

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

**ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO  
DETECT CARTELS**

**-- Note by Hungary --**

*This note is submitted by Hungary to the Competition Committee FOR DISCUSSION under Item X at its forthcoming meeting to be held on 30-31 October 2013.*

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## ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO DETECT CARTELS

### -- Note by Hungary --

1. In the cartel investigative work of the Hungarian Competition Authority (hereinafter: Gazdasági Versenyhivatal – GVH) the gathering of information on usually concealed cartels is of utmost importance. In order to strengthen this work, the GVH set up a Cartel Detection Section to deal solely with the investigation and analysis of relevant economic data and market information related to cartels – in other words to carry out business intelligence. The tools used are linked to legal sources and serve one goal: the acquirement of more information on the market. Cartels may only be detected, and competition supervision proceedings may only be initiated, if the means of intelligence at the GVH's disposal are used to obtain sufficient information.

2. In the experience of the GVH it is only worth devoting resources to the investigation of a cartel if there is already some suspicion as to its existence. This is due to the fact that such investigations are very demanding from a resource point of view. Consequently, it is partly the task of the Cartel Detection Section to identify suspicious behaviours, industries and conducts of undertakings which might deserve further analysis.

3. Means of detection can be:

#### **1. External information sources:**

##### ***1.1 Anonymous notifications***

4. During the detection of a cartel there are usually persons who (for revenge, jealousy, believed or real offences) are willing to provide information on a suspected cartel or information which identifies the existence of a cartel either after being contacted by us or by contacting us, provided that their identities remain a secret.

##### ***1.2 Informal/Formal Complaints***

5. Persons, similar to the above-mentioned ones and/or persons whose interests are damaged by the activity of a cartel often submit informal/formal complaints to the GVH in accordance with the provisions set out in the Act 'LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices' (Hungarian Competition Act hereinafter: HCA). Such persons may request that their identities are kept secret.

##### ***1.3 Application of leniency policy***

6. The leniency policy is applied under the conditions and provisions set out in the HCA. There is not much of an incentive in Hungary for applications to be made under the terms of the leniency policy. Domestic undertakings usually only apply for leniency after the GVH has already initiated a proceeding against them.

#### 1.4 *Cooperation with informants and cartel informant reward*

7. Persons providing indispensable information on hard-core cartels (hereinafter: informants) may be entitled to an award if the conditions set out in the HCA are met.

8. Due to the excessively damaging effects and hard detectability of hard-core cartels, the GVH holds that it might be reasonable to reward persons who provide indispensable information<sup>1</sup> for the detection and investigation of cartels with a prize. The GVH had also previously cooperated with persons revealing cartels (e.g. employees, business partners), but the experience was that the cooperating parties also undertook financial risks because of the possible retaliation of the other parties involved in the cartel. This risk needed to be offset in order to motivate individuals to come forward to assist in the enforcement of the law.

9. The other goal of the reward was to make undertakings feel more threatened by the GVH in the hope that it would encourage violators to apply for leniency, or that it would at least make the organisation of cartels more complicated.

10. Conditions of the payment of the reward:

- it may only be paid in the case of hard-core cartels;
- there can be two types of information: either written evidence that proves to be indispensable for the detection of the cartel and/or such oral information that leads to the GVH obtaining a search warrant during its cartel proceeding.

11. Obtaining a search warrant so that unannounced inspections (dawn raids) can be made on the premises of the undertakings suspected of being involved in a cartel is of vital importance in the fight against cartels. Such inspections, which must be carried out in accordance with the relevant provisions of the HCA, enable the GVH to search and confiscate any papers and electronic documents found on the premises. Under certain conditions dawn raids may also be carried out on private premises or on premises for private use.

12. The GVH cooperates with any natural person who has provided information. Such persons may have had direct contact with the cartel (e.g. they may have been involved in the cartel activity themselves) or may have information about this restrictive practice without having any personal direct contact with the cartel.

13. The Hungarian Criminal Code in force requires that those involved in cartel behaviour in public procurement or concession procedures (whether as a direct offender, accomplice or instigator) are punished. However, if a person who is participating in cartel activity in a public procurement or concession procedure, in the framework of the leniency policy, notifies the GVH about the cartel activity and provides indispensable evidence which enables the initiation of a proceeding, then – if other conditions are also met – it is possible, that that s/he is exempted from the criminal sanction. Regarding this latter point, it is the authorities endowed with the jurisdiction to enforce the criminal procedure (including the courts) and not the GVH that have the jurisdiction to decide. This possibility of exemption provides an incentive for applicants to come forward under the leniency policy.

14. The reward is based on the fine imposed by the proceeding competition council in the case, i.e. the reward is based on the cumulative fines imposed on the different parties.

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<sup>1</sup> No award may be paid in case of general information implying a violation of the law.

15. As regards the informant reward scheme that was introduced in 2010, experience shows that while the leniency programme does not have a substantial incentive effect, the GVH is receiving more data<sup>2</sup> from informants every year. On that ground the GVH has been able to initiate significant – on-going – cartel proceedings.

16. The GVH exploits the fact that it is actually the undertakings' own employees who pose the biggest threat to the undertakings when it comes to possible informants. This is because employees are likely to have access to the undertakings' sensitive data and may use this data against them if they become aggrieved.

## **2. Internal information sources:**

### **2.1 *Economic analyses (cartel screening)***

17. The use of economic tools and empirical data to assist in the detection of cartel activity has come up in the agenda of the GVH three times in the last six years. The first attempt in 2007 was a follow-up of a similar DG COMP attempt to set up a framework for initiating ex-officio cartel investigations.<sup>3</sup> The methodology was based on a two-step analysis (first an industry analysis using certain priorities to describe the level of competition, followed by a second step using critical events to detect suspicious activities). Considering that this type of analysis requires a serious amount of man-power and other resources, it was decided that it was best not to try it in practice.<sup>4</sup>

18. Our second attempt at approaching the issue was in 2010. Inspired by the presentation<sup>5</sup> (and previous works) of Joe Harrington, an ad hoc working team in the GVH tried to evaluate the issue again focusing on the use of econometric tools. While the team of the Chief Economist was highly capable of applying these highly sophisticated methods, there was a lack of sufficient data. It turned out that not only did the GVH not have access to the necessary data, but also other government institutions. The collection of the necessary data using monitoring tools would have taken too much time and effort, so the issue of cartel detection by economic methods once again went silent within the office.

19. The Competition Policy Section of the GVH picked up the issue again this year and set up a working group, the main task of which was to catch up with several other authorities in Europe where economic analysis in cartel detection has been successfully used. The team, after collecting the experiences of other authorities, decided to focus on public procurement auctions using the most successful cartel screening methods. Almost all of these methods were based on data from public or private procurement tenders. Public procurement actions are frequent, data is publicly available, bidding rings are known to be common; cartels are more stable and less easy to detect. Although a new IT facility has been set up at the Public Procurement Authority, it has become apparent that setting up a database which is adequate for testing is not a lot easier than before due to the current legal environment. At this stage, the GVH is trying to work together with the Public Procurement Authority to solve the problem of acquiring and accessing data in order to set up an adequate database.

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<sup>2</sup> Exact numbers may not be disclosed

<sup>3</sup> See for example A FRAMEWORK FOR INITIATING EX-OFFICIO CARTEL INVESTIGATIONS, Working Paper, DG COMP CET (2007)

<sup>4</sup> The GVH has been informed about the attempts of some of the competition authorities within the EU, which, however, have all only had a limited outcome.

<sup>5</sup> Joe Harrington, "Screening for Cartels: The Next Step in Enforcement", CRA Annual Conference on Economic Developments in Competition Policy, Dec ), 2009, Brussels

## **2.2 *Internet/press***

20. The experts of the Cartel Detection Section are currently working on acquiring data-mining methods which would be able to filter online data in accordance with a pre-set and constantly maintained taxonomy and set of rules and which would be able to highlight the hits for the evaluator/analyst.

21. The GVH is constantly developing its IT forensic tools with the help of experts as they can assist in the detection of other cartels in the course of on-going or in the initiation of cartel investigations. Pursuant to the HCA, during dawn raids investigators of the GVH may make copies of or confiscate evidence that is not connected to the subject of the investigation, not included in the warrant, but which violates Articles 11 or 21 of the HCA<sup>6</sup> or Articles 101 or 102 TFEU<sup>7</sup>. If such evidence is found, a court warrant is to be obtained afterwards.

22. The GVH cooperates with the Public Procurement Authority of Hungary. This cooperation covers which data and in which manner the Public Procurement Authority may oblige, under its jurisdiction, the participants involved in public procurement procedures to constantly share. This data may be suitable for the development of a system which signals public procurement cartels.

## **2.3 *Information exchange between authorities***

23. Since 2005 the Criminal Code has required that cartel behaviour in public procurement or concession procedures (whether as an offender, accomplice or instigator) is punished, therefore in such cases investigators of the GVH are constantly cooperating with members of the police. The cooperation is generally based on the exchange of information of general interest. The competition supervision and the criminal proceedings are conducted separately. It is worth to mention the reporting obligation of the GVH in the case of any crime, became aware of it through leniency application submitted to him. According to Article 171 (2) of Act XIX of 1998 on the Criminal Procedure Code a member of the authority and the official person, in addition, if a specific law requires, the public authority is obliged to report a crime if it became aware of it under its authority. The accusation shall be accompanied by the means of proof, if this is not possible, the preservation must be provided.

## **2.4 *Proceedings of other EU Member States***

24. Investigators of the GVH are constantly monitoring and following information regarding the proceedings initiated by the European Commission and other EU Member States. The primary source for this is the Mlex database (info.mlex.com). If the GVH is interested in a particular case, the investigators of the case of the Member State or the Commission are contacted within the framework of the European Competition Network.

## **3. *Detecting public procurement cartels***

25. Collusion between bidders on tenders and public procurement procedures is a common type of cartel.

26. In order to detect and acquire information on these practices, besides the tools mentioned above, the GVH's activities include the following:

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<sup>6</sup> These are provisions relating to restrictive agreements (including cartels) and unilateral conducts.

<sup>7</sup> Treaty on the Functioning of the European Union

27. In December 2012, the GVH established a cooperative relationship with the Hungarian Procurement Authority, to enhance the efficiency of the fight against bid-rigging type cartels. The agreement covers expert meetings, transparency issues of procurement data and other tools on raising awareness of suspicious collusive schemes.

28. Since 2012, the GVH operates a webpage dedicated, among others, to contracting entities ([www.megfeleles.hu](http://www.megfeleles.hu) – a webpage on compliance) where information and examples are given about the nature and recognisability of public procurement cartels.

29. In addition to the mentioned webpage the GVH also issued a publication with similar contents but especially for contracting entities, under the title “Suspected cartel in public procurement?”.

30. The relevant provisions of the Public Procurement Act aim to facilitate the acquirement of information on public procurement cartels. These provisions stipulate that if during the procurement process and based on solid grounds, the contracting entity identifies a clear and manifest infringement or reasonably assumes an infringement of the cartel prohibition rules set forth in the HCA or Article 101 TFEU, it shall (in accordance with the regulations on notifications or complaints of the HCA) notify the GVH.

31. This provision has resulted in the Public Procurement Act placing an obligation on contracting entities to report to the GVH, if they suspect that there has been a violation of the cartel rules.