

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**ROUNDTABLE ON MARKET DEFINITION**

**-- Note by the Delegation of Hungary --**

*This note is submitted by the delegation of Hungary to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 13-14 June 2012.*

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## ROUNDTABLE ON MARKET DEFINITION

### -- Note by Hungary --

#### 1. Introduction

1. This submission deals with the experience of the GVH<sup>1</sup> in relation to the role that market definition plays in the analysis that is applied in competition enforcement. It focuses on unconventional market definitions. Relying on the questionnaire of the Secretariat, it describes the challenges the GVH encountered when defining relevant markets, and how these challenges made the analytical approach of the GVH more flexible in a manner which was consistent with the existing legal framework, as facilitated by legislative changes. It also discusses in which cases the complete elimination of market definition – as a next step – has seemed plausible in Hungary, either from an analytical perspective, or from a legal point of view.

#### 2. Analytical aspects

##### 2.1 Challenges

2. Various difficulties and controversies concerning market definition have gradually emerged in the practice of the GVH. First, sometimes the relevant market cannot be precisely defined as a consequence of the unavailability of sufficient data, or because of the required time, resources and skills are not available to the GVH, either in the particular case, or in general. This difficulty first emerged very early, and led to situations where market definition resulted in two or more alternative relevant markets which were more or less equally plausible.

3. Second, sometimes relevant markets cannot be defined in an “either or” way – which otherwise would be the logic of market definition – for reasons which are inherent to the characteristics of certain markets, and which make the boundaries of relevant markets “blurred”. Such situations became more visible to the GVH from the early 2000s when it had to deal with differentiated products and try to define geographic markets. Here, certain products belong to the relevant market “to some extent” instead of being clearly either “in” or “out” of it, due to the presence of various degrees of substitutability between products (as well as their suppliers) and combined effects.

4. A third complication is related to the potential redundancies between the concepts of market definition and that of the competitive effects in the analysis (or in the document describing the analysis). While such redundancies are rooted in the conceptual overlaps that exist between the two notions, they did not become visible until the GVH started to apply quantitative techniques in order to explore the competitive constraints which link them together. Using empirical methods in certain cases to identify what competitive pressure one product or supplier exercises on the other – such as diversion ratios, or bidding studies – could result in either relying on the same arguments and findings both in market definition and in identifying the competitive effects, or in the use of arguments in market definition which

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<sup>1</sup> Gazdasági Versenyhivatal (GVH) – the Hungarian Competition Authority.

sound as though they are concerned with competitive effects, and vice versa. These redundancies require additional care, because they could lead to confusion as to where in the legal assessment such arguments and findings should be taken into account, and how these parts are related to each-other consistently. Such confusion – if it occurs – in turn may entail the risk of creating a bad impression on the soundness of the analysis and the integrity of the case.

## **2.2 *Impact on GVH analysis***

5. The responses of the GVH to the challenges described above have been based on the fundamental insight that market definition in the analysis is a means, not an objective. This was realised by the GVH very early, in the first half of the 1990s,<sup>2</sup> and was also heard at various international fora. The two basic types of solutions were “incomplete” market definition on the one hand, and making the role of the relevant market relative, on the other hand.

6. The most simple form of “incomplete” market definition is not to choose between candidate relevant markets when the choice does not matter for the purposes of the analysis, i.e. when the conclusion of the case would remain the same, either choice is acceptable. Often there are two candidates – a narrow and a broader market, depending on whether a product or group of products is part of it or not – but more options can also be dealt with in the same way. “Incomplete” market definition has been used in situations where an accurate market definition was impossible or too difficult for some reason, but could only be applied in cases where differences in market definition did not matter.

7. The GVH makes the role of the relevant market in the competition analysis more relative in two ways. First, it emphasises that the market shares are less relevant, or even that their relevance may be quite limited in differentiated product markets and in bidding markets. Second, in those situations, the GVH tends to use the terminology of “close/closer vs. weak/weaker” substitutes and competitors as a complement to traditional market definition (either it is a “precise” or an “incomplete” one).

8. The GVH relied on an “incomplete” market definition or attributed a more relative role to the relevant market, or did both, in a number of cases, mostly in bid rigging cases. Some of them will be discussed here in this paper.

## **2.3 *Abandoning the use of market definition in GVH analysis***

9. In theory, taking forward the logic behind the developments described above could lead to the disappearance of market definition in certain cases. This would be the case if the accuracy of market definition required for the analysis (i.e. to be able to decide on the case) was not only limited but zero, or if the market shares were not only less relevant, but totally irrelevant in identifying market power and competitive constraints. The terminology of “closer” and “weaker” competitors might be sufficiently intuitive and convincing not only to complement, but also to actually replace traditional market definition in such cases.

10. Nevertheless, to date, the complete elimination of market definition has not emerged as a serious option in the enforcement practice of the GVH. So far the current method of analysis has proved to be sufficiently flexible for dealing with the challenges that have arisen in relation to market definition. A large number of the cases dealt with by the GVH in its enforcement practice do not even require this amount of flexibility, and the “structural” approach offers a convenient method of analysis which might not be easily substituted.

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<sup>2</sup> The GVH was established in 1990 by the first modern competition legislation (Act No LXXXVI of 1990 on the Prohibition of Unfair Market Practices).

11. Therefore it seems that the idea of replacing market definition could only be seriously raised in extreme cases, when defining the market it would not add any value to the analysis, or when, in fact it would weaken it. Even in such a case, some sort of market definition, however vague it would be, could serve as a useful reality check when interpreting the results of methodological short cuts to effect.

### **3. Legal aspects**

#### **3.1 *The legal framework***

12. On the one hand, the Hungarian Competition Act<sup>3</sup> does not include any explicit provision making market definition mandatory. On the other hand, however, the notion of relevant market is deeply embedded into the Hungarian competition legislation. According to the Competition Act, it is the relevant market where either the significant lessening of competition must happen, dominance must exist, or agreements must restrict competition, although this conceptual framework alone could allow for non-specified relevant markets. The Competition Act also identifies certain factors to be taken into account when defining the relevant market, although the phrasing does not imply that that market definition must always take place.

13. Moreover, market share thresholds – such as the *de minimis* rule – play an important role in Hungarian competition law (as well as in EU competition law, which in certain cases must be enforced by the GVH). The application of market share thresholds assumes that there is a relevant market, which has been defined.

14. This legal framework has allowed the GVH to increase analytical flexibility concerning market definition.

#### **3.2 *Possible legal constraints of abandoning market definition***

15. It is not obvious whether the elimination of market definition in GVH proceedings would be compatible with the existing legal framework. As market thresholds may play a role in certain cases, it is unlikely that a general removal of market definition could be reconciled with the legislative status quo. However, it is another question if abandoning market definition in certain cases would be possible.

16. In some cases, market definition may be circumvented by first investigating the nature of the behaviour in question. If the behaviour is not abusive or restrictive, then the case may be closed without defining the relevant market. One could interpret this as a special situation where definitive findings on effect make market definition unnecessary. An alternative interpretation would be that this is merely about the sequence of analytical steps, rather than about a genuine removal of any of those steps.

17. Current rules prevent the phrase “relevant market” from being left out of any substantive analysis assessing conducts on the merit. Nevertheless, they allow analytical conclusions such as that a conduct or a merger was (or was not) anticompetitive “*on either of the two possible relevant markets*”, or “*on any of the plausible relevant markets*”. It is less clear however, that the formula of “*...on the relevant market whatever it is*”, would also be an option in cases where there are direct and conclusive findings about effect (on unspecified relevant markets). In other words, while “adequately incomplete” market definition is certainly legal, it has not yet been explored whether the “degree of adequate incompleteness” is limited by the rules.

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<sup>3</sup> Act No LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

### 3.3 Cases in GVH practice of unusual market definitions

18. As a consequence, carrying out an analysis on the merit without specifying what is the relevant market at all would be regarded as a very risky proposition, especially in cases where the GVH finds an infringement or blocks a merger. The lack of market definition would certainly trigger fierce attack from the party (or parties) and without thorough explanation it could significantly weaken the case before court.

19. In cases of public procurements, one of the obligations of the tender caller is that it has to specify the date until which applications can be submitted. After that date, it is quite clear to the tender caller how broad or narrow the circle of companies that could submit a bid, and therefore can be considered as competitors. The tender caller can identify these competitors, so there is no need for the usual method of market definition. We argue that the very goal of market definition is to identify what companies are present in a given market and how they can compete against each other. If these questions can be answered without the usual measure of product and geographical substitutability, then market definition can be abandoned. The influence of a company on the outcome of the public tender (market power) is proportional to the number of independent competitors also allowed to submit a bid. The measure of the market power has been indicated by the market share calculated on the basis of the number of bidding firms (50 % in case of two bidders, 33.3 % in case of three bidders, 25 % in case of four bidders, and so on.) These market shares can also be the basis of the assessment in the application of the *de minimis* rule. (The number of the relevant cases: Vj-138/2002, Vj-154/2002, Vj-27/2003)

20. Certain markets can be characterised by a few but highly paid contracts in a year having won in tenders, market shares fluctuate accordingly. A company can win more contracts in one year and less in the next. In case of a merger in this market, it would insufficient to look at only the market share in the year of the merger. Therefore, in markets like this the GVH

- calculated market shares on the basis of the factual and potential number of competitors (Vj-124/1999) or
- took a longer period of time (usually 5 years) and calculated the average factual market shares of the affected companies (Vj-103/2011.)

21. In certain retail markets, the market power of a company can be estimated on the basis of the average proportions of every product, similar in nature, regardless of whether they belong to the same product market or not. For example, in the assessment of the competitive effects of a joint purchasing agreement between two food stores, there were different kinds of foods which could be deemed different considering their role in consumption or in supply, therefore they surely belonged to different relevant markets. But considering that these two companies offer a wide but quite similar selection of foods, the market shares of every affected relevant markets cannot be significantly different from the average of these market shares, otherwise they would risk losing customers. Besides, the true market power of a food store can be estimated on the basis of its total, aggregate turnover. So, as a result, there is no need to calculate the market shares in every affected market, an average or aggregate approach can be used in the assessment. (Vj-81/2003)

22. A recent court decision perhaps gives reason to adopt a cautious attitude for using unconventional market definitions. In cartel cases, market definition tends to be considered as such that is not needed for substantiating the case. However in 2011, when reviewing a decision concerning a serial bid rigging conspiracy, the court found that the GVH had not defined the boundaries of the relevant market with sufficient accuracy to conclude that whether the individual bid riggings belonged to one single conduct and market, or that every tender should have been considered as a distinct market. The court therefore found that some of them, taken individually, could have not been subject to GVH scrutiny due to the expiration of the limitation period, as they took place more than 5 years before the case was launched. (Vj-130/2006).