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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN HUNGARY

-- 2007 --

This report is submitted by the Hungarian Delegation to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 11-12 June 2008.

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1. Changes to competition laws and policies, proposed or adopted

1. In 2007 the Competition Act was not affected by any substantive amendment except some deregulation and conceptual refinements.

2. Following the notice on method of setting fines in antitrust cases, in October 2007 the President of the GVH together with the Chair of the Competition Council issued a notice on the method of setting fines in consumer protection cases[1]. This notice details the considerations set out in law and used by the GVH to determine the amount of competition supervision fines imposed in cases concerning unfair manipulation of consumer choice.

3. Two decisions of the Constitutional Court (Alkotmánybíróság, AB) related to the field of competition law or the functioning of the GVH. In its decision 25/2007. (IV. 20.) the Constitutional Court accepted the standpoint set out in a submission, which questioned the constitutionality of some points of the instruction concerning the internal procedure of the GVH issued by the President of the GVH. The AB established that – although the President directs the activities of the GVH, establishes the organisational and operational rules of the GVH and exercises the rights of employer – the President does not have the power to determine obligations for the members of the Competition Council through defining deadlines for the completion of competition supervision proceedings. The AB took into consideration the provision of the Competition Act, according to which the members of the Competition Council are only subjected to the law in the course of a competition supervision case. The AB abrogated the provisions of the instruction, which contained these kinds of obligations. However at the time of the decision-making the objected provisions were no more in force.

4. The AB rejected the submission[2], which complained that the Competition Act maximizes the fine, which may be imposed by the Competition Council on social organisations of undertakings, public corporations, associations or other similar organisations in 10% of the total of the net turnovers in the preceding business year of undertakings, which are members of those organisations[3]. In the propounder's opinion this is unconstitutional in relation to public corporations since in this way the contribution to welfare charges of the public corporation is not proportional to its income and property status. According to the AB the fine is a sanction, that is to say a legal consequence of an unlawful conduct. The competition supervision fine is the sanction of an anti-competitive conduct the aspects of the imposition of which must be determined under the Competition Act. Thus in this context it cannot be considered as a welfare charge and cannot be judged under the constitutional scale of proportionate sharing of welfare charges.

5. The Act on the Rules of Broadcasting and Digital Transition[4] has created a new task for the GVH. In the future the National Communications Authority (Nemzeti Hírközlési Hatóság, NHH) and the GVH will share between them – with respect to the rules concerning data protection and business secrets – the available data, information and documents for the observance of the principles and the attainment of the purposes of the Act. Thereto, upon request of the other authority, each of the two authorities will give opinion or take position in professional questions concerning its tasks and competence.

6. The new Act on Electricity (Act LXXXVI of 2007 – passed on 25 June 2007) is the most important element of the legal framework for the completion of liberalization on the electricity market

1 Notice No 1/2007 of the President of the Hungarian Competition Authority and the Chair of the Competition Council on the method of setting fines in cases of unfair manipulation of consumer choice.

2 Decision 239/B/2005.

3 Article 78(1) of the Competition Act

4 Act LXXIV of 2007

in Hungary. It introduced the concept of Significant Market Power in the electricity sector with the necessary rules and regulations. The Hungarian Energy Office (HEO) is in charge of enforcing these regulations while taking into consideration the opinion of the GVH.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1 Summary of activities of: - competition authorities; - courts

7. In 2007 the GVH conducted 204 competition supervision proceedings, out of which 158 cases were finished by the decision of the Competition Council. 84 of the latter related to unfair manipulations of consumer choice while 74 of them to antitrust (in 15 restrictive-agreement, 13 abuse-of-dominance and 46 concentration cases). Of the total number of the cases concluded by a decision 114 cases were commenced ex officio, while 44 started on application. The total number of the interventions of the GVH was 106, they were made mainly in consumer fraud cases (81 cases), and the rest were in cases with antitrust relevance (25 cases). The GVG terminated 32 of the antitrust proceedings after it had made, by its orders, commitments offered by parties to those cases to remedy competitive problems, binding to the parties.

8. In 2007 the GVH imposed fines in 68 decisions. The amount of the fines imposed was HUF 2359,9 million (approx. EUR 9,3 million), including HUF 5,2 million imposed for the missing of the deadline set for the submission merger-notifications. Around half of the total amount was imposed in cartel and half in consumer fraud cases. No abuse of dominance was established in 2007. Only 530 million HUF (2,1 million EUR) was enforceable at the end of the year as in the cases of the highest fines (Vj-140/2006: 936 million HUF, Vj-113/2007: 200 million HUF, Vj-114/2007: 132 million HUF) the deadline for payment did not expired, or the court did not decided about the requests for the suspension of the fines. Almost the totality (over 97%) of the enforceable fine was paid by the end of the year.

9. Since its establishment in 1991, until 2007 the overall amount of the fines imposed by the GVH was 29,8 billion HUF (114 million EUR). The rate of enforceable fines significantly increased as compared to it in 2006, mainly due to the fact that courts decided more swiftly and usually they rejected the requests of parties to suspend the enforceability of fines.

10. Decisions of the GVH can be reviewed by the Municipal Court of Budapest, the judgements of which can be further appealed before the Court of Appeal Budapest. At a third level the Supreme Court can also make a judgement should one appeal the judgement of the Appeal Court in the form of a request for exceptional review. According to the Act on Civil Procedures a decision can be appealed by any party to the proceeding, or by anybody whose rights and obligations are directly affected by the case underlying the decision. Such a person might be e.g. the complainant or other participants of the proceeding. The reviewing court may alter the decision or dismiss it and order the initiation of a new proceeding.

11. Despite a slight decrease, like in recent years, around a half of the decisions establishing an infringement are submitted to court for review. The slight decrease is mainly due to the fact that within the prohibition decisions the number of consumer fraud cases has significantly increased (as from 75% in 2006 to 94% in 2007) and due to the relative simplicity of the cases and the lower level of fines imposed the rate of appeal in such cases is generally lower.

12. More than two thirds of the 412 appeals of the decisions brought under the present competition law have become final. The underlying decisions of the GVH were altered in part or in its entirety in 20 cases. In another 17 cases the amount of the fine was reduced to certain extent. It can

therefore be assumed that there is still harmony in the application of the competition law between the GVH and the courts.

13. Among the judgements made in 2007, that closing the cinema cartel case is worth to be mentioned first. The judgement of the Supreme Court upheld the decision of the GVH establishing the existence of the cartel. The judgement confirmed that cartels could be proved indirectly should indirect evidence form a logical argument that substantiates the existence of the infringement. In another judgement on the highway construction cartel, the Court of Appeal Budapest also upheld the decision of the GVH. This case however still continues in the form of an exceptional appeal before the Supreme Court. The Municipal Court of Budapest upheld the first „credit card" decision of the GVH. The GVH conducted a number of proceedings for misleading credit card advertisements and this judgement in relation to the first of these decisions, upheld the approach of the GVH applied in all these cases. Perhaps due to this judgement the parties in the other proceedings accepted and did not appeal the decisions of the GVH.

2.1.2 Description of significant restrictive agreement cases

14. In the supervision proceeding against undertakings (of which Northline Kft. and AND NOW Kft. were found guilty) dealing with currency exchange, the Competition Council underlined in its decision that the direct and regular exchange of even public data and information (and not only information on prices) may infringe the provisions of competition law. Information exchange that aims at, or has the effect of, lowering the risks arising out of the ambiguous behaviour of competitors go against the requirement of undistorted competition. If an undertaking regularly sends to its competitors its intended daily prices, that practice is anticompetitive in two respects. First, it might serve as a tool for price fixing; second, even in cases in which a price fixing cannot be proved, it can influence independent price setting. (Vj-83/2005)

15. In its decision concerning an agreement about the non-contesting of each others' newspaper distribution markets, the Competition Council emphasized that in the course of competitive assessment of an infringement it has no relevance whether the restrictive part of the agreement, afterwards, was considered by the parties as an important or unimportant part, binding or not binding, or whether the breaching of the agreement was sanctioned or not. Neither can parties refer to the lack of concurrence of wills alleging that the not attacking of each other's markets is only recognition of the status quo, or unilaterally supplied information. Unilateral statements incorporated in a contract qualify as an agreement from a competition law point of view, and they especially do so if the contents of such statements made by the parties are very similar or if one of the parties made its statement in exchange for financial benefits. As far as the capability of agreements about the non-contesting of each others' markets of restricting competition and their potential effects are concerned, it can be established that an important element of the risks motivating undertakings to attain better performance is the not knowing of the plans and intentions of the existing market players and of the potential entrants. A concertation between potential competitors about the date from which or until which they will or will not enter, respectively, each other's traditional markets means an anticompetitive influencing of market processes. The Competition Council set forth that an agreement on non-contesting the competitor's market qualifies as a market allocation. (Vj-140/2006)

16. Hardcore cartels (price fixing, allocation of markets, setting quotas) and bid rigging continue to be a priority field, although in 2007 – unlike in previous years – the biggest fine imposed was not in these types of cases. In secret hardcore cartels down raids (searches of the premises of the parties without a prior notification, subject to the attainment in advance of a judicial authorisation) constitute a core technique. Another important tool used against hardcore cartels is leniency policy, which was applied in one case in 2007.

17. The largest fine in 2007 was imposed in a proceeding against Hungarian Post Zrt. and Magyar Lapterjesztő Zrt. (Lapker) for market allocation. The amount of fine was HUF 936 million (approx. EUR 3 720 thousand).

18. The examined conduct concerned two closely related markets of newspaper distribution: the market of single copy sale (newsstands, shops, petrol stations), and that of subscriptions. Until 1998, both ways of distribution were used by the Hungarian Post Co. Ltd. (hereinafter referred to as the Hungarian Post). In 1998 the Hungarian Post sold its regional newspaper retailers to the French owned Hungarian Wholesale Newsagent (Lapker). Hence, it became the task of Lapker to deliver newspapers from the publishers to the retailers. At the same time, the Hungarian Post kept for itself the distribution of newspapers based on subscriptions, and until the beginning of 2007, when the company MédiaLOG entered the market, only the Hungarian Post dealt with subscriptions.

19. First, the agreement on the privatisation of the Hungarian Post's regional newspaper distribution network, which was in force between 1998 and 2001, contained a clause in which the Hungarian Post announced that it would not seek to forward newspapers from the printing house to the retailers. In exchange for this, in a Co-operation Agreement entered into by the parties for the period of 2002-2007, the Hungarian Post achieved that the commission, which it received from Lapker subject to the circulation (of newspapers) sold at post offices, rose from the former 13% to 23,5%. In the amendment to the Co-operation Agreement, effective from 2003, Lapker agreed not to enter the market of newspaper subscriptions. Lapker paid HUF 260 million (approx. EUR 1 million) in a lump sum, as a "market-organisation fee" on condition that the Hungarian Post would not enter the single copy sale wholesale market for a further five years.

20. 1The concertation between competitors on refraining from entering each others' market amounts to a market allocation. The agreement was not only capable of restricting competition, but in the course of entering into the agreement the parties had clear anticompetitive aims – as it is evidenced by notes, memos, strategy papers and other materials on the abstaining from competition. The agreement was aiming at, and resulted in, keeping away the biggest and most likely potential competitor. (It strengthened the artificially formulated competitive market environment.)

21. As the mutual self-restriction did not bring about efficiencies of which consumers received a fair share, the GVH did not see any possibility to assess the agreement as one being exempted from the prohibition of restrictive agreements.

22. Besides the infringement of Article 11 of the Competition Act, the Competition Council established, for the period following 1 May 2004, the infringement of Article 81 of the EC Treaty.

23. Therefore, both the Hungarian Post and Lapker were fined HUF 468 million (approx. EUR 1 890 thousand) each. In calculating the fines, the GVH took into consideration that the agreement aimed at completely excluding competition, it was in force for years, and it had actual effects on the market. An aggravating circumstance was the fact that the parties are practically monopolists on their respective markets; therefore they must have been fully aware of the competition restricting effect of their agreement. At the same time, as a mitigating circumstance, the GVH reckoned with the fact that both undertakings expressed their intentions to terminate the agreement. This termination reduced the envisaged duration of the agreement from five to three years. (Vj-140/2006)

24. In the course of the reconstruction of Bajcsy-Zsilinszky Hospital, the Municipality of Budapest announced a three-phase open public procurement procedure, for a contract value of HUF 3 billion (approx. EUR 11 878 thousand) relating to the purchase of specified medical tools in August and December of 2005. In each phase, only uniform bidding was allowed, that is no tenders relating to only a part of the tools could be submitted.

25. The winner of the public procurement procedure, in all the phases, was the Kortex Mérnöki Iroda (Engineer Bureau) Kft., which employed Olympus Hungary Kft. – an undertaking delivering endoscopes and accessories – as a subcontractor. The value of the products delivered by Olympus represented a significant part of the bid of Kortex, and thus of the procurement. It happened only n the third phase of the public procurement procedure that, in addition to Kortex, also another undertaking

submitted a tender. The competitor's offer was slightly (by 0.4%) better than that of Kortex, however the submitted offer turned out to be void.

26. In September of 2005, Kortex and Olympus entered into a cooperation agreement with regard to the phases of the public procurement procedure. In connection with the public procurement, in the agreement, Kortex undertook to purchase endoscopes exclusively form Olympus, while Olympus undertook to sell the said tools exclusively to Kortex.

27. The commitment made by Kortex might have restricted competition between the undertakings selling the given products, as a potential buyer, Kortex, was thereby eliminated. V*ica versa*, the commitment made by Olympus might have restricted competition between those undertakings that potentially could submit a bid. It was namely a fact that as far as phase one or the other two phases are concerned, only the products supplied by Olympus and another undertaking, or those supplied by Olympus, respectively, met the technical specification attached to the announcement.

28. The Competition Council established that the commitments made in the agreement restricted competition. However, the Competition Council examined whether the *de minimis* rule applied to the case or whether, in view of also other circumstances, the agreement was exempted. Consequently, it was found that the agreement with regard to phase I and the commitments of Kortex with regard to phases II and III were covered by the *de minimis* provisions of the Competition Act.

29. At the same time, the Competition Council found unlawful the agreement between the parties with regard to the phases II and III, by which Olympus undertook to sell the tools in question exclusively to Kortex. The restrictive conduct of the parties, by way of the exclusive supply, might influence the outcome of the procurement procedure. The exclusive supply obligation undertaken by Olympus could not fall under a block exemption regulation, as the undertaking held a market share over 30%. Furthermore, as the exclusive supply obligation did not produced any consumer benefit either, the said agreement could not be considered as being individually exempted.

30. The Competition Council imposed a fine of HUF 77 million (approx. EUR 27 730 thousand) on Kortex. In accordance with the leniency policy[5], Olympus was granted immunity from the fines, as it was the first to submit information and evidence until than unknown to the GVH upon which the GVH was able to open investigation, and it met the other conditions as well (it did not take any steps to coerce other undertakings into participating in the infringement and operating the cartel agreement; it co-operated fully, on a continuous basis throughout the procedure, with the GVH; and ended its involvement in the cartel following the submission of evidence). The Competition Council made it clear that despite the fact that according to the international and Hungarian legal practice leniency policy is applied to horizontal agreements, it regarded leniency policy to be suitable for application and to be applicable in the case at hand. Besides the fact that any deviation from the leniency policy of the GVH to the detriment of the undertaking concerned would have caused considerable harm to legal certainty, the secret nature of the agreement, and its actual and potential effects made it eligible for being covered by the leniency policy, in compliance with the objectives followed by the leniency notice. This does not imply, of course, the conclusion that the notice could generally be applied to vertical agreements too (Vj-81/2006).

31. Cases on retail price maintenance (RPM) come more and more into the sight of competition authorities on international level as well. In the practice of the GVH, the first case in which a considerable amount of fine was imposed is Vj-26/2006.

32. The GVH initiated a competition supervision proceeding as it suspected that Navi-Gate Kft, which was both a wholesaler and a retailer of the leading product Garmin on the market of GPS

5 Notice No 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority.

equipments, and other retailers had entered into an agreement fixing the retail prices of Garmin products. Later, the GVH extended the proceeding also to cover the reseller agreements concerning the marketing of I-Go navigation software.

33. The reseller agreements concluded by Navi-Gate for the I-Go and Garmin products were obviously worded with the aim of applying the recommended resale price as a fixed price. This is evidenced by the fact that any deviation from the recommended price was subjected to a written approval of Navi-Gate. Some of the agreements did not contain any hint at all that the prices were of a recommended nature thus any freedom of the reseller to set its own prices could not be detected in them. The great majority of the Garmin agreements authorised the importer Navi-Gate to withdraw the reseller's distributor authorisation for the case of an arbitrary price modification by the latter.

34. The proceeding was soon terminated in relation to the resellers who bought no products or bought only for their personal use, and to those who did not actively participate in the implementation of the price fixing stipulations of the agreement. Subsequently, the proceeding continued against the undertakings, which actively participated in the implementation of the price fixing, furthermore against Navi-Gate, the deviser of the price fixing clause. Concerning the I-Go software, the software designer Nav N Go Kft., standing on the top of the marketing chain, was subject to the proceeding.

35. Based on the available reseller agreements, correspondence with the resellers and other evidence, the GVH arrived at the conclusion that the stipulations of the agreements fixing the retailers' price (i.e. the price which was charged to the end-users) were capable of restricting competition. The provisions of the agreement – to restrict or eliminate intrabrand competition, that is the price competition between resellers marketing the same products – were capable of actually restricting competition on the market, as these provisions were enforceable by civil proceedings. The resale price maintenance employed by the importer in relation to end-users was capable of restricting and monitoring price competition between resellers on different levels of the value chain. This qualifies as a serious infringement and does not serve consumers' welfare, neither in the short nor in the long term as it entirely suppresses production and distribution efficiency deliberations.

36. The Competition Council established that the *de minimis* provision of the Competition Act could not be applied as the undertakings concerned had a market share exceeding 10% both on the markets of software for handheld computers and on the markets of car navigation devices. A further reason against minor importance was the fact that the fundamentally vertical agreement also generated (horizontal) price restrictions between competitors. For similar reasons, the agreements could not enjoy thee benefits provided by a group exemption; moreover, the undertakings concerned could prove that their agreements met the conditions for being individually exempted.

37. The GVH imposed a fine of HUF 43 million (approx. EUR 169 thousand) on Navi-Gate. In the light of their minor role in the anticompetitive conduct, no fine was imposed on the other undertakings.

38. Since 1997, several codes of ethics of professional chambers were subjects of competition supervision proceedings. By conducting those proceedings, the goal of the GVH was, on the one hand, to make it clear for the public that competition law applies to the activity of chambers and their codes of ethics in the same way as to any other business activity, and, on the other hand, to stop the infringements observed. Most of the cases ended with termination of the proceeding due to commitments to rectify the codes.[6] In cases where serious restrictions of competition could be detected

[6] Vj-119/1999 – Magyar Mérnöki Kamara; Vj-136/1999 – Magyar Építész Kamara; Vj-134/1999 – Magyar Gyógyszerész Kamara

(such as efforts to operate a price cartel), apart from the establishment of the violation and the prohibition of its continuation also fines were imposed.[7]

39. The GVH adopted an infringement decision establishing that some provisions (in force between 1 March 2003 and 31 January 2005) of the Code of Ethics and Discipline and of the Rules for Tariff Calculation, furthermore, of the Draft Competition Code of Magyar Építész Kamara (Hungarian Chamber of Architects) were anticompetitive.

40. According to the Code of Ethics and Discipline's provisions architects had to determine the honoraria they got for their architect services in line with the Rules for Tariff Calculation and no derogation from those rules were allowed. Any derogation from the provisions of the Rules could lead to the commencement of a disciplinary procedure. Although the Rules did not set a complete range of particular tariffs, they provided calculation methods (e.g. the estimated costs of the construction or the devoted working hours) and other methods to be applied (formulas and multipliers) in a way through which they practically provided mandatory minimum prices. The reasons for the application of the Rules were to ensure the quality of service, and to provide appropriate information for customers, the Chamber stated.

41. Certain provisions are not caught by the prohibition of restrictive agreements. Namely those, which, by their very nature could reasonably be held by professional organisations or bodies to be indispensably necessary to achieve certain goals that are reasonably acceptable on the grounds of the public interest.[8] The reference to the public interest, however, does not provide an automatic exemption for every rule of the Code of Ethics; each and every case has to be scrutinised on its own with a view to the goals to be attained and, thus, the proportionality of the restrictions.

42. In the case of architectural services, a.o. the planning and safety of buildings, public safety measures in connection to quality, the forming of harmonious metropolitan landscape, the conservation of natural and cultural heritage may constitute public interest. In the course of the proceeding, the Chamber of Architects could not identify any professional principle, which would serve the attainment of the above-mentioned public interests, and, at the same time, a full compliance with which would justify the price fixing.

43. The GVH underlined that more simple and more efficient means of providing information to market consumers (customers) may be available than the publication of Rules for Tariff Calculation; furthermore, the prices calculated based on the Rules do not necessarily prevent services from being of poor quality and offers from being unfounded. Several mechanisms exist through which quality assurance and consumer protection can be guaranteed in a less restrictive manner. For instance, the consistent supervision – by the Chamber – of strict conditions required for the exercising of the profession. By using such high tariffs, the Rules intended as one of its aims to restrict competition by keeping away from the market those architects who work too cheap. By the creation of the Code, the Chamber went beyond the objectives and the scope of the authorisation granted to it by the law[9].

44. Following its negotiations with the GVH, the Chamber amended, as of 1 February 2005, its Code of Ethics and Discipline and the Rules for Tariff Calculation. The amendments targeted the determination of provisions relating to the members according to which the stipulations and rules of

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7 Vj-148/1998 – Magyar Könyvvizsgálói Kamara; Vj-137/1999, Vj-45/2001 – Magyar Orvosi Kamara; Vj-1/1999 – Magyar Állatorvosi Kamara, Vj-180/2004 – Magyar Ügyvédi Kamara, Vj-16/2005 – Magyar Könyvvizsgáló Kamara

8 In EC law, this principle is known as the Wouters-exception, named after the Wouters-case against the Dutch Bar Association, investigating one of its stipulations (C-309/99 J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten ECR 2002., I-1577. P]).

9 Article 11(2) of Act LVIII of 1996.

the Chamber about architectural tariff calculations constitute only recommendations and derogations from them are allowed (Vj-201/2005).

45. The proceeding against Magyar Gyógyszerész Kamara (Hungarian Chamber of Pharmacists) with regard to its provisions restricting the marketing activities of pharmacies was terminated after the commitments offered by the Chamber had been accepted. The GVH took into account the practical interpretation of the Code, which was given by the resolutions of the Ethics Commission. Albeit particular resolutions relating to the infringement of the Code of Ethics may not be assessed, under Hungarian or Community competition law, in competition supervision proceedings, the method of implementation reflected by them – uncovering the anticompetitive nature of the aim – may help in identifying the actual goals of the provisions. It cannot be disregarded that the ambiguous phrasing – furnishing a basis for actual practice – could discourage pharmacists as to the lawfulness of their practices, which in itself can be restrictive to competition.

46. Advertising can be an important factor in pharmaceutical activities. At the same time, with regard to the marketing and advertising of pharmaceuticals, significant legal restrictions are applied with a view to the public interest attached to health and the reasonable limitation of subsidies. Competition law is to protect public interest attached to competition; however, other public interests may overwrite it. If these other public interests are protected by other statutes, then competition policy must respect the will of legislators. Therefore, in assessing the provisions of the Code of Ethics restricting marketing activities of pharmacies, the starting point for the Competition Council was the opinion that only those provisions can avoid being caught by the Competition Act (or by EC law), which identify as ethical misconducts activities that are prohibited, at the same time by state regulation as well.

47. In the course of the proceeding the Chamber referred to the fact that restrictions provided by the Code of Ethics (those namely that aimed at extending the public interest) were otherwise in contradiction with the economic and market related individual interests of the pharmacists as individuals. In contrast, the Competition Council pointed out that the said provisions restricting marketing activities of the Code of Ethics did not necessarily go against the collective interest of pharmacies, which, measured against the public interests of pharmacists that qualify, in comparison with the public interest, rather as being "private" interest. In fact, those provisions are aiming at preserving the *status quo*: on the market; they may hamper the expansion of more efficient market players, and reduce the possibility available to new entrants to popularize themselves, which is obviously in the interest of the drafters of the Code of Ethics.

48. In the knowledge of the preliminary position of the Competition Council, the Chamber committed itself to delete the provision from the Code of Ethics, which declared a general prohibition on all the possible means of increasing the turnover of pharmacists/pharmacies, and not just on those relating to the granting of benefits expressly and exclusively prohibited by the relevant law; furthermore, to delete the provision, which prohibited the application of marketing means with regard to those pharmaceutical products, which were not publicly subsidised. (Vj-60/2006)

49. Euronics Kft. was founded by the commercial and service provider undertakings Vöröskő Kereskedelmi és Szolgáltató Kft., Elektro-Quality Kereskedelmi és Szolgáltató Kft., and Bravotech Kereskedelmi és Szolgáltató Kft. In order to join the international supermarket chain Euronics and to build up Euronic's Hungarian network. In the course of this activity, the undertakings wanted to take advantage of the joint venture regarding joint supply and marketing and regarding a uniform retail business image. Thereby, the undertakings use Euronics Kft. to ensure their uniform representation when it comes to negotiations with suppliers, to the creation of a uniform image and design of the supermarkets, to a concertation of discount campaigns, further to the provision of services associated with trade mark of Euronics (training for the sales personal, home delivery, and offering loans for the purchase of goods to customers).

50. 2In the proceeding, the GVH examined in particular the extent to which the establishment of the joint venture (Euronics) could be considered as a concentration. The Competition Act provides that a concentration of undertakings is effected, where more than one undertaking, which are independent of each other, jointly create an undertaking controlled by them, which is able to perform on a lasting basis all the functions of an independent undertaking. Should it be proved that the undertaking is not a full function undertaking, the joint venture must be scrutinised under the provisions relating to restrictive agreements of the Competition Act.

51. The fact that a joint venture develops business relations exclusively, on a long lasting basis, with its founders, usually excludes the possibility for it to qualify as a full function joint venture. In the given case, it was undoubtedly established that Euronics Kft performs activities that can only be utilized by its founders. The Competition Council pointed out that, in theory, there might be a case where a joint venture relies exclusively on its founders only during the starting (market entry) period of its operation. However, with regard to Euronics, this possibility could be ruled out, as its business relations were taken up six years before the initiation of the competition proceeding. Therewith, neither did the Competition Council regarded the franchise partners of the founder undertakings as independent market players of the kind, the providing of services to which by Euronics could have questioned that it was not qualified as a full function joint venture.

52. In examining the question whether the founding of Euronics is capable of restricting competition between the founders, the Competition Council arrived at the conclusion that the activity of the Euronics, regarding both purchase and marketing, meets the requirements for being exempted. The joint purchase and the coordination concerning the spreading of goods to the outlets provides efficiencies and appreciable savings, besides the fact that the founders of Euronics – in view of the market share of the firm and the number of competitors – have remained under appropriate competitive constrains on the markets of both purchases and sales. The determination of uniform discount campaign prices could be considered as being exempt from the prohibition as the price-agreement between the competitors was only a part of a much wider agreement between them. The continuous flow of goods that are on sale, in the field of technical consumer-goods, is a crucial precondition of retail level competing; and the uniform image of the Euronics-network makes joint discount campaigns necessary. (Vj-191/2006)

2.1.3 Description of significant abuse of dominant position cases

53. On the market of infocommunications services, in 2007, besides the well-known cases of fixed-line broadcasting (cable TV services: excessive price increases, changes of programme packages), „naked" ADSL cases represented the other part of investigations.

54. The cases of UPC Magyarország Kft. (Vj-2/2006) and FiberNet Kommunikációs Zrt. (Vj-4/2006) concerned the undertakings' price and programme package policy. With regard to prices, both cases ended with the termination of the proceeding for the following reasons. According to the Competition Council, in order to establish an infringement due to excessive prices, a full analysis of the undertaking's economic activities is needed, except when the lack of infringement can be unambiguously determined.[10] However, based on the experience of earlier cases, such analysis requires enormous costs and is time-consuming and even in these cases, there is little chance that excessively high prices can be proven. Consequently the amount of resources needed is not proportional to the possible harm caused to the public interest by the possible infringement.

55. As to the structure of programme packages the Competition Council also terminated the proceedings since an infringement could not be established based on the evidence available and no result was expected from the continuation of the proceedings as well.

[10] In its earlier practice, the Competition Council terminated all proceedings where the annual price increase was lower than 15 per cent or was slightly over that mark, which indicated (indirectly) the lack of infringement as well.

56. In the cases ViDaNet Zrt. (Vj-16/2006) and TvNetwork Rt. (Vj-15/2006), in addition to the above-mentioned issues the general contract terms of the parties were investigated as well. In ViDaNet, the undertaking made the commitment to modify its general contract terms taking into account the need to inform consumers before significant modifications of the programme packages. In the TvNetwork case, the Competition Council terminated the proceeding due to the lack of a dominant position as a result of competition by competing cable TV products in the service area and by similar Antenna Digital services.

57. In January 2006, the GVH initiated proceedings against 5 earlier (concessionaire) fixed line telephone operators (Magyar Telekom Távközlési Nyrt., Invitel Távközlési Szolgáltató Zrt., Hungarotel Távközlési Zrt., Emitel Távközlési Zrt. and Monor Telefon Társaság Rt.) to examine whether they infringed competition law by providing broadband ADSL Internet services only in connection to fixed line (PSTN) services. The GVH received complaints concerning the tying of ADSL services to fixed line subscription already before 2006, nevertheless it refused to launch investigations, since due to the pricing of these products, consumers suffered no significant harm. The ADSL service was presented earlier as a premium service built on the fixed line subscription. The costs of maintaining and operating the local loop, which is the basis of the ADSL service, were not totally included in the price of it, because the subscription fees provide coverage for that. In the period before 2006 all the incumbent operators offered fixed line subscriptions which provided no coverage for the reasonable costs of the local loop, therefore consumers got ADSL through the tying cheaper than they would receive it in the form of naked ADSL, which would have contained the costs of the local loop as well. Since then the circumstances have changed because the subscription fees increased, while the access fee paid for the local loop decreased, therefore negative effects on competition could not be ruled out, making it necessary to initiate investigations.

58. In course of the proceedings all operators undertook to introduce the naked ADSL product. According to the Competition Council the safeguarding of the public interest can be ensured in this manner and by making those commitments binding on the parties, it terminated the proceedings. Pursuant the commitments consumers have the choice of whether they buy the package of ADSL and subscription as earlier or they purchase only the naked ADSL product, however at a higher price than the price of ADSL in the package.

59. In the case of naked ADSL the complementary role of competition policy and regulation was visible. The GVH cooperated successfully with the National Communications Authority in order to find an effective solution for the problem. Following the investigation of the GVH the National Communications Authority supervises the naked ADSL service, particularly with regard to the determination of the wholesale conditions and prices. The National Communications Authority, in its decision on wholesale broadband access market, prescribed the provision of wholesale naked DSL services for operators with significant market power, regardless of whether they offer products like this on the retail level. Moreover, the authority regulated the prices of naked DSL as well by using as a reference the retail minus prices of non-naked DSL services (Vj-7/2006, Vj-8/2006, Vj-9/2006, Vj-10/2006, Vj-11/2006).

60. In 2007, two investigations ended with commitments concerning the retail bank sector, both of them were related to the unilateral amendment of long term credit agreements.

61. In the case of consumer credits, OTP Bank unilaterally modified the amount of early repayment fee charged in connection with these products. The rise was substantial compared to the amount fixed determined by the contracts with the clients; the fee became HUF 35000 instead of HUF 5000. Due to the modification, besides consumers paying more, the increasing trend of early repayments broke as well, which was remarkable considering the market environment of declining interests and the appearance of plenty of new credit products, which would have enabled more beneficial refinancing.

62. The preliminary position of the Competition Council raised objections against the practice of OTP, which hindered consumers in getting real possibility to know the changes in the fees, which potentially concerned them, since the information prescribed by the General Business Terms was inadequate. According to the Competition Council the dominant undertaking might exploit consumers whenever it unilaterally and significantly raises any component of the fees, without leaving enough time for consumers to terminate their agreements, thereby forcing them into disadvantageous conditions. Another harmful effect of the increase in fees was that a part of the clients reconsidered its plans for early repayment, which limited the availability of potential consumers for competing financial operators on the market, thereby limiting competition.

63. In response to the preliminary position of the Competition Council, OTP Bank offered commitments, according to which it undertook to extend the information provided by the bank before changing substantially the conditions of payment (longer deadlines, informing consumers personally) and to repay consumers a part of the gain it achieved from the increase of fees; furthermore it also undertook to provide the opportunity for early repayment with the same conditions.

64. When considering the adoption of commitments, the Competition Council took into account that in this way a huge number of consumers can get financial compensation in a relatively easy procedure, which they would otherwise receive only after a lengthy and costly litigation before courts if they were prepared to litigate (Vj-12/2006).

65. Concerning mortgage loans, OTP increased in the same manner the early repayment fees from 0% to 3.6%. In addition, OTP changed the rules on handling fee, eliminating the original HUF 9000 upper ceiling of the otherwise 2% fee resulting in a significant increase in the monthly payments of many consumers. The conduct of OTP, similarly to the case of consumer credits, has, on the one hand, an exploitative effect on consumers in the form of increased fees, on the other hand, it has a market foreclosure effect by increasing the early repayment fees and in this way the switching costs of consumers.

66. Based on the commitments adopted, OTP was obliged to repay consumers the difference between the HUF 9000 and the amount of handling fees that were applied after the abolishment of this ceiling. With regard the early repayment fees, OTP made available for a given period the possibility of early repayment of the loan under the original conditions (mostly for free). In addition, OTP has to inform personally its clients about the refunding of the excessive handling fees, the possibility of early repayments, and any other future amendments.

67. The investigation showed that the Act on Credit Institutions, and the general business terms of banks based on it, provided unrestricted possibilities for banks unilaterally to modify long-term agreements. It is the effective regulatory environment, which would provide adequate protection for consumers against the passing on of cost increases to them by the service providers in the form of unrestricted, unilateral and practically unnotified amendments (Vj-41/2006).

68. The GVH also investigated the market of liability insurances for health care services. Nevertheless due to the unique nature of the market, neither an abuse of dominant position, nor an illegal agreement restricting competition was found by the investigation (Vj-173/2005).

69. During 2007, the GVH received numerous complaints concerning the activity of parking companies in the capital and in various other cities. Parking in the public domain is a service subject to fees, based on a civil law relation among the owner of the area, i.e. the municipality, the parking company and the motorists using the parking space. The fulfilment of these payment obligations is not relevant for competition law purposes; it can be appraised in a civil law dispute to be decided by courts and not by the competition authority. Similarly, the issue of the amount of parking fees is not subject to competition law review either since the municipality sets these prices in its regulations about the use for parking purposes of publicly owned land.

70. On the other hand, the GVH examined the payment methods of Centrum Parkoló Rendszer Kft. ("Centrum Parking System"). The undertaking party to the proceeding required motorists to incur the costs of the conclusion of contract and the costs of SMS' verifying the beginning and closing time of the parking when they wanted to use the payment via mobile phones.

71. The Competition Council terminated the proceeding due to lack of an infringement of competition rules. The obligation to pay for the conclusion of contracts was not illegal because the fee was calculated according to the real costs of paper-based documents that were given to the motorists. The total cost of the service was not higher than the costs of developing and maintaining the system.

72. The Competition Council found it acceptable that motorists had to pay for the verifying SMS' too, since they had the opportunity to avoid these costs by simply choosing another payment method. Furthermore, with the development of the payment method via mobile phones, the parking company incurred considerable investments; therefore it was not unfair to share the extra costs arisen with consumers. It has to be mentioned that the investigated undertaking ceased to operate its parking system via mobile phones before the end of the competition authority's proceeding, because another company, Első Mobilfizetés Elszámolóház Zrt. ("First Mobile Payment Clearinghouse") built up a new, nation widely used payment system by standardizing the already existing systems (Vj-176/2005).

73. In the investigation initiated against Fővárosi Parkolási Társulás ("Metropolitan Parking Association"), the GVH examined whether it was an infringement that the parking company gave no refund to motorists who left the parking place before the end of the already paid period. It was argued that car owners should get back the amount of fee for the period for which they did not utilize the service anymore. The investigator terminated the proceeding, which was confirmed later by the Competition Council and also by the court. The development of a mechanism for providing a refund for the prepaid nevertheless not utilized parking service would result in substantial additional costs for the parking company, which would pass on that financial burden to consumers thereby increasing the price of the service (Vj-162/2006).

2.2 Mergers and acquisitions

2.2.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws

74. In 2007, the Competition Council adopted 46 decisions in concentration cases. Of the 46 cases that ended with a final decision 44 was initiated upon the notification of the parties, while in the two remaining cases the GVH opened proceedings ex officio due to a failure to apply for an authorization. Out of the 46 cases 26 resulted in horizontal concentrations, one was of vertical nature, while the remaining 19 produced both horizontal and vertical effects or neither of them.

75. In three of these cases the GVH intervened: namely it imposed obligations on the parties as a precondition for the authorization of the transaction. The GVH imposed fines in three cases, in the amount of HUF 5,2 million, for the missing of the deadline set for the submission of such notifications.

76. In seven cases, there was no need to apply for an authorization or the notified transaction did not qualify as a concentration under the Competition Act.

77. Article 24 of the Competition Act determines the thresholds, which trigger the obligation of the parties to notify their transaction to the GVH. Since 1 May 2004, concentrations with a Community dimension must notified to the European Commission, even if at the same time they satisfy the conditions of the Hungarian Competition Act as well. In 2007, concerning the Mondi Packaging AG/Dunapack Zrt. case, the parties requested that, even though the concentration was to be notified in Hungary and three other Member States, the Commission should examine it due to its cross

border effects. The GVH did not support this request and assessed the merger in a full, second phase procedure and finally authorized the transaction.

78. Out of the concentrations with a Community dimension decided by the Commission, only two raised significant issues in relation to the Hungarian market. In both cases the GVH communicated its opinion to the Commission. In one of the cases, Louis Delhaize SA, through its subsidiary Delparned BV, acquired control over Magyar Hipermarket Kft. thereby combining the latter undertaking with its own subsidiaries (Csemege-Match Zrt., Profi Magyarország Zrt.) on the retail distribution market of consumer goods. The concentration produced effects only on the distribution level, since on the purchase level the undertakings concerned already created a joint purchasing entity and aligned their activities. Nevertheless the Commission established that the transaction would not impede effective competition neither on the distribution nor on the purchase level, therefore it approved the deal. In the Kronospan/Constantia merger, which concerned the particleboard industry, the GVH raised the Commission's attention to possible problems on the Hungarian market. In the end the Commission authorized the deal by accepting commitments from the parties.

2.2.2 Summary of significant cases

79. On the market of water and sewage treatment services, the Municipality of Budapest, Degrémont SA and OTV France SA acquired joint control over BKSZT Budapesti Szennyvíztisztítási Kft. (dealing with sewage treatment) but they failed to apply for an authorization; therefore the GVH initiated a proceeding ex officio in the case.

80. BKSZT was established by the Municipality in 2005 for the management of the central sewage plant of Budapest. The Municipality announced a public tenderi procedure for the operation for a period of 4 years of BKSZT. The winner of the tendering acquired a minority shareholding in the company with the possibility and the responsibility of professional control over its activities. The winner consortium included both Degrémont SA and OTV France SA

81. Even though the Municipality retained majority ownership in the company by 50.2%, due to the provisions of the memorandum of association and the management agreement concluded with the consortium, each decision of the company's main decision-making body needs to be adopted with unanimity. Therefore Degrémont and OTV France have veto right in all important decisions concerning the operation of the undertaking. In addition, the latter two undertakings have the right to designate the only chief executive officer of BKSZT.

82. With a modification of BKSZT's memorandum of association, the decision making about the annual and midterm business plan became one of the powers of the main decision making body instead of the CEO who had this power earlier. The Competition Council therefore arrived at the conclusion that before the amendment described above of the memorandum of association Degrémont and OTV France had joint control over BKSZT, while afterwards also the Municipality became part of the group of the controlling entities. This means that the examined conduct (the development of the control of BKSZT) was formally implemented through two concentrations. In the end the Competition Council authorized the transaction since it raised no serious concerns (Vj-18/2007).

83. In the agricultural and food industry, the Competition Council authorized the concentration between Bács-Tak Takarmánygyártó és Forgalmazó ("fodder manufacturing and distributing") Kft. and Kiskunhalasi Baromfifeldolgozó ("poultry processing") Zrt. only with preconditions. Bács-Tak is active in the poultry industry (breeding), while the acquired undertaking was in vertical relationship with it as a poultry (waterfowl) processing undertaking. Although the parties to the transaction do not perform the same activity, in a situation where the Bács-Tak group includes the Kiskunhalas group, given the already vertically integrated Hungerit Zrt., there seemed to be a risk of a joint dominant position on the Hungarian waterfowl processing and purchase markets being created, due to the personal and ownership connections between the two groups.

84. The creation of a joint dominance could be based on the fact that the acquisition would establish a link between two Hungarian waterfowl (duck and goose) processing undertakings (Kiskunhalasi Baromfifeldolgozó and Hungerit). Namely, the acquirer of control over Kiskunhalasi Baromfifeldolgozó, Bács-Tak has ownership and personal interlockings with Hungerit. Bács-Tak is a minority (16.9%) shareholder of Hungerit and one of the entities, which have interests in Bács-Tak, is a member of Hungerit's supervisory board. Furthermore, the proprietor general manager of Hungerit is a member of the board of directors of Kiskunhalasi Baromfifeldolgozó; this circumstance further increases the possibility of a joint dominance. The fact that an undertaking's representative is a member in the management of its competitor can facilitate the coordination of conducts between the two undertakings. A relatively high percentage of minority shares may make the undertaking interested in getting its competitor successful on the market. The connections described above, the relatively high joint market share of Hungerit and Kiskunhalas (around 80%), the balanced individual market shares, the lack of significant competitors, the fact that the market is hardly contestable and the more or less homogeneous nature of the product increased the risk of the creation of joint dominance on the market, based on oligopolistic interdependence.

85. The vertical effects of the transactions were also problematic because of the possible joint dominant position that would have been created by the concentration of the parties. The competitors of Bács-Tak could have faced difficulties on the purchase market of waterfowls dominated by the integrated processing undertakings. In its preliminary position the Competition Council found that the elimination of personal and ownership interlockings between the Bács-Tak group and Hungerit could remedy the competition concerns resulting from the concentration. On the other hand, if Hungerit and Kiskunhalas already had a joint dominant position on the market, that would not be the result of the transaction, therefore it could not be remedied by the imposing of conditions and obligations.

86. Accordingly, the GVH cleared the transaction by attaching to its decision the pre-condition that the person having an interest in Bács-Tak resigns his membership in the supervisory board of Hungerit and that the meeting of the stakeholders of Kiskunhalasi Baromfifeldolgozó calls back from the board of directors the proprietor general manager of Hungerit. In addition to this, for the period until 31 December 2017, the GVH obliged Bács-Tak and all the undertakings directly and indirectly controlled by it, to refrain from buying Hungerit-shares. Furthermore, also until 31 December 2017, one and the same person may not be elected office holder, at the same time, of both the Bács-Tak-group and the Hungerit-group (Vj-91/2007).

87. In 2007 two concentrations concerned the Mondi group, which is active on the market of packaging materials. The first transaction between Mondi Packaging Flexibles B.V. and Unterland Flexible Packaging AG had no particular negative effects on the market (Vj-106/2007). However, the acquisition of Dunapack Papír és Csomagolóanyag Zrt.'s ("paper and packaging material") factory at Nyíregyháza, and Dunapack Ukraine Ltd.'s plant in Zhydackev by Mondi Packaging Vác Kft. and Mondi Packaging AG required already a detailed analysis of its horizontal effects on the market of industrial paper bags.

88. Industrial bags are flexible packaging materials, which are provided to industrial and commercial end-users as finished or semi-finished products. The bags are produced from different raw materials and they are purchased by various end-users. Industrial bags are more or less homogeneous products requiring a minimum of know-how. The GVH conducted an inquiry among end-users of industrial bags, which revealed that the majority of them use paper bags; however there were different views as to the substitutability of paper bags with bags made of other materials (plastic). The investigation also showed that paper bags could be transported economically on a 500-1000 km distance. A 30-40% of the need of industrial paper bags in Hungary is covered by imports, while 20-30% of the production is exported abroad.

89. The undertakings concerned by the concentration had together a share of 90% of the industrial paper bag sales in Hungary; nevertheless the Competition Council assumed that due to the eminent role of import and export, the geographical market is wider than the territory of Hungary.

Furthermore, the Council also took into account that potential competition can come from a distance of at least 500 km of Hungary. In Hungary considerable unexploited capacities exist. Competitors would be ready to increase their sales in Hungary, while customers seemed to be prepared to switch suppliers. Hence, potential competitors could probably satisfy market demand, should the Mondi group increase the prices of industrial paper bags after the implementation of the transaction (Vj-159/2007).

90. In 2007, there were two significant mergers increasing the concentration of Hungarian telecom markets. On the one hand Hungarian Telephone and Cable Corporation (HTCC) acquired control over Matel Holdings N.V.; thereby the two biggest Hungarian local telecom providers (Hungarotel and Invitel) and together with them one of the leading alternative providers (Pantel) and the nation widely active Internet service provider Euroweb got into one and the same group of undertakings. In the course of the investigation, the GVH examined in detail various infocommunications markets, nevertheless, it found a possibility for restrictive effects to appear only in relation to the retail markets of business Internet and data communication services. The Council concluded that not even on these markets could such effects be expected as results of the transaction.

91. The parties' market share, calculated based on their turnover on these markets, exceeded 25%, nevertheless, given the leading role of Magyar Telekom, no risk of the creation of a dominant position existed. However, the investigation also showed that on a significant part of the market (in the CMA segment), purchases were made by tendering, therefore the turnover-based market shares might not appropriately indicate the actual competitive situation. In addition, given the change in market structure and a decrease in the number of market players, the GVH could not exclude the possibility that coordinated effects would arise. The conducted econometric analysis identified several factors that significantly reduce the possibility of the creation of joint dominance and of coordinated effects based on that joint dominance.

92. The coordination of behaviour is made difficult by the fact that the asymmetry of the competitors' market power and the difference in network coverage made it uncertain that in a tender both parties would be able to submit offers for all data-transmission services. Furthermore the offered service packages compete both in prices and quality. Besides the merged entity and Magyar Telekom, other operators like GTS Datanet also have an important role in stimulating competition. Finally, even if the creation of coordination would not cause any problem to the providers, it would entail difficulties to maintain the coordination, since in the case of large, demanding customers telecom providers would be able and have the incentive to pursue a strategy deviating from the coordinated business policy.

93. Based on the above, the Competition Council found that there was no real possibility that the merger would create detrimental concentrative effects. At the same time, the case drew the attention to the fact that situations cannot be dealt with under the present dominance test of the Competition Act where the market participants No 2 and No 3 merge without gaining a market leader position by this, but the number of competitors will be reduced from 4 to 3 which may even generate harmful competitive effects (Vj-19/2007).

94. The same group of undertakings was involved as a buyer when Invitel Távközlési ("telecommunications") Zrt. acquired control over Tele2 Magyarország Kft.; the acquisition was authorized by the GVH. Tele2 is an alternative provider offering a.o. voice telephony services through call-by-call carrier selection by means of the dialling of a prefix number. The GVH came to the conclusion that the transaction could exert negative horizontal effects only in the service area of the applicants Invitel and Hungarotel, since these undertakings wished to acquire control of one of their main competitors in the period 2005-2006. The elimination of the competitive pressure could have resulted in an increase of prices to the earlier levels or even to higher levels. A scrutinisation of market forces revealed that T-Kábel and other alternative network operators could exert a lasting and significant competitive pressure on the pricing policy of Invitel and Hungarotel, furthermore, Magyar

Telekom could take over the role of Tele2 as an alternative service provider and Telekom also has the incentives to do so (Vj-111/2007).

95. In 2007, the GVH examined two further proposed concentrations, which strengthened the process of infocommunications convergence through the combination of the provision of media content and the transmission of it. In both cases the buyer was the Liberty group, i.e. the group of undertakings directly or indirectly controlled by Liberty Global Inc. In the case Vj-42/2007 LGI Ventures B.V. acquired control over Audiotec Médiaszolgáltató Zrt., the provider of the Minimax children channel. In the other case Chellomedia CEE Holdco B.V. purchased Filmmúzeum Zrt. the provider of the Hungarian movie channel with the same name (Vj-123/2007).

96. The Liberty group is the direct owner of the largest Hungarian cable TV provider UPC Magyarország Kft., the local telecom provider Monor Telefon Társaság Zrt., and the sport channel operator Sport1 Műsorszolgáltató (program provider) Zrt. Foreign undertakings controlled by the Liberty group sell to Hungarian program providers the programs Club, Romantica, Europa, Extreme Sport and Reality.

97. The two cases were similarly treated. Negative horizontal effects could easily be excluded in the first case, since the Liberty group had no presence on the children channel market before the transaction, and even by using a wider market definition the merged undertaking's market share remained below 20%. Although in the case of Filmmúzeum the parties' market share was higher than 20% on the market of movie channels, but there are other strong competitors on the Hungarian market, while the increase in their share on the advertising market could be regarded as insignificant.

98. In both cases, due to the integration of the program provision (content) and the vertically connected programme distribution (transmission) levels, the Competition Council examined in particular the vertical effects of the transactions and imposed conditions on the parties to remedy the likely competition concerns. The GVH prohibited the undertakings of the Liberty group from refusing to sell Minimax or Filmmúzeum to competing program providers, if the latter were prepared to pay non discriminative prices for them determined under usual business and technical conditions and if they satisfied the necessary preconditions.

99. The GVH examined in detail the merger between Hungaropharma Gyógyszerkereskedelmi Zrt. and Medimpex Gyógyszer-nagykereskedelmi Zrt., two of the main pharmaceutical wholesalers in Hungary. According to the GVH, on the one hand, the concentration of the second and fourth largest wholesalers may reduce significantly, in theory, competition; on the other hand, it brings no significant changes concerning the structure of the market, since the same two powerful groups of undertakings (Hungaropharma and Phoenix Pharma). Will remain on the market. Although by the acquisition of Medimpex, Hungaropharma will have a market share exceeding 40% and thereby it will go before Phoenix Pharma, the difference between them will not be high enough to create a sole dominant position for Hungaropharma.

100. It could not be excluded that through the merger Hungaropharma and Phoenix Pharma would get into a joint dominant position, especially because the structure of the Hungarian wholesale of pharmaceuticals is favourable for the development of oligopolistic interdependence. On the other hand, the possibility of the development of joint dominance is decreased by fact that there is a third participant, TEVA, on the market with a substantial market share (15%).

101. As regards the vertical effects of the merger, two consequences are visible. From a competition perspective it is advantageous that the pharmaceutical companies Egis and Richter lost their direct control over the wholesaler Medimpex group. However, it is disadvantageous that Egis, Richter and Béres can now influence the business policy of both Hungaropharma and Medimpex. Nevertheless the Competition Council found none of these effects significant and it could not identify a portfolio or conglomerate effect either (Vj-166/2007).

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

102. Within the framework of competition advocacy the GVH tries to influence state decisions in favour of competition. In these efforts the GVH uses its rights granted to it by the Competition Act and it relies on the constitutional right for free competition, and raises the awareness of general public. State decisions in this context include the shaping of public policies and the individual decisions and interventions of the government and other state bodies.

103. The most important form of competition advocacy is the opining of legislation. However, other tools are also available; e.g. the GVH may also submit proposals and its role is not restricted to mere reactions to others' initiatives.

3.1 Opining draft pieces of legislation

104. According to the Competition Act all draft pieces of legislation that might affect the scope of duties of the GVH have to be submitted for opining to the GVH.

105. In 2007 more than 500 proposals and drafts were submitted for opinion, with a fourth of them requiring a detailed analysis from a competition perspective.

106. In 2007 the GVH paid great attention to the re-regulation of the energy sector.

107. The GVH expressed its accord concerning the objectives laid down in the Concept on Energy Policy for the period of 2007-2020.

108. Nevertheless it drew the attention to the fact that until a key element, namely long-term agreements determining the development of the market would not be handled appropriately by the concept, the seriousness of the declarations on the need to foster competition on the electricity market remains dubious.

109. It pointed to the fact that the concept failed to enumerate, among the strategic objectives, the establishment of a regional market, though competition on a market of at least this size was a necessary precondition of the security of supply. The GVH also criticized the statements relating to energy prices, primarily because though the concept intended to provide a thorough view to energy policy, in the case of prices it dealt only with network based energies and not the whole of the sector. It was also considered problematic, that the precise role of market actors (the Government, the undertakings, and institutions) and the supervision of the fulfilment of these roles were not established in the concept.

110. During the process of adoption of the new Act on Electricity the GVH fought deliberately but without success against the stiffening long-term agreements for a market structure, which would be more beneficial for competition.

111. The GVH considers that the new Act is a step forward as compared to the previous one only partially opening the market, but it brought no breakthrough, and it contains a number of questionable or unclear solutions.

112. The natural monopoly nature of networks makes competition on the level of the infrastructure impossible. Therefore those effects that are natural when competition exists have to be introduced artificially in the case of natural monopolies, and this is the duty of sectoral regulation. However according to the GVH it is not clear how and to which market segments the new Act will introduce competition, and it also failed to implement a toolkit for demolishing structural barriers to competition. Moreover the Act is not based on an effects analysis.

113. The most important change is, that the new Act eliminated the public utility segment and thereby the two level market, but it has not established a transparent new system.

114. The change in the model of the market has not solved the problem of long-term agreements, as they remained intact maintaining 70-75% of domestic supply for the incumbent trader, MVM Zrt.

115. Moreover the Act maintains the vertical integration between the network-owner system operator and the incumbent trader.

116. The GVH considers it extremely alarming that instead of fostering more intensive competition, the first legislative amendments after the adoption of the Act aimed at the strengthening and future extension of the existing dominant position. Thus while a most important element of competition would have been the competitive pressure deriving from import, countervailing to a certain extent the dominance of MVM, the amendment of rules relating to cross border transport of energy restricted and reduced the cross-border network capacities. This reduction resulted from the fact that the cross-border network capacities of MVM were excluded from the capacities put into auction.

117. The new Act introduced the notion of significant market power, an approach previously known only in the telecommunications sector. According to the GVH a regulatory definition is more appropriate at the early stage of liberalisation, than a competition law approach based on market analysis.

118. The GVH also welcomed the market changes introduced by the Act on Gas Supply.

119. However, similarly to the case of the electricity market the widespread application of long-term agreements has raised concerns on the market of gas as well, and the new Act provides no solution for this issue. The GVH emphasised the importance of the supervisory role of the Energy Authority as the supply side of the gas market is much less competitive than the electricity market and therefore possible abuses with significant market power are considered more likely.

120. In a phase of the procedure where the GVH had no more possibility to provide opinion on the text, certain provisions considered to be anticompetitive were introduced into the Act on the Rules of Broadcasting and Digital Transition. The arguments underlying these provisions, which actually make vertical integration possible are not known to the GVH. The GVH considers that a competitive market structure would be more efficient than the application of behavioural rules.

121. The GVH raised objections against provisions on the procedures relating to the execution of Regulation (EC) No 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries. The provisions objected by the GVH established that if before the entry into force of the Regulation the actual use of limited air traffic right in the case of a flight to a third country is commenced, than the revision of that right is possible only after ten IATA schedule periods (i.e. five years) have passed.

122. Having regard to the fact that according to the present bilateral agreements only national flag carriers may be designated for the provision of limited air traffic services, the incriminated provision hinders all entry until 2012, constituting a serious restriction of competition. Due to it, Malev the national flag carrier enjoys exclusivity, and even if the presence of the counterpart national flag carrier creates a duopoly for each flight, according to the experiences this does not exercise real competitive pressure.

123. Despite the opposition of the GVH the draft provision was accepted and entered into force.

124. Though the Act on the Retail Sale of Pharmaceutical Products is more ore less pro-competitive, certain regulations in this sector restrict otherwise legally authorised opportunities for competition. The GVH signalled these problems to the Ministry, sometimes with a positive result.

125. The GVH also expressed its reservations concerning the Act regulating the prescription of prescription drugs. According to the rules, doctors are obliged to prescribe for the patient the drug that is the cheapest at the time of the visit. According to the GVH this imposes an obligation on doctors that has at least two problematic aspects. First, doctors are not perfectly informed about the prices of the different drugs on the market in a given moment and second, the artificial exclusion of more expensive brands eliminates competition ant thereby the competitive pressure on the cheapest price as well.

126. Concerning the Act on Voluntary Mutual Insurance Funds the GVH emphasised that in order to avoid the hindrance of the effective functioning of the liberalised market it is necessary to make it clear by the relevant regulations that there is no basis for discrimination among the services that can be differently financed by the funds according to the place where the service was actually provided. The terminology used in the Act does not intend to make such a distinction, and when it speaks of „products supplied in pharmacies“ it does not want to exclude the same products bought in other retail premises from being financed by the funds. The terminology only aims to define the scope of products.

127. The GVH actively advocates the introduction and increase of competition in professional services. However in 2007 no step forward was taken, despite the obligations of Hungary under the Lisbon agenda. In some respect barriers have even increased. Despite previous plans, mandatory membership in the respective chamber remained a barrier in the provision of private detective and security services.

128. A re-regulation of accounting services was based on the Directive 2006/43/EC. The implementation took as a basis the most severe approach offered by the Directive significantly altering the existing system. The draft implementation provided wide scale powers to the Chamber in the determination of the requirements of education, the content of the exams, the applicable fees. According to the GVH such freedom enables the Chamber to restrict entry to the market through unduly severe requirements. The GVH also expressed concerns that the supervision of accounting services is not appropriately ensured.

129. The GVH actively participated in the implementation of Directive 2005/29/EC on unfair commercial practices. Its position was that the new national provisions should affect the whole of the legislation relating to consumer information (i.e. the Act on Advertisements, the Act on Consumer Protection, the Competition Act and some sectoral rules) because the term of the Directive „commercial practice“ should be interpreted in the widest possible sense.

130. Furthermore the GVH expressed, that unfair commercial practices might have an effect of restricting competition, so the GVH would like to maintain its present role in the supervision of infringements of such effect. According to the clear position of the GVH, practices having an effect on competition should belong to the jurisdiction of the GVH, while other practices should be supervised by consumer protection agencies.

131. The GVH participated in the working group which was entrusted to review what amendments in the overall legislation would be necessary having regard to Directive 2006/123/EC on services in the internal market. The GVH considers that deregulation was not given enough emphasis and ministries still consider justified the maintenance of existing provisions, constituting legal barriers to entry through different authorisation procedures.

132. The GVH provided its opinion on the draft Government Decree on the energetic characteristics of buildings. The GVH suggested that the regulation should provide for a standardized

and low cost qualification process, that relies on available information as that about the level of actual gas or electricity consumption. It should be avoided to provide for costly, individual examinations, including the check of the structure of the buildings. The GVH doubts that the model accepted really serves the prevention of the loss of energy instead of ensuring only seemingly the fulfilment of the obligation to implement the relevant directive.

4. Resources of the competition authority

4.1 Resources overall (current numbers and change over previous year)

4.1.1 Annual budget (in 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
2005	million HUF	1522
	million EUR	5.8
2006	million HUF	1787
	million EUR	7.1
2007	million HUF	2294.4
	million EUR	9.1

4.1.2 Number of employees (person-years)

Economists

2000	2001	2002	2003	2004	2005	2006	2007
21	27	32	31	31	28	27	31

Lawyers

2000	2001	2002	2003	2004	2005	2006	2007
38	36	43	49	49	49	39	44

Other professionals

2000	2001	2002	2003	2004	2005	2006	2007
26	21	18	19	18	18	14	14

All staff combined

2000	2001	2002	2003	2004	2005	2006	2007
104	120	120	120	119	116	114	114

4.2 Human resources (person-years) applied to

4.2.1 Enforcement against anticompetitive practices

133. Approx. 60 person-years including merger review but excluding consumer protection (unfair competition). Professionals at theoretical sections (legal, international, competition policy) were counted as 0,5 person-years.

4.2.2 Advocacy efforts

134. Approx. 10 person-years. There is no explicitly dedicated staff for this task, but a number of employees participate in the shaping of the views of the GVH on draft legislation submitted for opining and on the assessment of existing norms.