers and products. The GVH, after consulting financial regulators and the association

⁶ Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions

⁷ For an English language summary, see:

https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the_hungarian_competition_authority_has_issued_a_n

⁸ For an English language summary, see:

https://www.gvh.hu/pfile/file?path=/sajtoszoba/sajtokozlemenyek/sajtokozlemenyek/2009-es_sajtokozlemenyek/sk_2009_02_09_agazativizsgalat_bankvaltas_a_pdf.pdf&inline=true

of banks, proposed that amendments should be made to the regulation of the market in order to remedy the four below-mentioned identified problems, mainly connected to “lock-in” effects.

1. The financial institutions’ practice of unilaterally modifying contractual terms, which was undermining the natural restraints that could mitigate the problem of asymmetric contractual terms. The GVH found that unilateral modifications were applied too broadly, and consumers were not provided with an opportunity to challenge them. To remedy this situation, the GVH proposed the adoption of legal provisions which would only allow contractual terms to be unilaterally modified in cases where objectively verifiable events – external to the operation of the financial institution – made such modification necessary.
 2. The GVH also found that consumers switching between providers were faced with significant direct expenses as a result. According to the calculations of the GVH, these expenses were particularly high, amounting to at least 4-10% of the net present value of the loans under investigation. To solve the problem, the GVH proposed that a ceiling should be set in relation to one of the most important cost factors of switching, namely concerning the early repayment fee.
 3. The GVH observed a lack of price transparency in relation to financial services. To remedy this, the GVH proposed that an independent, verifiable product-comparison website should be set-up. The GVH also proposed that foreign currency risk should be calculated into the Annual Percentage Rate.
 4. After assessing the effect of subsidised loans, the GVH found that the non-transferable nature of state subsidies for mortgage loans enhanced contractual asymmetry to the benefit of lenders. If a consumer decided to switch between banks with respect to his/her subsidised mortgage, he/she could only do so under normal conditions, without being able to transfer the benefit of the state subsidy. The GVH proposed that state subsidies should be transferable, allowing consumers with state-subsidised loans to switch between banks.
13. After the GVH made its proposals, the relevant laws were modified by the Hungarian Parliament, incorporating the proposals elaborated above.⁹

2. Overlaps between Competition Law Enforcement and Economic Regulation

2.1. Obligations for coordination

14. Hungarian law provides for compulsory coordination between the competition authority and sectoral regulators in a number of areas.

15. For instance, the law on electronic communication provides¹⁰ that the telecommunication regulator shall consult and obtain the opinion of the GVH in procedures a) for defining the relevant markets of the electronic communications sector; b) for the identification of service providers with significant market power; and c) for defining the obligations conferred upon these service providers.

⁹ For an English language press release on the relevant changes, see:

http://www.gvh.hu/en/press_room/press_releases/press_releases_2009/5754_en_the_amendment_of_the_law_will_result_in_increased_competition_of_banks_for_consumers.html

¹⁰ Act C of 2003 on Electronic Communications, Section 20

16. The law on media stipulates¹¹ that the GVH has a similar obligation in media-related merger cases towards the telecommunication regulator: the GVH shall obtain the opinion of the Media Regulator concerning concentrations involving firms bearing editorial responsibility and whose primary objective is to distribute media content to the general public via an electronic communications network or a printed press product.

17. There are similar obligations in other sectors as well. For example, the law concerning electricity market provides¹² that the sectoral regulator must seek and consider the opinion of the GVH in its proceedings for the identification of authorised operators with significant market power and for defining the obligations conferred upon these operators.

18. The cooperation obligations serve as a tool to harmonise the approach of the competition authority and the sectoral regulators, thereby also facilitating legal certainty for stakeholders.

2.2. The benefits of voluntary cooperation

19. The GVH places special emphasis on voluntary cooperation with sector regulators. During 2020-2021, several cooperation agreements between the GVH and other authorities have been renewed and updated (including those with the financial, energy and pharma regulators).¹³

20. The cooperation agreements – while differing in detail – serve similar objectives. One of the main goals of such agreements is to provide enhanced and accelerated cooperation between the competition enforcer and the sectoral regulators with respect to the relevant proceedings of the authorities, in addition to the compulsory cooperation requirements stipulated by the law. This can provide an excellent opportunity for the competition authority to channel the sectoral knowledge and expertise of the sectoral regulators into its activities, including competition enforcement and sector inquiries.

21. The GVH is currently carrying out two sector inquiries: one covers the television broadcasting and distribution markets,¹⁴ while the other investigates beverage procurement practices of the HoReCa sector.¹⁵ During these sector inquiries the GVH also cooperates with sectoral regulators.

22. Voluntary cooperation may facilitate the adoption of a common approach to infringements identified in certain markets. Cooperation agreements often provide means to discuss competition problems noticed by the GVH or its counterparts and to consider the best tools to address the issues (including legislative proposals or coordinated regulatory intervention).

¹¹ Act CLXXXV of 2010 on Media Services and on the Mass Media, Section 171

¹² Act LXXXVI of 2007 on Electric Energy, Section 162

¹³ For a list of the cooperation agreements that have been concluded by the GVH, see (in Hungarian language): https://www.gvh.hu/gvh/egyuttmukodesi_megallapodasok

¹⁴ For an English language press release, see: https://gvh.hu/en/press_room/press_releases/press-releases-2020/the-hungarian-competition-authority-has-launched-a-sector-inquiry-into-the-television-broadcasting-and-distribution-markets

¹⁵ For an English language press release, see: https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/the-hungarian-competition-authority-is-investigating-beverage-procurement--

2.3. Regulatory compliance versus antitrust infringement

23. While competition law and sectoral regulations ultimately serve similar objectives, a particular conduct may well be in line with the latter and still infringe antitrust rules. We illustrate this phenomenon with two case examples of the GVH.

2.3.1. *Blank copying levy case*

24. The overlap between intellectual property and antitrust law is well-known and dealt with in a number of competition law cases in various jurisdictions.

25. The EU Copyright Directive provides¹⁶ that member states are allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. The Hungarian Parliament decided to introduce a private use exception, together with a private copying levy scheme.¹⁷ According to the law, the copying of copyrighted music, films, images and literary works is permitted for free for private purposes. However, “fair compensation” must be paid for this freedom in the form of a lump-sum remuneration which is payable on the sale of blank video and audio carrier media. The collection societies – authorised by law – determine the blank carrier media remuneration every year in their tariff announcements.¹⁸ When determining the amount of the lump-sum fee to be paid for the blank carrier media remuneration, a mix of the copied content is taken into account and the calculation is based on the market researches and analyses made by the collecting societies.¹⁹

26. Although the annual tariff is prepared by the collecting societies, the list containing the actual fees must be examined by the sectoral regulator and confirmed by the competent minister. The GVH established in its investigation that the approval process focuses on IP related aspects and does not consider competition law aspects (including fair calculation of prices under Article 102). Therefore, while the annual tariffs are confirmed by the sectoral regulators, the competition authority may investigate the same conduct and find that the setting of fees breaches antitrust law.

27. The GVH in this particular case found that the collecting societies – authorised by law and having a joint legal monopoly to determine, collect and distribute the blank carrier media remuneration – had not, since 2007, made any adjustments to reflect the changes to content consumption habits (e.g. when specifying the fee, copying for music purposes remained well overvalued), with the result that the determination of the blank carrier media remuneration may have been distorted due to deficiencies in the methods of their market researches and economic analyses. Therefore, the conduct was capable of amounting to a collective abuse of dominance.

28. The parties offered commitments to remedy the concerns of the GVH. The GVH accepted the commitments in its decision and requested the parties to remedy the deficiencies present in their market research and economic analysis so that when they are determining the blank carrier media remuneration they can take into account the changes to content consumption patterns, even if this necessitates abandoning obsolete methods and employing new content consumption technologies.

¹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Article 2 (b)

¹⁷ Act LXXVI of 1999 on Copyright, Section 35

¹⁸ Act LXXVI of 1999 on Copyright, Section 20

¹⁹ Act XCIII of 2016 on Collective Management of Copyright and Related Rights, Section 148

2.3.2. Network sharing agreement case

29. As an industry having strategic importance, the telecommunication sector is heavily regulated. The adaptation of new technologies in this sector requires particularly large investments, which may reduce the speed and territorial scope of the rollout of such improvements.

30. The GVH is in the process of analysing a so-called network sharing agreement between two leading mobile telephone operators in Hungary.²⁰ In accordance with the agreement under investigation, the operators develop and use certain elements of their networks collectively; consequently, they are able to build 4G networks faster as they do not need to build a parallel network infrastructure.

31. According to Hungarian sectoral laws, such an agreement must be approved by the telecom regulator before it can be adopted. While the Hungarian regulator found the given agreement to be in line with the sector-specific rules, the GVH opened a competition law case on the suspicion that the agreement breaches the prohibition of anti-competitive agreements.

32. The case is still pending.

2.4. Liberalisation and the role of competition enforcement

33. The liberalisation of network industries usually consists of a transitional period safeguarded by special provisions aimed at maintaining the smooth operation of the sector while limiting the possibility of the incumbent operators foreclosing the market. The conduct of the incumbent operators may be investigated by both the sectoral regulator and the competition authority. In Hungary, the competition authority intervened in several markets when the opening-up of these markets took place. We cite the example of the rail freight market as an illustration of such efforts.

34. The liberalisation process of the Hungarian rail network started soon after the Hungarian accession to the EU in 2004, primarily in the market of freight transportation. As the opening-up of the rail freight market resulted in a serious conflict of interest for the incumbent companies, they tried to minimise their losses by restricting competition.

35. The GVH initiated a proceeding²¹ in the beginning of 2005 to investigate whether the incumbent railway operator, MÁV, had abused its dominant position by: (1) causing unreasonable additional costs to its competitors on the freight transport market when it required a bank guarantee as a precondition of the conclusion of the 2005 network access agreements; (2) hindering, impeding and delaying access to non-public industrial sidetracks; and (3) concluding long term transport agreements that contained exclusivity clauses (so-called English clauses) with the most significant bulk-shippers, thereby foreclosing the access of new entrants to a significant part of the freight transport market. The GVH found that the conduct of MÁV constituted an abuse of dominance on all of the above-listed grounds. Upon appeal, the second and the third grounds of the decision were upheld by the Supreme Court.

²⁰ For an English language press release, see:

https://gvh.hu/en/press_room/press_releases/press_releases_2015/gvh_investigating_cooperation_between_telekom_and

²¹ For an English language summary of the case, see:

https://www.gvh.hu/en/press_room/press_releases/press_releases_2008/5025_en_court_confirms_that_state_railways_chose_the_wrong_track