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ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE PROCEEDINGS

-- Hungary --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 2010.

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1. This contribution discusses procedural fairness aspects of the competition law enforcement activity of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH). It follows the structure of the questionnaire of the OECD Secretariat by touching some additional, related issues, such as deadlines. For better understanding its main part and complementing it, the contribution starts with the brief description of some features of GVH procedures that are relevant in a procedural fairness context.

2. GVH law enforcement proceedings are administrative procedures and – adjusted to the organisational structure of the agency – consist of two phases: first the phase of the case handler and then the phase of the Competition Council. The case handler (or a team of case handlers) is responsible for initiating the proceedings in case of suspected infringements, and for taking the necessary investigative measures to clarify the facts of the case. After completing the investigation, the investigator prepares a report, summarising the facts established and the supporting evidence, and submits the report, together with the files, to the Competition Council. Investigators are organised in sector- or case-type specific units. All the investigatory units are supervised by one of the vice presidents of the GVH whose consent is required to launch a case. Formally, the investigation is initiated by an order which specifies the suspicion (with reference to the competition law provision(s) involved), the circumstances and practices that have triggered the proceedings. In the course of the proceedings the investigation can be extended by an order (similar to the initiating one), to further relating conducts or to further competition law provisions.

3. After the phase of the case handler, the Competition Council receives the case for decision making. (The Competition Council may return the case for further investigation if it finds the files and the report of the case handler inadequate.) The Competition Council is a separate decision-making body within the authority, led by the other vice president of the GVH (who is the chair of the Competition Council). When bringing a case, the Competition Council is made up of three or five members, appointed by the chair of the Competition Council, and one of them acts as the *rapporteur* of the case. Pursuant to the provisions of the Hungarian Competition Act (Competition Act)[1], the members of the Competition Council are independent in their competition supervision proceedings: when they adopt the decision, they are subject only to law, no instructions can be given to them. The decisions of the Competition Council – both on substance and on the procedural aspects, including the fairness of the procedure – may be subject to judicial review.

4. Both the investigator and the Competition Council can terminate the proceedings if the circumstances that have triggered the case turn to be non-existent, or if the evidence collected in the course of the proceedings is insufficient to prove the infringement and further investigation is not expected to produce any results. A decision on the substance of the case can only be made by the Competition Council.

1. Transparency relating to the law and agency procedures and practice

1.1 Substantive legal standards

5. Concerning the substantive legal standards, the GVH contributes to transparency by elaborating some public, non-binding documents, such as notices and position statements. Before going into details about the notices and position statements issued by the GVH, it is worth mentioning that there has been conflicting views on the function and admissibility of such pieces of soft law (and soft law in general) in Hungary. On the one hand, soft law instruments can ensure transparency and predictability of the practice of law enforcers, therefore legal certainty. This is exactly the objective of the GVH when designing and issuing pieces of soft law. On the other hand there is a school of thought in the legal profession in Hungary (including the Constitutional Court) claiming that pieces of soft law tend to derogate legal certainty by disguising the law-making activity of law enforcers and therefore are considered undesirable. (This latter

[1] Act LVII of 1996 on The Prohibition of Unfair and Restrictive Market Practices.

approach is probably partly rooted in the strongly negative experience about excessive discretionality of authorites, gained before the rule of law was restored in the early 1990s.) An in between view holds that admissibility of soft law depends on the authorisation of the law enforcer to elaborate such documents as well as on their content whether they simply compile the existing (past) law enforcement practice, or involve law interpretation in abstract, the practice to be followed in the future or policy statements.

6. Regarding the legal ground on which the concerning GVH documents have been issued, the Competition Act explicitly empowers the GVH to issue notices, while the publication of position statements has no explicit statutory grounds. Both types of documents are non-binding, technically not even on the GVH, and by no means on administrative or civil courts.

1.1.1 Notices

7. The notices of the GVH describe the basic principles of the law enforcement practice of the authority in specific questions. These notices, in the sense of their function and legal status, are quite similar to notices applied under EU law. Their function is to draw up how the law enforcer will apply the legal provisions, to summarise the experience of the GVH (based on the experiences resulting from the adopted decisions) and to outline the expected enforcement policy in general.

8. So far, notices have been issued in several topics:

- the criteria of distinction between mergers authorised in simplified and full procedures[2],
- the principles relating to the calculation of the fine, in antitrust cases[3] and in consumer protection cases[4],
- leniency policy[5], or
- the application of remedies[6].

9. These notices can be modified or revoked owing to the changes in legislation, case law of the courts, enforcement policy or other circumstances.

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2 Notice No 1/2009 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on criteria of distinction between concentrations authorised in simplified and full procedures.

3 Notice No 2/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the method of setting fines in antitrust cases (amended by Notice No 2/2005).

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

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 on leniency policy assisting cartel detection (amended by Notice No 1/2006 and Notice No 2/2009).

6 Notice No 1/2008 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on imposition of conditions and obligations by decision authorising concentrations.

10. The notice on leniency policy was repealed after the details of the application of leniency had been incorporated in the Competition Act. The reason behind this legislative amendment was – above all – to increase legal certainty and transparency both for potential applicants and parties to proceedings (parties). Though in practice the GVH faced no particular problems or discrepancies deriving from the fact that its leniency policy had been regulated only in a notice, and not in the Competition Act, reflections primarily from business stakeholders implied that a higher – statutory – level of regulation would mean more credible commitment on the side of the authority. Moreover, the terms laid down in the Competition Act cannot be overruled by the court, contrary to the provisions of notices of non-binding nature. Furthermore, settling statutory guarantees is also in line with EU law developments, namely the adoption of the European Competition Network's Model Leniency Programme.

11. Another notice of the GVH, the one relating to the calculation of fines in antitrust cases, was revoked after certain principles laid down in the notice- and in this sense the law interpretation and enforcement practice of the GVH - had been criticised by the Court of Appeal in its judgements. Moreover, in a decision this court gave a detailed reasoning (like a "notice" of its own) what aspects should be taken into consideration when setting the amount of fine for infringements. Later certain conclusions of this judgement were overruled by the Supreme Court, which confirmed that the GVH was allowed to manifest and refer to its own jurisprudence, as the Competition Act explicitly entitles and at the same time requires the authority to issue notices summarising its practice. The Supreme Court also ruled that in case the GVH undertook to issue a notice on a specific matter, the authority should abide by its principles in individual cases. On the other hand, the existence of a notice does not relieve the GVH of giving thorough and case-specific reasoning for each decision.

1.1.2 Position statements

12. Among the documents issued by the GVH relating to substantive standards should be mentioned the position statements of the Competition Council, which reflect the law interpretation and practice of the GVH's decision-making body with regard to the Competition Act. By publishing the statements, the Competition Council intends to give guidance for market players highlighting those parts of decisions, which interpret the sections of the Competition Act (including the procedural provisions, beside the substantive ones). Contrary to the notices, the position statements do not focus on a specific matter, but collect and in essence quote the points of fundamental importance from the decisions for each section of the Act. The statements are reviewed and completed on a yearly basis, though a disclaimer warns the readers that it is recommended to check the validity of the relevant statements, as practice may develop over time.

1.2 Procedural standards

13. Concerning the procedural standards, the procedural rules to be followed in the course of the proceedings are defined primarily by the Competition Act, and as a background legislation, the Public Administrative Procedures Act.[7] These laws incorporate fundamental legal principles like procedural fairness or legal certainty, and regulate GVH proceedings in a relatively detailed way, leaving little discretion for the authority in procedural issues.

14. Within the legislative frames, internal regulations issued by the president of the authority govern the internal operational questions concerning the proceedings. The Organisational and Operational Rules of

[7] Act CXL of 2004 on Public Administrative Procedures.

the GVH, and the Organisational and Operational Rules of the Competition Council[8] are relevant in this respect by defining the competences and responsibilities of each actor (e.g. that the investigator makes a proposal to open an investigation, with the consent of the head of unit, and the vice president is to decide on the proposal). Both are public documents. The Manual of the GVH describes the internal procedure, with internal deadlines and other requirements (e.g. rules for in-house consultation). This regulation contains the rules for share of labour between the investigator and the Competition Council (e.g. division of time limits, involvement of the Competition Council in the preparation of a case). The Manual is not available for the public.

1.2.1 Deadlines

15. Antitrust cases are started ex officio, except for mergers, which are usually initiated on notification. Both the Competition Act and the Public Administrative Procedures Act generally require the GVH to close its proceedings within a reasonable period of the time. The Competition Act sets the time limit for the proceedings: ex officio cases must be finished within six months, in merger cases the GVH has 35 working days (four months in more complicated cases raising competition concerns) to conclude its decision. The time limit can be extended. In ex officio cases, the time limit can be prolonged two times, by six months each, while in merger cases an additional 15 working days (in Phase II mergers, 45 working days) may be used, by extension. Parties have to be notified of the extension before the expiry of the original time limit. Though the proceedings of the GVH – in principal – consist of two phases, the Competition Act settles one uniform deadline for the final decision, the time limits to complete the investigation (first phase) are governed by internal regulation (the Manual). The likely timetable of the proceedings is not communicated to the clients, the official documents – as well as the public announcements – mention only the statutory time limits.

16. Both the Competition Act and the Public Administrative Procedures Act provide that the time demand of certain procedural measures (like data requests, expert assistance, or when the legal successor or the appropriate party have to be called into the proceedings) need not be taken into account when calculating the deadline of the final decision. This possibility to put off the time limit is not subject to any restrictions in the two acts mentioned, neither in frequency, nor in duration, nor in respect to when it can be invoked. In practice the GVH does not make use of this opportunity frequently, though it can play an important role in completing information requests in merger cases, where the authorisation is deemed to have been granted if the agency fails to make a decision within the due time limit.

17. In ex officio cases if the authority closes the proceedings beyond the statutory time limit, the consequences are different – compared to merger proceedings initiated on notification – as the Acts governing the procedures of the GVH apply no sanctions for the expiration of time limit. Moreover, the courts confirmed that though it constitutes a serious infringement of procedural rules if the authority does not finish the case in time, the delay does not affect the substance of its decision, and does not eliminate the responsibility of the authority to complete the investigation and to bring a decision on the alleged infringement and sanction it if necessary.

1.2.2 Identity of the persons involved in the case

18. The parties become aware of the identity of investigator(s) when they receive the order initiating the proceedings, which includes the case handlers' names. If the investigation is preceded by a complaint procedure, the identity of the investigators is already revealed, as in GVH practice the same person acts as

[8] While the Organisational and Operational Rules of the GVH are issued by the President of GVH, the Organisational and Operational Rules of the Competition Council is established and issued by the Chair of the Competition Council, after being approved by the President.

case handler in investigating the complaint and in conducting the following proceedings. The identity of the members of the Competition Council assigned for the case becomes known for the parties when they receive the first document from the Competition Council, typically the "statement of objections".

19. The Competition Act provides the possibility for the parties to make an objection against the person dealing with the case (for reasons of conflict of interest issues or alleged prejudice). Such objections can be put forward by a party at any phase of the proceedings. However, in the course of the procedure of the Competition Council, together with the announcement, the parties have to make it probable that they have just acquired knowledge of the fact, which serves as basis for exclusion. (Exclusion has effect on the time limits of the proceedings, in case the investigator is excluded, the deadlines are counted from the appointment of the new investigator, while in case a member of the Competition Council is excluded, the period of time used for the exclusion procedure need not be taken into account when reckoning the time limit.)

2. Party contacts with the agency

20. Parties get in contact with the investigators in the course of hearings and through information requests. Access to the files is only provided for the parties after completion of the investigation, but the Competition Council may give its consent to have access before this date (providingthat it cannot jeopardize the effectiveness of the proceedings). There are other limitations to access to files, applicable in the whole course of proceedings, concerning the internal documents and correspondence between the GVH and other authorities, unless those documents are used as evidence when establishing the facts of the case. Limitations also cover the access to confidential information like business secrects and other privileged information, personal data.

21. The first document, which demonstrates for the parties in its entirety the authority's knowledge of the facts and assessment on the case, is the "statement of objections" of the Competition Council. Before the "statement of objections" is submitted to the parties, they may estimate the directions of the investigation through the investigative measures taken (questions set forth in a data request or a hearing to clarify the circumstances of the alleged infringement), there is no special form, except for the informal ones, for the investigators to express their competition concerns.

22. This "statement of objections" includes the facts of the case, the evidence in support of them, the economic and legal assessment and conclusions of the Competition Council. On request of the party or in case the Competition Council considers it necessary, preceding the final decision one or occasionally more hearings are held before the Competition Council with the participation of the parties, the investigators and the relevant members of the Competition Council. Hearings before the Competition Council are held in public. The pPublic can be excluded from the hearings before the Competition Council (or a part thereof), on request or ex officio, in case it is considered necessary for the protection of state secrets, business secrets and other confidential data, or the interests of the national economy. The date of the hearing before the Competition Council must be set in time to allow the party to prepare its defence, but the time provided for the party between the receipt of the "statement of objections" and the hearing before the Competition Council is discretionary. The length of time provided cannot infringe the parties' right to defence. In practice, if the party requests to postpone the hearing before the Competition Council with reference to lack of enough time to prepare its defence, the Competition Council tends to accept it.

23. In responding to the authority's enforcement concerns, the parties have the possibility to submit their opinion on the allegations and to offer evidences, especially when responding to the data requests or on hearings. Concerning the hearings, all the parties (and their – legal – representatives) are invited to the hearing of witnesses, but not to the hearing of another party. As the "statement of objections" of the Competition Council is intended to summarise the agency's enforcement concerns, the response on this

document plays an important role in the parties' defence. Evidences and arguments can be presented till the hearing before the Competition Council is closed to make the decision, or in case no hearing is held before the Competition Council, till the decision is brought. In case the parties present a relevant piece of evidence shortly before the decision is planned to be taken, the Competition Council tends to postpone the decision to have the necessary time to assess, even if they exceed the time limit settled for the proceedings (see also above).

24. As regards the burden of proof, the agency is obliged to ascertain the relevant facts of the case in the decision-making process, where any evidence are admissible if suitable to facilitate the ascertaining of the relevant facts of the case. Apart from this responsibility, the courts confirmed that parties should act cooperatively with the agency in finding the relevant facts of the case. According to the Competition Act, parties are obliged, at request, to supply the data which are necessary to decide on the substance of the case. This obligation does not cover the admittance of an infringement of the law, the parties may however not refuse to supply incriminating evidence of any other kind. In the course of the proceedings the parties can offer evidence or propose the collection of evidence, but the agency is entitled to select the evidence it deems admissible at its own discretion, including that it decides what facts are considered relevant and what evidence or investigative measures are needed to support them. The authority assesses each piece of evidence separately and on the aggregate, and establishes the facts according to its persuasion based on this assessment.

25. Parties can offer the agency commitments[9] or remedies[10] to eliminate the possible competition problem, thus avoiding the prohibition decision (and fines). Though it is the Competition Council that can accept and decide on the terms of the undertakings concerned, the discussion on the undertakings may be started anytime in the course of the investigation. The investigators may test the parties' willingness to undertake commitments or remedies, and may take steps to clear the details, however, the parties typically submit their undertakings following the receipt of the "statement of objections" of the Competition Council. In case of commitment decisions, it results from the wording of the Competition Act that the parties, not the agency, propose the undertaikings the GVH may – and sometimes does – informally suggest this solution for the parties.

26. Proceedings concerning mergers have certain specialities to non-merger antitrust cases. According to the Competition Act, mergers fall under mandatory notification if they meet the turnover threshold. In the pre-notification period, there is no statutory basis for consultation, but the GVH can be approached informally by the merging parties. The merger has to be notified by fulfilling the notification form of the authority,. If the parties do not complete the form properly, it is returned to them and the proceedings only starts when they file in the complete form. The Competition Act requires the GVH to inform the parties within a certain time limit if the transaction requires a full investigation (similar to the distinction between Phase I and Phase II mergers in other jurisdictions).

9 Where, in the course of competition supervision proceedings started ex officio, parties offer commitments to ensure, in a specified manner, compliance of their practices with the provisions of the Hungarian Competition Act or of (former) Article 81 or 82 of the EC Treaty and if effective safeguarding of public interest can be ensured in this manner, the Competition Council proceeding in the case may by order make those commitments binding on the parties, terminating at the same time the proceeding, without establishing an infringement of the Act.

10 In order to reduce the detrimental effects of a concentration, the GVH may attach to its decision pre- or post-conditions and obligations. It may, in particular, demand by its decision the divestiture of certain parts of the firms or certain assets or the relinquishment of control over an indirect participant, setting an appropriate time limit for the carrying out of these requirements.

3. Hearing officer

27. The Competition Act does not involve the institution of hearing officer as it exists e.g. in the DG Competition in the EU, but in certain cases it seem to replicate it in other ways.

28. Where this is authorised by the Competition Act, separate appeals may be sought against certain procedural orders made by the investigator or the Competition Council (e.g.: procedural fines or costs, termination of proceedings for the lack of evidence or public interest). The appeal may be submitted by the party, the person in respect of whom the order contains provisions and the person required by the Competition Act to be informed of the order. The appeal is assessed by a member of the Competition Council, or the court (depending on whether the investigator or the Competition Council has passed the contested order).

29. Apart from the procedural orders that can be challenged by a separate appeal, in case the parties allege to suffer any irregular measure in the proceedings, they may file an objection, and the investigator or the Competition Council have to give reasons in the report or the final decision if they ignore the objection. The possibility to raise an objection is restricted by a relatively short time limit, after this deadline the party has no grounds to challenge the measure.

30. There can be special situations in an investigation, where the court is involved to guarantee the lawfulness of a measure. For example, in a dawn raid inspection, which itself must be authorised by the court previously, the investigators are entitled to make copies of, or seize means of proof which are not relating to the subject of the investigation and are not covered by the authorisation of the court, but which are indicative of the competition law infringement. However, in respect of such pieces of evidence, the authorisation of the court must be obtained subsequently, in a statutory time limit,; without this subsequent approval the evidence cannot be used.

31. The role of the court can be regarded even more important for the parties when the investigator of the agency and the client disagree whether a document revealed is qualified as legally privileged. According to the Competition Act, documents covered by legal privilege[11] may not be used in evidence, examined or seized in the course of the proceedings, and the owners of such documents may not be obliged to present those documents, or the persons concerned can refuse such obligation. However, the investigator is entitled, without prejudice to the right to legal privilege, to have access to the document in order to establish whether the reference to that document is protected by legal privilege, is obviously unfounded. If the person concerned and the investigator assess the status of the document differently, it will be put in a storing device suitable to preclude access to the document, and be submitted to the court to decide whether the document falls under protection of legal privilege. In cases where the content of the document in question is only partly covered by legal privilege, the two parts have to be separated if this does not adversely affect the probative force. In the latter case, the document cannot be separated, and the court is entitled to define which parts thereof fall under legal privilege. The storing device, containing the document, is given to the authority, but the device may be opened and the part of the document to which the authority can have access according to the ruling of the court, may be examined only in the presence of the party. If the forensic image of a data carrier contains the priviliged information to be separated, the

[11] "Legal privilige" for the purposes of the Competition Act refers to documents prepared for the purposes of, or during, the exercise of the rights of defence of the parties or prepared in the course, or for the purposes, of communication between the parties and the lawyers appointed by them, furthermore documents containing statements made in the course of such communication, provided in each of these cases that this character is directly manifested by the document concerned and are in possession of the party (or its legal representative) or of a lawyer authorised by the party, unless the person concerned shows they have come out of his possession in an illegal manner.

separation is carried out by using a copy of the forensic image, and later the copy (or the relevant part thereof) is used in evidence.

4. General attitude – openness

32. Firms / law firms turn to the GVH for informal consultation mostly in merger cases, but it may occur in relation to agreements as well. Originally GVH used to be averse from any informal contacts, but recently it became more open towards them when formal proceedings is not in progress. These informal consultations tend to be useful in general as well as instrumental in improving the effectiveness and efficiency of subsequent case handling for both sides, especially in pre-merger notification phase. Nevertheless, the GVH is careful, especially when there is a prospect for subsequent formal proceedings.

33. When a formal proceedings is already in progress, the GVH inclines to be rather cautious regarding informal contacts. In the course of the investigation, the informal contacts are limited to "putting oil on the mechanics" of the procedure, e.g. to clarify certain technical details of formal data request (sometimes case handlers prepare notes even about these conversations), occasionally the likely timetable of the proceedings, or the application of commitments or remedies. As the burden to ascertain the facts of the case properly is on the authority, the direction of the investigation, the measures to be taken – including their content and sequence – are designed by the agency even if considerations of the parties may be taken on board when they are thought to be relevant and contribute to the effectiveness and efficiency of the proceedings. Besides, the GVH does not comment or make public statements on pending cases other than the facts of the case and in certain cases the broad reasons why the case was launched.

5. Publication of decisions and closing statements

34. The Competition Act requires the publication of resolutions, which are the decisions brought by the Competition Council on the substance of the case. The resolutions have to be published irrespective of the pending court review (but in the public disclosure the GVH must indicate whether the decision is final or under court review). The disclosure of other decisions closing a case (these can be commitment decisions or orders terminating the proceedings), either by the investigator or the Competition Council, is also possible under the Act. In case the information on the opening of an investigation was published, the result must also be published.

35. In practice, the GVH is open to the public in this respect and makes announcement both on the starting and on the closing of its proceedings, irrespective whether it is an enforcement or a commitment decision, or a decision establishing that the investigation is closed owing to lack of evidence or public interest. Besides the public announcement, the decisions themselves – together with the final judgement of the court if a decision of the GVH has been contested –are published on the website. Before publication, the decisions should be cleared from all business secrets and other confidential data, and be anonimised to protect personal data.