

**For Official Use**

**DAF/COMP/WD(2008)37**



Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

**21-May-2008**

**English text only**

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

**DAF/COMP/WD(2008)37  
For Official Use**

**ROUNDTABLE ON COMPETITION IN THE CONSTRUCTION INDUSTRY**

**-- Note by Hungary --**

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

**JT03246134**

Document complet disponible sur OLIS dans son format d'origine  
Complete document available on OLIS in its original format

**English text only**

## **Some Suggested Issues and Questions for Consideration in Country Submissions**

1. The competition authority of Hungary (GVH) assessed a number of cases concerning the construction industry, mainly hard core (bid rigging) and merger cases. In hard core cartel procedures the GVH paid less attention to the definition of the market as these agreements fall outside the scope of the *de minimis* rule establishing a 10% market share threshold. In the analysed merger cases the GVH based its primary assessment on the smallest imaginable relevant market, where the parties concentration could have effect, but due to the lack of competition concerns no in depth market analysis was subsequently undertaken. Nevertheless the GVH laid down in this sector cornerstones of market definition.

### **1. Market definition**

2. In bid rigging cases the basic point is that the relevant product and geographical market is the construction project actually affected by the agreement, as the buyer could not replace the provision of the construction service in question with other products, such as a similar construction in another geographic area. Should however a cartel affect a larger number of projects, e.g. all the construction projects put into tender by the same entity, the definition of the market extends to the whole of these projects. On the other hand the GVH often considered, that construction companies, especially the major ones are present on a national level and therefore able to participate on any projects put to tender. The number of undertakings considered to be present on a relevant market was more restricted however in individual cases. Depending on the type of the procurement procedure (restricted or invitation), or the stage of the process (before or after pre-qualification), the circle of undertakings *de facto* present on the market is usually more restricted. The definition of the relevant market is therefore much dependent on the stage of the procedure in which the cartel agreement actually took place, and the scope of the cartel agreement. The more restricted the number of undertakings present on the market is, the greater the effects of a restrictive agreement are.

3. In merger cases none of the decisions prohibited or imposed conditions on the merger. The identified horizontal or vertical effects were rather weak and none of the cases raised portfolio concerns either. Market analysis were based on the main activities of the parties and as not even the narrowest possible market definition raised concerns the cases were closed at this stage without providing a definitive answer on actual substitutability of the different kinds of construction services. As narrowest possible markets were established: the construction of ferro-concrete structures, roads, bridges, railways, public utilities etc. In all the merger cases the geographical market was defined as national.

### **2. Market structure and particularities**

4. Depending on the construction work put to tender, there may be differences in the number of firms capable to undertake it. In the case of highway construction 4-5, while in the case of national roads around 20 firms had the know-how and capacity required for the fulfilment of the work. It might therefore be true that on some segments there are fewer, while on others there are more firms, but it is not considered as a particularity of the construction industry.

5. As indicated above, in the cases investigated there was no need for detailed market analysis and therefore the issue of entry barriers was not assessed. Nevertheless it was perceivable that often the buyer was the one who tried to restrict entry for certain reasons.

6. Simply because of its structure, the construction sector should not be considered as an unavoidable playing field of anticompetitive practices. In none of the segments has the GVH identified dominant or even an eminently strong position providing for the possibility of abusive practices. The number of small size construction firms is rather high, according to a 1999 decision close to 70 thousand. The number of firms of more than 50 employees in structural construction was 122 while in the segment of

civil engineering 140. Though geographical distances reduce the availability or at least the competitiveness of distant firms, still it cannot be said that the market is prone to collusion due to the low number of competitors. Nevertheless a lot of cartel cases were investigated by the GVH in this sector including the most significant infringements ever discovered in Hungary. Cartels in the construction industry related to market sharing and price fixing.

7. It is not clear why are there so many cartels in the sector but certain specific features of the market that might facilitate collusion can be identified. The cartels investigated related in all cases to public procurement procedures, where the number of participants, due to the size of the project, the restricted scope of invited competitors or the reduction in their number due to pre-qualification procedure resulted in a market structure of restricted oligopoly on which collusion was much easier than on an open market. Market sharing was further facilitated in some cases by the fact, that a number of construction sub-projects were put into tender at the same time and the parties were able to share the works according to their size and preferences. Detection of these practices is rather difficult in lack of direct evidence provided by former employees or gathered from other sources prior to the investigation. As supply does not take the form of the continuous provision of homogeneous or at least products of constant characteristics, but rather the sequence of projects of quite different substantive content, it is hard to identify suspicious changes in price or output upon comparison of different and previous projects used as benchmarks.

8. Another feature of this sector in Hungary is the existence of good personal relationship among the managers of the competing undertakings. This relationship dates back to the socialist era when the normal way of working was to come together in the organisation of the Ministry to distribute the available capacity according to the planned projects. The present COs of firms in this industry were already at a senior managerial level at that time and have an affiliation to such cooperation until these days, despite the prohibition of the law. According to anecdotal evidence from investigators, the existence of amicable relationship was expressed during investigations. This feature not only facilitates collusion, but also makes the leniency policy of the GVH almost completely ineffective.

### **3. The nature of cases**

9. Though it is quite frequent that competing firms enter into consortia for given projects, such horizontal cooperation agreements were not subjects of competition supervision. Cooperation was only scrutinised when the existence of a secret cartel was suspected and it was considered that the open consortia agreement or subcontracting was actually a form of compensation for engaging into the sharing of the market.

### **4. Investigation of cases**

10. Cartel investigations were almost always based on information directly related to the existence of the infringement, though only once on leniency application. It happened very often that the investigation of one case revealed evidence on another cartel and so on, constituting a kind of domino-effect.

11. Having regard to the secret nature of these cases the first investigative measures were always dawn raids conducted on several places at the same time. In many instances these measures proved to be successful, producing pieces of direct evidence on communication between the parties before the submission of the tender (sharing projects, noting competitors' prices, agreeing on reimbursement for abstention on the tender etc.). In other cases no such communication was found, which always resulted in the subsequent termination of the proceedings, i.e. no cartels were established solely upon circumstantial evidence. Beside the results of dawn raids the GVH took into consideration the existence of former illegal cooperation, circumstances that provided for the lack of real willingness to win on a tender, for instance that the offer contained inexplicable features, i.e. the low contractual penalty was not counterbalanced by a

shorter deadline though both had great importance in the tender what's more proved to be decisive in the procedure as there were no great differences in prices.

12. The parties' defence was mainly the consequent denial of any agreement among the participants, even if direct evidence was available on their communication. Sometimes it was raised that it is the normal functioning of the market that parties involve each other as subcontractors but no cost overrun or ruinous competition defences were relied on, as the main strategy was always the denial of the agreement.