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PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- Hungary --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 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. Though it has already been outlined in our submission for the February roundtable (February submission), for a better understanding of our detailed answers, this contribution repeats and starts with the brief description of some features of GVH procedures that are relevant in a procedural fairness context. Furthermore, in case the present contribution touches topics already addressed in the submission of February, we repeat the relevant parts thereof.

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 *rappporteur* 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 a 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 Act LVII of 1996 on The Prohibition of Unfair and Restrictive Market Practices.

1. Decision-making process

“What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?”

5. As it has already been touched upon by the February submission (para. 24), the burden lies with the agency to ascertain the relevant facts of the case in the decision-making process. Any evidence are admissible if suitable to facilitate the ascertaining of the relevant facts of the case. Those facts are deemed to be relevant that are substantial for deciding the case. The method and extent of collecting evidences are specified by the agency, independent of the requests of the parties, still it rests upon the agency to take into consideration all the circumstances that may be of importance. However, the parties can offer evidence or propose the collection of evidence, but – as mentioned before – 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. It does not preclude that considerations raised by the parties may be taken on board when they are thought to be relevant and contribute to the proceedings (see also paras 32-33 of the February submission). The authority assesses each piece of evidence separately and on the aggregate, and establishes the facts of the case according to its persuasion based on this assessment.

6. A further aspect in determining the borders of fact-finding, is that the GVH, as all administrative authorities according to the Public Administrative Procedures Act,² is required to act in an efficient and cost-effective way in the course of its proceedings. As the court confirmed, this requirement does not mean that the agency can refuse or ignore relevant procedural measures because they are costly, but a reasonably economical attitude in order to cause the lowest possible costs both to the parties and the GVH itself, and to close the proceedings as soon as possible. In this sense, cost-effectiveness plays a role when the agency (the case-handler or the Competition Council) concludes to terminate the proceedings, because the evidence collected is insufficient to prove the infringement, and further investigation is not expected to produce any results (i.e. it is doubtful that the investigation produces even any results or any value-added results, compared to the costs).

7. Besides the responsibilities vested in the authority to ascertain the facts of the case, the parties are required to act in good faith in the course of the proceedings. The courts also confirmed that parties should act cooperatively with the agency in finding the relevant facts of the case. According to the Competition Act and the Public Administrative Procedures 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.

1.1 *The role of the support units*

8. Procedures to “test” cases, or would-be cases, internally through independent teams, either ad-hoc or permanent – like devil’s advocate exercises –, do not exist within the GVH. Nevertheless, support units and certain procedures involving them have a function which is similar to some extent. Support units

² Act CXL of 2004 on Public Administrative Procedures, it serves as background legislation for the Competition Act in procedural aspects.

– like the Chief Economist Section, or the Legal Section – are independent from those of the case handlers’, and may be involved in enforcement directly or indirectly.

9. One tool to be mentioned in this context is the consulting process on concept memos before a formal proceedings is launched. Concept memos are brief internal documents prepared by the case handler when she/he intends to initiate a case. A concept memo describes the theory of harm of the particular case (including its legal aspects), a “plan” about how to check the theory of harm (including standards to prove), and how the investigation would be structured “logistically” (including the composition of the case team and need of assistance from the support units and of outsourcing needs throughout the investigation). It is circulated within the GVH and support units (as well as the Competition Council) make comments on it as a whole (i.e. not only about their possible contribution), as a default, in writing. They are shared with all participants of the process and the GVH management. Further verbal discussion or meeting(s) to clarify issues and opinions and to develop a common understanding are possible, but rare in practice. Comments by support units are non-binding, nevertheless it is not typical that a case handler would ignore them. As a result of the consulting process, a final concept memo is prepared if needed, and serves as a framework for the investigation. The whole process – including participants, their roles, time-frames – is governed by the Manual of the GVH³ in a relatively flexible way and covers all significant cases. In principle, a similar exercise is used in the course of the investigation if the case handler believes that certain basic directions of the case should be changed. A status report memo can initiate this latter procedure, and it can be regarded as a review of the substantive points of the concept memo.

10. The primary objective of these consulting procedures is to put (and keep) the proceedings on the right track at an early stage (possibly when they are still at the “launching pad”), by making sure through collective effort that the directions (e.g. the theory of harm) of the case are appropriate. They provide a framework for pooling ideas from various parts of the organisation and for interactions between them. This way they channel the perspective, knowledge and experience of the support units into the case. By the same token, paradoxically, they also have a quality control aspect by involving a “fresh eye” of the support units, which makes them somewhat similar to review processes by independent teams.

11. Beyond a consultative role, support units may be involved more deeply in proceedings, at any stage of a case. Members of the support units can be part of the case team, but it is rare and not related to the subject. It is more frequent that they make a part of the analysis on their own. This tends to be the case with the analysis carried out by the chief economist, or with surveys. This is again, not a typical fully independent review process of the whole case. Moreover, the main idea is to be integrated into the case and to co-operate with the case handler – even the particular analysis might be requested originally by the case handler. The case handler also tends to be involved in designing such analyses (e.g. surveys). Nevertheless, a particular analysis of this kind is both controlled and ultimately designed by the support unit in question and the case handler is not in the position to have a final word about what its professional conclusions should be. According to the Manual, the conclusions of these analyses are non-binding on the case handler, but she/he has to reason if she/he does not incorporate them into the report to the Competition Council. Whether or not those conclusions are incorporated into the case handler’s report, the analyses themselves move together with the file and are readily available for the Competition Council. It follows from the general principles of assessing evidences in the Hungarian legal system (mentioned also in para. 5) that the Competition Council is not obliged to accept their conclusions either, however it is expected to reason when doing so.

³ 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.

12. Outside experts and analysts may be involved at any stage of the proceedings. Informal consultations with them are rare and only occur regarding industries that are new to the GVH. In these cases the subject of the meeting is general issues that are relevant in that particular industry, rather than any particular would-be proceedings or allegation. These consultations are primarily aimed at the better understanding of the dynamics of competition in the given area and are more likely to be held in the context of a sector inquiry than of a law enforcement proceedings.

13. The GVH sometimes outsource certain tasks to outside experts or analysts in proceedings. For surveys this is the general practice, while for other tasks – like sophisticated statistical or econometric analysis – it depends on factors like whether the required skill and expertise is more available at the particular time of need outside of the GVH than inside of it. Outsourcings of these kinds are controlled either by a support unit or the case handler (or in special cases by the Competition Council). According to the manual procedure, the results of these outsourcings are non-binding on the case handler, but she/he has to reason if does not incorporate them into her/his report to the Competition Council. Whether or not those conclusions are incorporated into the case handler’s report, the analyses themselves move together with the file and are readily available for the Competition Council. It follows from the general principles of assessing evidences in the Hungarian legal system (mentioned also in para. 5) that the Competition Council is not obliged to accept their conclusions either, however they must reason when doing so.

14. A subcategory of external experts are the “forensics experts” listed in the register of the Ministry of Justice. (In the Hungarian system the legal term “expert” applies indeed only to them.) There are some specificities related to their use and role, but neither the GVH nor the parties use them regularly due to the characteristics of, and expertise related to antitrust.

2. Confidentiality

“How does your agency balance a defendant’s right to review and respond to evidence that will be used against it with the need to protect confidentiality? Are there special procedures available for disclosure necessary to protect rights of defense, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses? How is confidential information defined? What rules apply to the protection of confidential information obtained from parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure? How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on their reputation? What are the penalties for negligent/intentional violation of confidentiality rules?”

15. As regards confidentiality, first it should be noted that confidential information and dealing with such information in administrative procedures are important for two reasons. One being the protection of legitimate interests of the person (and other persons) owning the data concerned to restrict access to such information by others, the other being the interest of other persons (most importantly the parties’ right to review) and the public who also have legitimate interests in getting to know the decisions of the authorities and – an extent as large as possible – the underlying reasons (ie. proofs). Both (or rather three) types of interest have to be taken into consideration when deciding on disclosure of any data provided by the parties. This need for balance of interests also results in that the scope of disclosure of any data is defined relatively, and in many cases depends on the concrete persons and their position in the procedure (parties, witness, third person concerned, etc.).

16. It should also be mentioned, that although there are several types of information that need to be protected from access by third persons (beside business secrets personal data, classified information and professional secrets⁴ worth mentioning) and the handling of which in administrative procedures are largely regulated in the same manner, in our contribution we concentrate on business secrets since these are those that most frequently occur in the GVH's practice and in handling of which the legislative provisions permit some margin of discretion to the agency. Besides, internal documents that are produced in the course of the proceedings as well as leniency applications, and information or documents provided by applicants for leniency within the framework of the GVH's leniency programme, are also worth mentioning. Protection of personal data which also constitute an important part of confidentiality will not be discussed in this paper thoroughly, yet will be mentioned where relevant.⁵

2.1 Definition of business secrets

17. Business secrets are defined in the Hungarian Civil Code⁶ as facts, information, conclusions or data pertaining to economic activities the publication, release to or use by unauthorized persons of which is likely to imperil the rightful financial, economic or market interest of the owner of such secrets – other than the State of Hungary –, provided the owner has taken all of the necessary steps to keep such information confidential. As a general rule such data are eligible for full protection from unauthorized access. Yet it is important to note that the law explicitly contains an absolute exception in as regards business information, namely data that relate to use of public finances⁷ shall not be deemed business secrets; thus these data lie outside the scope of legal protection, even if otherwise would constitute business secret, which may well have significance in particular in cartel cases involving bid rigging in public procurements or bids for a concession. This exception well demonstrates the relative nature of confidentiality itself and that even the relevant legislation defining business secrets substantively creates a balance between the competing interests of private parties and of the public.

2.2 Personal data

18. According to the Data Protection and Public Data Access Act⁸ personal data comprise any information relating to a specific natural person identified or identifiable directly or indirectly (e. g. by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity) and any reference drawn, either directly or indirectly, from such information.

2.3 Access to confidential data by the GVH

19. As a general rule public authorities – except for the case of classified information – are authorized by the law itself to have access to all protected information the knowledge of which is necessary

⁴ Secrets entrusted to doctors, lawyers, notaries public when acting a professional capacity, and to the clergy.

⁵ In this part we use the term 'parties' to the parties against whom, or (in case of merger control) to the request of whom) the procedure is conducted by GVH and the term 'other party to the proceeding' to those, who are formally involved in a proceeding, yet not as clients (e.g. witness, holder of a document or other thing subject to investigation, experts).

⁶ Act IV. of 1959 on Civil Code, Art. 81.

⁷ These are data relating to the central budget, the budget of a local government, the appropriation of money received from the budget of the European Union, any subsidies and allowances in which the budget is involved, the management, control, use and appropriation and encumbrance of central and local government assets, as well as the acquisition of any rights in connection with such assets.

⁸ Act LXIII. of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest.

to conduct the given proceedings, as well as personal data deemed absolutely necessary to discharge their duties. Although Public Administrative Procedures Act restricts this right of access of the authority in some cases (e.g. a witness, or a third person holding a document inspected by the authority is not obliged to provide business secrets if not authorized by the data owner), the Competition Act gives the GVH a broader, almost full access to such data (actually only information under LPP is an exception), at the same time making it the obligation of the parties and other parties to the proceeding to provide the required data to the GVH. This means that in the GVH's practice such protected information may come from various sources and providing access to such data is a core issue in our procedures as well.

2.4 Legislative framework

20. The protection of business secrets and personal data is on the one hand enshrined in the rules of civil law which states that any abuse of these data constitutes a violation of civil rights, and on the other hand the legislation on legal procedures, in particular the Public Administrative Procedures Act recognises this protection and makes it a general obligation of the authorities to restrict access to such information obtained by them in the course of their procedures.

21. The rules governing handling of business secrets and disclosure thereof by the GVH are provided for in the Public Administrative Procedures Act with some special rules contained in the Competition Act. According to the Public Administrative Procedures Act in the course of its proceedings any authority shall ensure that protected information⁹ (including business secrets) are not disclosed to the public, cannot be obtained by unauthorized persons, and that all personal data is sufficiently safeguarded. There is an important exception provided by the same Act, providing that compliance with the regulations relating to data protection may not result in any restriction of right to review.

22. At the same time the relevant legislation – in order to allow transparency of public administration, as well as to exercise parties' right to review and public control – provides as large publicity as possible, while trying to balance between the competing interests referred to above. According to these rules, hearings of parties and witnesses are public, but the authority may decide (upon request or ex officio) to hold the hearings in closed sessions and bar the public from any stage of the hearing in order to ensure the protection of protected information and confidential personal data. Similarly, during the proceedings the authority has to let access to the documents in the file of the case for the parties, and even third persons¹⁰ may require access to these documents if it is necessary for the enforcement of their rights, or for the fulfilment of their obligations conferred upon them by the relevant legislation or an official ruling.

23. At the same time this right of access is restricted in that any document containing protected information (including business secrets), may not be accessed, unless the lack of knowledge of such information would impair the person requiring access in exercising his rights conferred by law. (This means that on the other hand access to protected information necessary for the exercising of the right to review by the parties or that are necessary for a third person for the enforcement of his right, or for the fulfilment of his obligation conferred upon him by the relevant legislation or an official ruling cannot be denied.) Nevertheless, normally in GVH proceedings, that neither the parties, nor any other persons are allowed to have access to the internal documents of the GVH (draft decisions, internal consultation papers – like the ones related to the concept memo discussed in paras 9-10 –, correspondence between the GVH and other authorities or between the latter), unless it is to be presented as evidence when making the case.

⁹ These are: classified information, professional secrets, as well as business, trade, bank, insurance and securities secrets, fund secrets, and private secrets.

¹⁰ In GVH practice, such request has not occurred yet, although this possibility cannot be disregarded in principle.

The same is true for the internal documents of the European Commission, the competition authorities of Member States of the European Union, and the correspondence involving them.

24. As a special rule – partly with regard to the extremely high occurrence of information comprising business secrets in GVH proceedings – the Competition Act provides that the parties' right to have access to the documents and to make copies and notes thereof shall be open only following the conclusion of the investigation by the GVH, as of the time specified by the Competition Council allowing ample time for the parties to prepare for making a statement. In the GVH's practice, Competition Council generally sets this date as the date of communication of its preliminary statement ("statement of objection") to the parties. This means that, unless there are some exceptional circumstances, where the Competition Council authorizes a party to inspect certain specific documents before the conclusion of the investigation,¹¹ the documents cannot be accessed by the parties or any third persons, which ensures that any protected information or confidential personal data can be accessed only by officials of the GVH acting in the case as investigators, the members of the Competition Council and the president and vice presidents of the GVH.

25. As for personal data, it is worth mentioning that personal data of a witness or an other party to the proceeding not being a party is generally disclosable only to parties in a proceeding (all other's access is prohibited), yet in special cases a person – claiming that he could be exposed to extreme danger or harm on account of his taking part in the proceedings – may require his personal identification data and address to be handled confidentially. If this request is accepted, even the parties are denied to access these data, yet this of course may have an impact on the probative value of the information provided by such person.

26. A related issue is that of complainants who notify alleged infringements of competition law to the GVH and the informants, who are individuals providing the GVH with evidence or information that is essential in proving hard core cartels and who are eligible to a special fee for this. From a procedural point of view, the the same rules apply to them as to witnesses. The only but significant difference related both to the handling of their personal data and parties' right to defend is that such persons can request anonymity without the need to justifying any possibility of danger or harm and the GVH has to accept such a request automatically. Therefore if they so request their identity cannot be disclosed to the parties.

2.5 Special procedures regarding business secrets

27. In the GVH's procedures there are no special rules regarding the persons who can get access to a document on behalf of a party or other party to the proceeding (both the person itself, or his/her legal representative are eligible for access if other criteria are fulfilled), yet there are special procedures both for requesting restriction of access by others and for authorizing access to documents containing protected information and/or confidential personal data. On the one hand, any party or other party to the proceeding providing information to the GVH may request that free access to the documents (inspection or making copies or notes thereof) containing business secrets be restricted, while on the other hand the GVH may in a separate ruling reject or restrict access to a document containing such protected information that the requesting person has no right to know (see also paras 22-23). In both cases the separate ruling of the GVH denying the request is subject to a separate review either by the Competition Council (in case of rulings by the investigator in the case) and/or (in case of rulings adopted by the Competition Council) by judicial authority.

28. This also means that the GVH does not decide ex officio on whether a piece of information comprises business secret or not; it is always the relevant party that has to apply for it. Such an approach is in a way a consequence of the fact that it is always the owner of the data that can establish the relevant legitimate interests and who is responsible for keeping these data confidential (see the legal definition in

¹¹ If this is unlikely to adversely influence the outcome of the proceedings.

para.17) The relevant legislation does not contain any special conditions for such a request. Yet it is an established practice of the GVH that only those requests can be accepted that are specifying the piece of information concerned concretely enough and in case of each piece of information is duly justified. (Of course in most cases the type of information is such that a general justification can be accepted – e.g. detailed data of incomes and buyers etc.). Similarly other parties or any third persons have to duly justify either that the knowledge of the given piece of information is necessary to exercise their right to review or for enforcement of their right or for the fulfilment of any obligation conferred upon them by law.

2.6 *The GVH's margin of discretion, considerations taken into account on deciding on business secrets*

29. When deciding on a request for restricting access to business secrets, as well as on request for access to document containing such information, the GVH has a margin of discretion in determining whether the given piece of information can be treated as a business secret as such and consequently whether other persons have a well justified legitimate interest in knowing such information and if yes, to what extent it is absolutely necessary. It is clear that data contained in publicly available databases or those otherwise have become public, as well as data prescribed by law as public interest information cannot be eligible to protection as business secrets. In all other cases if restriction of access is requested with regard to a given piece of information the GVH, as a general approach, is to provide protection for information pertaining to economic activities of the party. Although requests for access by other parties or third persons can be treated in a separate ruling, determining in each case individually whether the relevant interest (especially right to review) justifies access and the extent of such access, in practice the GVH is to take these interests into consideration also when deciding on the original request for limiting access. Generally speaking the GVH is to give protection to information as business secret as broadly as possible, within the limits prescribed by law and with the considerations outlined bellow, while it is to give access to third persons to protected information as narrowly as possible. Naturally the concrete set of protected information may vary from case to case.

30. Of course the GVH's ruling on protection of business secrets, the potential parties and their interests taken into consideration may significantly differ depending on the type of the case. While in the course of a merger control only the merging parties with the same interest are the parties who have right to review the decision, in cartel or abuse of dominant position cases each, otherwise competing parties' interests may significantly differ, especially in the case of a review procedure, so business secrets of other parties could be more at danger. Moreover in both cases there may be other parties to the proceeding who themselves are not targets to the proceeding yet obliged to provide sensitive business information to the GVH or who have special interest in the outcome of the proceedings of the GVH (e.g. in the case of action for damages in cartel cases or in consumer protection cases); as for the former it is clear that their business secrets have to be highly protected, while in the latter case it should be ensured that such persons could gain access only to such and so much information that are inevitable for exercising their rights.

31. Another aspect of such a determination (which strongly correlates with parties' right to review as well as the public interest of general prevention) is that in its decisions the GVH has to show in details the grounds for the decision and the pieces of evidence considered, among which pieces of protected information may well be found. In most of the cases the competing interests can be well balanced and protecting a given piece of information as business secret does not constitute an obstacle of referring to it as an evidence. For example, instead of using concrete detailed data, referring to a range of quantities may be sufficient (a method that can be used both when referring to the information as evidence and for the purpose giving acces to other parties for the purpose of exercising their right for review). Nevertheless there are cases where parties request for protection as business secret of information that under normal circumstances would be eligible for such protection, whereby the information necessary in proving an infringement or justifying the decision can lose its status as an evidence if not revealed or is made obscure.

With regard to this latter aspect in such difficult situations (which in fact rarely occur) the GVH considers such information as not eligible for protection as business secret for the reason that keeping in secret information that themselves are results of an infringement or constitute a substantial element of the infringement cannot be considered as a rightful financial, economic or market interest (see the legal definition in para. 17).

32. Partly due to the complex considerations behind rulings on requests in connection with access to business secrets, it is an established practice within the GVH to adopt rulings accepting protection of information as business secrets at as late phase of the procedure as possible, but in any case before anyone could gain access to the documents concerned (as referred to in para. 24 as a general rule it is relatively close to the end of the procedure), thereby ensuring that when adopting the ruling the GVH is in good position to consider both the parties' interests and the function of the given information among the pieces of evidence.

2.7 *Leniency applications, and information or documents provided by applicants for leniency*

33. Until the GVH has not decided on a leniency application,¹² the application and documents provided by applicants for leniency are fully confidential; the Competition Act provides for that leniency documents can only be used by the GVH for the evaluation of the application, and – if that is the case – for requesting a court order for search of premises without advance notification (dawn raid) and only the investigator of the case, the Competition Council and the court may have access to them. In case of refusal or withdrawal of the application the GVH, if the applicant for leniency so requests, shall return the application and the documents submitted, together with any copies made. If this is not the case (e.g. the application is accepted, or the applicant does not require returning the documents), after the ruling has been taken on the application for leniency, the documents pertaining thereto fall under the general confidentiality regime outlined above.

2.8 *Public access*

34. According to Public Administrative Procedures Act after the conclusion of the proceeding the general public, unless provided otherwise by specific law, may get access to the texts of final decisions,¹³ not containing any protected information and any personal data. As a special rule the Competition Act provides that final decisions of the Competition Council in every case shall be made public. (It is worth mentioning that this obligation of publishing final decisions is also taken into consideration when ruling on access – see paras 29-31). In the case of other rulings, publication is at the discretion of the GVH. As a general rule, the GVH publishes only rulings closing the procedures. Beside these, the GVH systematically publishes a short communication on each new case it has started to investigate, containing the names of the parties and a short description of the case (without any protected information) together with a short disclaimer stating that initiating a procedure does not automatically entail that the firm in question has actually committed the infringement or does not otherwise prejudice the final decision of the GVH.

35. None of these publications impair the right of parties as regards confidentiality. The published version of the decisions and rulings do not contain any data that could not made public. The same is true for the short communications about launching a case, since the names of the parties cannot be treated as personal data.

¹² The acting Competition Council decides on these applications in a separate ruling in the course of the proceeding without undue delay, allowing enough time for consideration, after hearing the applicant, but at any time before communicating its statement of objection to the parties.

¹³ As well as any rulings of second instance annulling the decision of the first instance and ordering the authority of the first instance to reopen the case.

36. In the GVH's view the practices to provide public access include reasonable safeguards to prevent undesirable damage in the reputation of the parties. First, not only GVH decisions, but also their judicial reviews are published at the GVH website. Secondly, GVH practice to make certain documents and information available to the public is fully neutral (e.g. there is no selection among cases whether to publish or not, publication policy is applied in a uniform manner instead).

2.9 *Burden of preparing confidential versions*

37. As a general rule it is the authority, that has to prepare the version of the document not containing any data that are undisclosable to the person requesting access to the document. It is always the case with the authorities' decisions, while as regards other documents in the file, the GVH is authorized by the Competition Act to order the party requesting to restrict the access by third persons to certain information obtained from him during the investigation to prepare a version that can be disclosed to third persons. According to the Public Administrative Procedures Act a decision should be drafted in such a way that it contains only that kind of protected information which can be made available to the person to whom the decision is communicated. The decision must be phrased without revealing the protected information to which as an evidence it contains any reference. Furthermore, the decision shall be phrased without making any implication as to the identity of the person, whose natural identification data and home address is considered confidential information. As regards other documents in the file, the GVH quite often orders the party requesting restricted access to de information, to prepare a disclosable version. The GVH uses this opportunity mostly with parties, while other parties to the proceeding are usually required to do so only when preparing a disclosable version would entail a disproportionately high surplus workload by the GVH.

2.10 *Sanctions of violating confidentiality*

38. In case of violating confidentiality rules there are different type of sanctions in our national legal system. In any case such a violation could give rise to an action for damages under the Civil Code, if the damages caused couldn't be abated by ordinary legal remedies in the course of the administrative procedure or if this is not the case, the available remedies were used by the aggrieved person. In exceptional cases, if committed intentionally for financial gain or advantage, or causing pecuniary injury to others, violation of confidentiality can constitute a criminal offence. It must be noted that in the practice of the GVH there has not been any cases where violation of confidentiality would have arisen.

3. *Requests for information to targets of investigations*

“Does your agency have procedure to review information requests with the party? Is the party informed of the theory of the case and reasons for requesting the information? Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency? Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?”

39. Data request issues in merger cases may come up first at the pre notification phase. Parties when notifying a merger to the GVH have to provide data that are described by a general notification form issued by the GVH. (The function of this form is similar to that of form CO of the European Commission.) Parties sometimes turn to the GVH for clarification regarding the notification form data request. The GVH is open for consultations to clarify issues like the aggregation levels of data, or the exact meaning of certain questions in the form. However, the GVH do not check preliminary the accuracy or the appropriateness of data intended to submit by the parties as part of the notification. Neither the GVH reconsider the data request coming from the form. If parties indicate difficulties about data availability, they are advised to submit (the closest) what they have and include explanation for absence of data in the notification. Notifications that do not fulfil the data request built into the notification (or do so without an explanation

accepted by the GVH) are regarded incomplete, and given back to parties to complement. This matters also in terms of deadlines, since the formal proceedings starts only at the day when the GVH receives a complete notification. Providing data required by the notification form goes usually smoothly, especially if parties are represented by law firms with substantial experience in merger cases.

40. Data requests by the GVH may happen in cases involving either mergers, abuse of dominance allegations, or agreements. Broadly speaking the practice and the law governing it are the same, with some differences due to variations in the timeframe or some other characteristics in substance or procedure.

41. GVH data requests specify the kind of data, including aggregations levels, scope and time period of the data, the deadline for providing the data, and also the format the data is supposed to be provided. Data requests are designed by the case handler, on the basis of the underlying theory of harm, the GVH's knowledge about the industry, and data issues within the industry, and the time frame (depending on procedural deadlines) of the proceedings. Experience also plays an important role when designing a data request. In non-merger cases the procedural time frame has no effect on the substance of the data request. In merger cases such a link is not impossible, and becomes more relevant towards the end of the proceedings.

42. The GVH may ask data (and by the Public Administrative Procedures Act) several times in the course of a proceedings. This applies also to merger cases, where multiple data requests are rare, in larger merger cases one major and perhaps and one or two smaller complementary or refinery data requests occur after notification. The time required for providing the requested data extends the procedural deadlines of the proceedings by law (i.e. data requests stop the clock according to the Public Administrative Procedures Act). This provides a motivation for parties to fulfil the data request, especially in merger cases, but in practice, the GVH usually close cases within the original deadlines.

43. The document outlining the data request mentions – or the case handler informs the parties verbally about – the opportunity of consultation, and parties sometimes use this opportunity. These consultations are not specifically regulated by law, so the GVH can be flexible and practical and to follow its own policy, keeping in mind of course the general legal framework. Data request consultations are not informal in the sense that a minutes of the meeting or a memo about the results is prepared for the files of the proceedings. The consultations usually serve as a tool for clarification, including to make the parties understand what exactly they need to submit and why. Sometimes consultations result in reconsidering certain parts of the data request (either substance, time frame or deadline). This can be just a technical reconsideration (e.g. when the parties can provide only a different kind of data which is nevertheless equally, or almost equally good for the original purposes) or material reconsideration (e.g. the data are not available, or not within reasonable time or at a reasonable cost). The latter happens very rarely, no more than 5-10% of the cases. Parties sometimes ask for longer deadlines for submitting data. The time frame to fulfil a major data request is usually 30 days, but the GVH usually allows 5-10 extra days, provided that the parties' request is explained and indicated in time.

44. GVH experience suggests, that parties are both more willing and more able to provide relevant data and to consult on the issue if they understand the proceeding and its purposes. In this context, the theory of harm of the case is not regarded as a secret. Indeed, disclosing reasons behind data needs can facilitate co-operation, especially, if the parties – perhaps after communications – think that the data is required for an analysis, which might rule out a particular theory of harm, e.g. remove an obstacle from clearing the merger. At the same time, in this respect the GVH can go only so as not to disclose the strategy of the investigation or endanger it another way. These two considerations require careful balancing in certain cases.

45. As a default, in law enforcement proceedings the parties are supposed to initiate data request consultations and they are bilateral. There was one occasion when the consultation was initiated by the GVH and was multilateral. This happened in the MIF (Multilateral Interchange Fee) case, which was a unique one because of the extremely high number of parties (including 23 banks), and because the GVH knew that while the banking sector produce a large amount of ready made data, many of them either not directly appropriate for the purposes of the proceedings, or not compatible between the parties themselves. Since these characteristics resembled that of a sector inquiry, so did the consultation (conference) on data request.

46. The GVH has the power to fine, with a procedural fine, those who do not fulfil the data request (including providing the data with delay). In mergers – where the parties motivation to co-operate is usually higher – the GVH has to use this power very rarely and mainly regarding third parties. In non-merger cases it tends to be the other way around.

4. Agreed resolutions of enforcement proceedings

“At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?”

47. As it has already been touched upon by the February submission (para. 25), parties can offer the agency – in abuse or restricting agreement cases¹⁴ – commitments or – in merger cases – remedies to eliminate the possible competition problem, thus avoiding the prohibition decision (and fines).

48. Concerning commitment decisions, the Competition Act renders that “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 Article 101 or 102 of the TFEU¹⁵ 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 law”.¹⁶

49. Under the Competition Act, commitment decisions (described above) provide for resolving the enforcement matter by means of a mutually agreed disposition between the agency and the party (parties), the Act does not provide the possibility of settlement procedure or any other similar solution. It has to be noted that the GVH has no legal obligation to apply this outcome for the case, it is in discretion of the Competition Council whether it accepts the commitment proposal of the alleged infringer(s) or not. When the party offers a proposal, the Competition Council needs to assess whether the competition problem can be solved by a commitment or the effective safeguarding of public interest can – rather – be ensured by a prohibition decision, and whether the commitment in question is adequate and fulfils these requirements, and even – from a procedural point of view – whether the public interest requires the continuation of the proceedings (involving further possible time-consuming and costly investigative measures) when the authority is already in possession of the commitment offer. If there is more than one party to a case, all parties have to commit themselves (either by one or more commitments) enabling the GVH to close the case with a commitment decision, as the proceedings cannot result in different outcomes (commitment / prohibition) for different parties.

¹⁴ The GVH can adopt commitment decision in consumer fraud cases as well.

¹⁵ TFEU: Treaty on the Functioning of the European Union.

¹⁶ Article 75.

50. Deriving from the share of labour between the investigator and the Competition Council defined by the Competition Act (see the introductory remarks of our submission), it is the Competition Council that can accept and decide on the terms of the undertakings concerned, though 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, 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. The "statement of objections" of the Competition Council is the first document to define and clarify for the parties the position of the agency's decision-making body (see also paras 21-22 of the February submission), and in case the "statement of objections" suggests a prohibition decision, it gives incentives for the parties' to propose commitments. The "statement of objections" contains indirectly the main elements how the parties could ensure compliance of their practices with the law. In case the parties file in their commitments in the investigative phase, the investigator prepares a memo to inform the Competition Council on the content of undertakings, the data necessary for assessing them and its position (and presents the files of case to the Competition Council as well). The proceedings shall be continued according to the guidance given by the Competition Council in response to the memo. However, the response of the Competition Council does not constitute a decision on the proposed commitments, the Council may even later conclude – after receiving the report of the investigator and the files – to bring a prohibition decision (this may require the files to be referred back to the investigator for further investigation). As it has already been mentioned in the February submission, it results from the wording of the Competition Act that the parties, not the agency, propose and elaborate the commitment, the GVH may – and sometimes does – suggest or even encourage this solution for the parties (draw their attention to this possibility), but itself does not compile any particular commitment package for / instead of the parties.

51. The Competition Act allows the GVH to terminate the proceedings by commitment decision in all ex officio antitrust cases, providing that the requirements (i.e. the commitment can ensure the compliance of the practices of the parties with the law and the effective safeguarding of public interest relating to competition) are met. There are no restrictions by types of cases, but in practice certain cases are generally considered to be inappropriate to be closed by commitment decision. E.g. cases of great weight (which provide appreciable competition benefits to the infringer or which is appreciably detrimental to the competitors or the consumers), or when a decision has to be made in a completely new issue of law and legal certainty is better ensured by sending an explicit message to the market by expressing a clear position of the authority on the issue. The GVH tends to refuse a commitment offer, when a behaviour is against a well-formed expectation. The Competition Council is also reluctant to accept meaningless commitment offers i.e. if the controversial behaviour has already been terminated (e.g. a predation already finished) or if the undertaking merely aims at refraining from unlawful conduct in the future.

52. Concerning remedies in merger decisions, the Competition Act renders that "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."¹⁷ If the authorisation by the GVH is subject to condition, the Act sets that a pre-conditioned authorisation takes effect from the date when the condition is fulfilled, while a post-conditioned authorisation takes effect when being granted, but cease to have effect should any of the conditions not to be satisfied.¹⁸

53. Contrary to commitment decisions, which are even formally made on initiative of the parties (and accepted by the GVH), in merger cases the conditions or obligations attached to the authorising decision of

¹⁷ Article 30 (3).

¹⁸ Article 30 (4).

the agency, are formally defined by the authority in response to the competition problem identified in the course of the investigation. This does not preclude – moreover, it can be considered a typical attitude –, that the merging parties recognising the competition harm expected to be raised by the post-merger situation, propose possible conditions or obligations even at the earliest stage, when submitting the notification form. In this case, the GVH (especially the case handler, though there is room for it in the phase of the Competition Council as well, while in complex cases “negotiation” with the Competition Council plays an equally important role) consults with the parties on the content of the remedy, but it is finally specified and prescribed in the decision according to the considerations of, and as regarded appropriate by the GVH (and formally regardless of the proposal or opinion of the parties).

5. Judicial review and interim relief

“At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred? What level of deference does the judicial body grant to the agency’s decision? If the agency’s decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy? Can the judicial body grant interim relief? What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?”

54. As outlined in our introductory remarks, the competition supervision proceedings of the GVH can be terminated (either by the investigator or the Competition Council) 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 (as to whether a violation of the law has occurred) can only be made by the Competition Council. Judicial review can be sought when this final decision of the Competition Council is brought on the merits of a case.

55. Any request for the judicial review of the final decision of the Competition Council adopted in the proceedings has to be submitted to the Competition Council within thirty days from the date when the written decision has been communicated. The Competition Council arranges for forwarding the claim, together with the files and its comments concerning the claim, to the court (namely the Metropolitan Court of Budapest) within thirty days of its receipt. It has to be mentioned that a recent amendment of the Code of Civil Proceedings,¹⁹ applicable for lawsuits concerning GVH decisions, restricted the group of possible applicants to the parties to the case and other participants of the proceedings in respect of the provisions relating to them (practically appeal is only allowed to the parties since then).²⁰

56. The statement of claim may contest the decision of the Competition Council for violating either a substantive or a procedural legal provision, or for the improper interpretation of the law applied in the decision. However, the violation of a procedural provision can only lead to the annulment of the decision if the violation is serious and affects the merits of the case so that it cannot be eliminated or remedied in the procedure of the judicial body. In case a decision is annulled for this reason, it has as a consequence that the GVH has to initiate new proceedings. In competition cases the court has the possibility to overrule the contested decision. Though, according to the Code of Civil Proceedings, if the court concludes that the decision should have been based on different legal grounds, it cannot alter the decision of the

¹⁹ Act III of 1952 on the Code of Civil Proceedings.

²⁰ Before this amendment, any person, whose rights or lawful interests were directly affected by the contested decision, was entitled to ask for judicial review thereof. On this ground complainants or third parties could challenge a decision of the GVH, if the court had found that the decision in question directly and personally affected their interests.

administrative body, but has to annul it and order new administrative proceedings to be initiated. When the decision of the authority is annulled for any reasons, in the new proceedings the agency abides by the ruling of the court and shall proceed accordingly.

57. The Code of Civil Proceedings specifies that a discretionary administrative decision is deemed to be lawful if the authority has ascertained the relevant facts of the case, the procedural rules have been kept, and the decision contains the reasonable assessment of facts. It entails that when the court establishes that these conditions of lawfulness of an administrative decision are met, the judicial body shall not overrule the decision of the authority. When the court overrules a decision of the GVH, it occurs more often in respect of the amount of fine imposed (and the relevant facts relating thereto). Considering the scope where an authority decision is allowed to be overruled by the court, it has been recently declared by the Supreme Court (in respect of fine) that, if the court admits that the decision is deemed to be lawful under the above mentioned conditions, and the authority assessed a certain fact reasonably in the contested decision, but its own assessment would differ from that of the authority, the court shall not alter the authority decision and adopt its own decision (and its own assessment) instead.

58. The decision of the Competition Council is final (while it can be subject to judicial review) and enforceable. The fact that the decision has been challenged before the court has no automatic suspensory effect on the sanction or remedy involved therein. The appellant may request the suspension of enforcement in its statement of claim, or anytime later in the course of the judicial procedure. In case the statement of claim contains a request for the suspension of enforcement, the claim and the files of the case has to be referred to the court within fifteen days (instead of thirty days) from the receipt of the claim. Once the suspension of enforcement has been requested, enforcement of the decision may not be carried out. Practically it entails that the GVH takes no measure to enforce the decision within the time limit when the statement of claim is due to be submitted against the decision, the enforcement is ordered only if no request for suspension is filed in or if the court dismisses the request. If – upon the request – the court orders the suspension of enforcement, the sanction or remedy involved in the decision cannot be enforced till the judicial review is pending. Though, in case the GVH gets to know that liquidation proceedings has been opened against the appealing firm (because of insolvency), it notifies and registers the claim for fine to the liquidator, even if the judicial review is still pending.

59. In the request for suspension the appellant is expected to give detailed reasoning and justification, often requests are refused for lack of sufficient justifiable reasons. The court decides on the request considering whether the former status quo can be reinstated after the enforcement, or whether the potential harm caused by the postponement of enforcement is more serious than the opposite situation. It has to be noted that if the court finally rules for the appellant and establishes that the GVH has violated any legal provision resulting that the firm can reclaim the fine (or a part of it), it has to be reimbursed with an interest corresponding to twice of the central bank base rate. For this reason, and in case the appellant cannot prove by documents that the enforcement of fine endangers its current financial situation, the request is likely to be dismissed. (We notice that in consumer fraud cases – which are not covered by this roundtable – the GVH is entitled to order a corrective announcement to be published in respect of the deceptive information. When the request for suspension of enforcement relates to this type of sanction, the court is more likely to agree with the appellant and accept that enforcement might cause non-reparable harm for the firm if the decision of the Competition Council (and the sanction therein) finally does not attain confirmation by the court.) In our practice requests for suspension of enforcement of these two kinds of sanctions have occurred, so we have no experience in how requests for the suspension of enforcement of other types of sanctions or remedies would be judged by the courts.

60. Considering the timing of the judicial review, the decision of the Metropolitan Court of Budapest (court of first instance) can be appealed before the Court of Appeal of Budapest (court of second instance). Both courts have exclusive jurisdiction on appeals concerning the decisions of the GVH. The courts have

no timetable or deadline for procedural measures or for closing the judicial procedure, they are only required to adopt a decision within a reasonable period of the time. There are no procedures for expedited review neither generally in competition cases, nor in certain ones. Due to the workload of courts, as a general phenomenon, and not specifically in competition cases, judicial procedures may last for years. As an extraordinary remedy, the appellants may turn to the Supreme Court against the decision of the Court of Appeal of Budapest, which (as of 1 January 2009) is required to rule on the appeal within 120 days.