



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

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ROUNDTABLE ON BARRIERS TO ENTRY

-- 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 19-20 October 2005.

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1. Barriers to entry in the case law of the GVH

1.1 Definition

1. Though barriers to entry were analysed in a number of cases no general definition was elaborated in the jurisdiction of the GVH. It is clear however that the concept of entry barriers is not restricted to cost elements as non-cost barriers such as administrative and legal barriers were also taken into account. In certain cases in order to make the analysis complete even non-market related conditions influencing market entry were taken into account as barriers to entry. Concerning the first question it can therefore be said that according to the practice of the GVH “any impediment that has the effect of reducing competition” constitutes an entry barrier.

2. Up till now the lack of a strict definition for entry barriers did not cause problems. This is mainly due to the fact that few decisions dealing more in details with barriers were challenged before courts and therefore the GVH was not obliged to defend its statements. Concerning a prohibited merger of two political newspapers in its judgement overruling the decision of the GVH the court only challenged the significance of the identified barriers and not the concept itself. Therefore as it seems that there is no disagreement between the court and the GVH on the concept of entry barriers in theory the establishment of a definition would not raise debates. However on the other hand a clear definition could cause problems in certain situations. Sometimes the GVH faces circumstances which do influence market entry or performance but which do not form part of normal market conditions. Such a circumstance was noted in a case concerning mosquito extermination services. In that case the GVH established that the financial and other common barriers for the provision of such services were low, however market entry was still restricted as semi-illegal lobbying and personal relationships were also necessary for successful market entry. In order to be able to characterise market conditions the GVH took this circumstance into account if it was an entry barrier though it would be hard to establish a definition covering such market particularities.

1.2 Barriers

3. In recent case law the following elements were recognised:

- High costs of entry including investments, marketing costs are entry barriers. It was also acknowledged however that the profitability of the market or the low level of sunk costs is a factor to be taken into account at the analysis of the significance of financial entry barriers. The GVH established that in the case of rapidly growing markets investments can be quickly recovered reducing the significance of high up front investments. Low exit costs may also counterbalance the financial obstacles of entry. Similarly, concerning the wholesale of pharmaceutical products it was stated that low level of fixed margins of 5-7% may reinforce the restrictive effect of the need for high up front investments as reaching of minimum efficient scale and therefore profitability requires more time.

4. Many aspects of administrative entry barriers were identifiable. Legal provisions influenced entry through the establishment of obligatory notifications, standards, administrative qualifications and authorisations, required minimum level of professional expertise, minimum level of stock, minimum standard for storage. Due to the financial burden imposed on the party, the minimum time frame delaying the entry and other impediments, these provisions might constitute significant barriers.

5. The abolishment of a 5% custom was also considered as a reduction of entry barriers.

6. The need for vertical integration and the necessity for the establishment of distribution channels was also recognised as a barrier to entry. Access to or acquisition of intellectual property rights may also be crucial for successful entry as it was the case concerning the merger of two music publishers.

1.3 Measuring

7. A minimum level or amount as a prerequisite of the existence of a barrier was never put at issue. In many cases, mainly in the telecommunications sector, barriers were considered as evidently high without detailed calculations.

8. In other cases though there could have been place for assessment the measuring of the level of the entry barrier was neglected. In a case concerning the coffee market it was established that market entry is barred by high marketing costs necessary for the introduction of a new brand. Though it could have been possible to submit a calculation comparing e.g. the percentage of marketing costs with that of other sectors or to establish a sector specific amount or share that makes that level high, it was not detailed what was the measure for the establishment of this statement. It should be added that the infringement at issue was a restrictive agreement and therefore barriers were only mentioned at the description of the market and was not essential for the outcome of the case.

9. In an other case concerning a merger in the sector of wholesale of pharmaceuticals similar issues arose. It was established that “significant” up front investments were required for market entry. It was also identified that the new entrant had to suffer losses for a “relatively long” period until it reaches the minimum efficient level of trade. However similarly to the other case the measure of the “significant” and “relatively long” nature of the barriers was not presented. As the merger was cleared the parties did not turn to court and therefore the GVH was not required to elaborate on its view.

10. Based on the practice of the GVH it can be said that entry barriers of cost nature are considered as high in two situations. One is the case of specific sectors where it is axiomatic that entry costs are high. Such a sector is for instance the fixed telecommunications market. The other case is where at first glance it can be seen in general that costs of entry are high and possibly other factual circumstances - like the lack of market entry - also uphold this fact. In the latter case however the statement on the high level of the barrier is based on impressions, which might prove to be false under scrutiny.

11. In the case of non-cost barriers the evaluation of the level of a certain barrier is also much likely based on impressions though some room could still be open to assess why the need for an authorisation qualifies as a high entry barrier as in such a case the barrier itself surely consists of measurable cost and time elements.

1.4 Classification

12. Entry barriers are not approached differently in dominance and merger cases nor difference between structural and strategic barriers were made.