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The standard of review by courts in competition cases – Note by Hungary

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More documents related to this discussion can be found at

http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm

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Hungary

This contribution discusses the standard of review applied by the Hungarian courts in competition cases. It follows the structure of the questionnaire of the OECD Secretariat issued on 19 February 2019.

1. Legal framework and standard of review

1.1. Is your jurisdiction an adversarial or an administrative competition enforcement system?

1. The law enforcement proceedings of the GVH 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.

2. 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 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.

3. 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

4. As for the review of competition cases, an administrative system of judicial review exists in Hungary. As of 1 January 2018 there are two instances of court review for competition cases, the first instance court is the Regional Court of Budapest, which possesses exclusive competence in competition law matters, while the second instance court is the Hungarian Supreme Court, the *Curia*, which is the presiding appellate court. Before the entry into force of the Code of Administrative Litigation[2], the Curia acted as an extraordinary review court in competition cases. However, in accordance with the legislation that is currently in force, the Curia is the appellate court for the review of the GVH's decision on the merits of the cases.

1.2. What is the standard of review for courts reviewing public competition decisions in your jurisdiction? Does the review court perform a full review on the merits or a review of legality on specific grounds? Is there a different standard for questions of fact than for questions of law? If the review is one of legality, what are the grounds for challenge?

5. Hungarian administrative review courts carry out a full review in competition cases. This review takes the form of a comprehensive assessment of both the findings of fact and conclusions of law. The same standard of review is applied to both of the abovementioned elements. The first instance court is responsible for carrying out a full review of the findings of fact and conclusions of law to the extent necessary based on the action of the plaintiff. The extent of the review is determined by the action, which means that the court only touches upon those facts and legal matters that are raised by the plaintiff. The administrative courts cannot initiate proceedings *ex officio*. The recent case law of the Curia suggests that the full review must fall within the limits of the action on which it is based, namely the proceeding court must not overstep the action and undertake a review of the findings of fact and conclusions of law that goes beyond what the concerned party has raised in its claim.[3] The Curia's interpretation of full review materialized in two major cases within the last decade.[4] The Curia – in accordance with European antitrust trends – noted that the rights of defence, as a basic concept of the competition supervision proceedings of the GVH, must be respected by the Authority and undertakings shall be able to exercise their rights after they have been served with the statement of objections by the GVH. The Curia considers the GVH's proceedings *quasi-criminal proceedings* and made it clear that the extent of the full review carried out by the administrative courts would be the more extensive the less rights of defence are conferred upon the undertakings in the competition supervision proceedings. The Curia also clarified that the quasi-criminal nature of the

2 Act I of 2017 on the Code of Administrative Litigation

3http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2011/vj_23_2011_475.html (only available in Hungarian)

4http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2011/vj_23_2011_475.html in Case no. VJ/174/2007. English summary of the GVH decision available: http://www.gvh.hu/en/press_room/press_releases/press_releases_2010/6544_en_deterrent_fines_imposed_for_cartel_activity.html ; http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2011/vj_74_2011_1069.html in Case no. VJ/74/2011. English summary of the GVH decision available: http://www.gvh.hu/en/press_room/press_releases/press_releases_2013/8456_en_95_billion_huf_fine_in_the_full_prepayment_loan_banking_case.html

competition supervision proceedings does not mean that the proceedings should be qualified as actual criminal proceedings, given the fact that the pecuniary nature of the sanctions imposed by the GVH are not as severe as the sentences imposed on natural persons in criminal proceedings. Furthermore, the Curia established that the standard of proof in competition supervision proceedings shall be the test of *beyond reasonable doubt*: (i) the GVH shall apply the principle *in dubio pro reo* when a piece of evidence does not prove the infringement and culpability of the undertaking; (ii) the GVH may use any evidence deemed to have been verified, which means that the GVH may use both direct and indirect evidence and may establish the facts of the case based on conclusions if these elements lead to a logical and closed chain of evidence. The Hungarian Constitutional Court also handed down a decision in which it confirmed the quasi-criminal nature of the competition supervision proceedings of the GVH.[5] In the Hungarian administrative review system lower courts closely monitor the case law of both the Curia and the Constitutional Court.

1.3. What competition enforcement acts and decisions are subject to review?

6. Both on the merits and procedural decisions of the Competition Council may be challenged before administrative courts. On the merits decisions can be challenged within 30 days of the decision being received. The undertakings must file their action electronically and must have legal representation throughout the administrative review process. The GVH is the recipient of the action and is responsible for submitting the action with the administrative files of the case, along with its document of defence, to the Regional Court of Budapest. In antitrust cases, the GVH must forward the abovementioned documents within 30 days.

7. The Competition Act expressly details which procedural, not on the merits decisions of the Competition Council may be subject to administrative review. These procedural decisions may be challenged within 8 or 15 days upon the decision being received. The decision must communicate the availability of court review proceedings and the time limit upon which an action may be brought. Such procedural decisions are for example the imposition of an administrative penalty, the qualification of information as a business secret or the termination of such protection, and the termination of competition supervision proceedings.

5 http://public.mkab.hu/dev/dontesek.nsf/0/07C98BED77FA2FC2C1257C3100212A5D?OpenDocument (only available in Hungarian). A constitutional complaint may be lodged against the res iudicata decisions of the Curia as part of the Hungarian administrative supervision proceedings. The Hungarian Constitutional Court narrowly interprets who is considered to be a rightful petitioner before it, and who may therefore launch a constitutional complaint. Public authorities are not considered to be petitioners before the Constitutional Court. Therefore, it may be the case that while undertakings may proceed in two instances in the general review system and bear standing as plaintiffs of the case and may even have the right to be petitioners before the Constitutional Court, the GVH may not have standing as petitioner before the Constitutional Court. The above detailed constitutional interpretation derives from the Constitutional Court's case law in taxation matters.

1.4. Is the review of decisions imposing fines or jail sentences subject to a different standard?

8. Criminal justice is not served by the GVH or by the administrative courts. The prosecutorial system and criminal courts are dealing with criminal charges mostly in bid rigging cases. The Hungarian Criminal Code specifically stipulates that natural persons shall be subject to criminal punishment if they enter into an agreement in restraint of competition in public procurement and concession procedures.[6] It must be also noted that according to the Hungarian legal system, a different act deals with the criminal liability of undertakings engaged in criminal actions.[7] Consequently, parallel competition and criminal proceedings may be initiated against undertakings, and criminal proceedings may be initiated against natural persons participating in infringements on behalf of undertakings. The case law in in recent years has demonstrated the parallel nature of the competition supervision proceedings and the criminal proceedings launched against the same bid rigging conduct, resulting on the one hand with an infringement decision being imposed on the concerned undertakings in the competition supervision proceedings, and on the other hand with a jail sentence being imposed on the natural person responsible for organising the agreement between the concerned undertakings in the criminal proceedings.[8]

9. It is settled case law that the competition supervision proceedings of the GVH are quasi- criminal in nature, which also makes it clear that there is distinction between the administrative and the criminal proceedings in terms of the applicable standard of proof. The criminal concept of 'proved beyond reasonable doubt' is not applicable in competition supervision proceedings.[9] According to the Hungarian Constitutional Court there is no legal obligation for the GVH to provide undertakings with the same procedural guarantees as prescribed by the Criminal Code for natural persons under criminal investigation. This interpretation of the Competition Act is in line with the case law of the ECHR and the *acquis communautaire*.

1.5. Is it possible to challenge charging documents (e.g., statements of objections in administrative systems; complaints in prosecutorial systems) and procedural

6 Act C of 2012 on the Criminal Code, Article 420.

7 Act CIV of 2001 on Measures Applicable to Legal Entities under Criminal Law

8http://www.gvh.hu/en/press_room/press_releases/press_releases_2015/the_gvh_imposed_fines_for_pharma_cartel.html, case No. VJ/28/2013., this was the first case in the Hungarian cartel practice where a jail sentence was imposed for bid rigging.

9 In its recent decision No. 7/2019 (III.2.) relating to the protection of witnesses in competition supervision proceedings, the Hungarian Constitutional Court distinguished between the application of the legal test of 'proved beyond reasonable doubt' in criminal proceedings and in administrative proceedings. The constitutional justices stated that the application of the reasonable doubt test in competition cases should be less strict, given the fact that the sanctions imposed in administrative proceedings are pecuniary in nature, unlike the threat of jail faced by natural persons convicted in criminal proceedings. This approach does not alter the principle of in dubio pro reo, however, the GVH applies the rule of free assessment of evidence. http://public.mkab.hu/dev/dontesek.nsf/0/4E515B47054B94F4C125802F00589071?OpenDocument

acts, like requests for information, requests for interviews, and dawn raids? What is the standard for their review?

10. According to the Competition Act the statement of objections, the request for information, the request for interviews and the court decision granting permission to enter the premises of the undertakings without prior notice, issued with the authority decision about the launch of the competition supervision proceedings, are not challengeable documents before administrative courts. The first charging document that may be subject to legal review is the decision ending the procedure. This decision may be an infringement decision exclusively issued by the Competition Council or it may be a decision terminating the proceedings without any infringement stated. The latter may be issued by either case handlers or the Competition Council.

11. The statement of objections is a key document since it activates the undertakings' rights of defence to practice, and is therefore considered to be the first actual charging document of the proceedings. The report of the case handlers has neither binding force on the concerned undertakings, nor does it dictate the approach that must be followed by the Competition Council.

12. If undertakings raise any issues related to dawn raids or the manner in which they are conducted, they may submit their claims relating to these issues in the records of the inspections. These claims do not result in court proceedings but are addressed by the Competition Council in the statement of objections and the decision ending the procedure.

1.6. Are commitments or settlements common in your jurisdiction? Can they be appealed, including by third parties, and is the standard of review the same as that applicable to infringement decisions? Do courts review them before they become binding?

13. Both commitments and settlements are permissible in competition cases. Competition supervision proceedings relating to antitrust and consumer protection cases may be terminated without the establishment of an infringement by commitment decisions. Article 75 of the Competition Act does not stipulate any restrictions regarding the types of antitrust cases in which commitments are permissible, however, the case law shows that the GVH primarily adopts commitment decisions in Article 102 TFEU cases[10] and on vertical agreements.[11] Settlement decisions may be adopted in Article 101 and Article 102 TFEU cases and in cases where the prohibition of abuse of significant market power is investigated in accordance with Article 7 of the Act on Trade.[12] A settlement decision involves the establishment of an infringement and an admission of guilt from the concerned parties, in return for a certain percentage[13] reduction in the amount of the fine. Settling undertakings must cooperate with the GVH and accept its legal evaluation of the facts and the conclusions drawn from those facts. The main purpose of the settlement procedure is

10 http://www.gvh.hu/en/resolutions/resolutions_of_the_gvh/Resolutions_2014/vj_15_2014_166.html?query=artisjus

11 http://www.gvh.hu/en/resolutions/resolutions_of_the_gvh/resolutions_2011/vj_049_2011_362.html

12 Act CLXIV of 2005 on Trade

13 The GVH may grant a 10-30% reduction from the amount of the fine to the acknowledging undertaking(s).

the acceleration of the competition supervision proceedings, and it must therefore be distinguished from the leniency policy. Commitment and settlement cannot be applied simultaneously in the same competition supervision proceedings.

14. It is not common in the practice of the GVH for commitment decisions or settlement decisions to be challenged before administrative courts, either by the undertakings involved in the resolution or by third parties. In the case of commitment decisions undertakings are not required to waive their right to challenge the decisions before the courts, however, this would be unreasonable given the fact that commitment decisions terminate the competition supervision proceedings without establishing any infringement. In the case of settlement decisions, according to Article 73/A of the Competition Act, the settling undertaking must waive its right to appeal the final decision. However, in certain circumstances the settling undertaking may revoke its statement of settlement, thereby theoretically reopening the possibility of appealing the final decision. Those undertakings not settling with the GVH may challenge the settlement as evidence of the infringement. The GVH considers the settlement itself as piece of evidence of the infringement thereby in an indirect way the undertakings not involved in the settlement may form claims against this certain piece of evidence as well. However, the case law of lower courts in recent years suggests that this litigation strategy is unsubstantiated.[14]

1.7. Are the opening or closing of enforcement proceedings or merger remedies appealable in your jurisdiction? What is the standard for their review?

15. The decision by which the GVH initiates a competition supervision proceeding is not challengeable separately. If the GVH terminates the competition supervision proceedings without establishing an infringement, this decision may be subject to appeal. Occasionally undertakings challenge the terminating decision by claiming that they do not accept the reasoning of the decision, namely the establishment of certain facts. Before 1 January 2018 in these cases the first instance administrative court carried out its review in a simplified non-litigious proceeding. In one particular case the Regional Court of Budapest – given the fact that the action was brought against the reasoning of the decision and the decision happened to be delivered in a cartel case – undertook a review of the case. The court observed the pieces of evidence leading to the conclusions made by the GVH in its decision and found no misconduct on the side of the Authority.[15]

14 http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2014/vj_104_2014_286.html, in a hybrid RPM case the undertaking not settling with the GVH challenged the final decision and the administrative courts found the GVH's approach lawful in which it evaluated the settlement decision as a piece of evidence in the chain of evidence establishing the infringement. The final court decision is only available in Hungarian: http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2014/vj_104_2014_286.html In another hybrid case two out of the three undertakings involved in the concerned cartel challenged the final infringement decision and in their actions they challenged the validity of the settlement with the third undertaking, claiming that the practice of the GVH in the settlement procedure was contrary to the principle of fair procedure. The first instance court rejected these claims and accepted the GVH's reasoning and evidence about the circumstances of the settlement procedure. http://www.gvh.hu/en/resolutions/resolutions_of_the_gvh/resolutions_2015/vj_2_2015_205.html

15 http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2013/vj_84_2013_1308.html, the decision is only available in Hungarian.

16. Merger remedy decisions are considered to be final and therefore challengeable decisions in line with Article 76 (1) ab) of the Competition Act. However, it must be bore in mind that third parties must prove their direct interest when they decide to bring an action against a merger remedy decision. It can be seen from the case law of the administrative courts that a restrictive approach is applied when determining if a third party actually has a direct interest that is affected by a merger remedy decision.

17. If an action is brought by a third party against the termination of a proceeding or a merger remedy decision, the standing of this party as plaintiff of the administrative ligation must be evaluated by the presenter judge of the case. In order for standing to be established, the existence of the above detailed direct interest must be proven. According to the relevant case law, administrative courts require third parties to submit evidence proving the harm to their circumstances resulting from such decisions. Consequently, mere references to potential events or changes are not sufficient to substantiate an action.

1.8. What is the margin of appreciation reserved by case law to the decision-maker?

18. Certain discretionary administrative decisions of the GVH are the result of the exercise of its margin of appreciation: (i) the most significant is the fining practice of the GVH and in the broader sense the sanctioning practice of the GVH; (ii) the GVH also exercises its margin of appreciation when deciding upon the undertakings' claims relating to what information in their replies to RFIs should be considered as amounting to a business secret; and (iii) and the Competition Council also exercises its margin of appreciation when deciding upon undertakings' requests to inspect documents. The old Code of Civil Procedure required the administrative courts to review the discretionary administrative decisions of the GVH by assessing whether the following conditions of lawfulness of an administrative decision were satisfied: (i) whether the authority ascertained the relevant facts of the case; (ii) whether the procedural rules were kept; and (iii) whether the decision contained a reasonable assessment of the facts. Consequently, if the court established that these conditions were met, the judicial body would not overrule the decision of the authority.

1.9. Is the review of economic evidence subject to a different standard? Is the review court free to interpret economic assessments?

19. If economic analysis has been used in a competition case as evidence, the administrative court may review it in the same manner as any other piece of evidence. According to the most recent case law of the Curia, the high court undertakes an independent assessment of the economic analysis used in a competition case during the complete review of the decision of the GVH. Accordingly, if the economic analysis is not definitive in terms of proving the infringement, then such analysis – in accordance with the principle *in dubio pro reo* – shall be considered as extenuating evidence.[16]

16 The Curia decision is only available in Hungarian: http://www.gvh.hu/dontesek/birosagi_dontesek_vj_szam_alapjan/birosagi_dontesek_2010/vj_96_2010_394.html

1.10. What is the average duration of a court case? Is there a possibility to expedite the court's review or use a simplified procedure?

20. The average duration (in days) of first instance cases of judicial review against decisions of the GVH applying Articles 101 and 102 TFEU for which a decision on substance was issued by a court in 2017 was 332.5 days. The average duration (in days) of second instance cases of judicial review against decisions of the GVH applying Articles 101 and 102 TFEU for which a decision on substance was issued by a court in 2017 was 297 days.[17]

2. Courts' access to competition expertise

2.1. In your jurisdiction, how do the courts acquire sufficient expertise to adjudicate competition law and economic matters? Have any cases posed particular problems as a result of the court's lack of understanding of technical or economic concepts?

21. In recent years rather legal than economic concepts and their interpretation became subjects of the administrative review procedure.[18] Both cases concerned the potential anticompetitive effect of information sharing schemes. During the judicial review of the GVH's decisions in these cases, the administrative courts undertook an independent assessment of this issue and found that the GVH should have been required to prove the actual effects of the concerned decade-long information sharing scheme or should have been required to prove what had hindered the realisation of actual effects. In the Bankdata case[19] the first instance court considered the possibility of asking an independent economic expert to determine the relevant market on which the information sharing scheme operated due to the claims of the plaintiffs that the market definition contained in the GVH's decision was insufficient. Ultimately, the review was carried out without the participation of an external expert, however, the case demonstrates that administrative judges are not prohibited from seeking the advice of external experts if necessary. A judge's decision as to ask an external expert to provide economic analysis in a review case falls under his/her margin of appreciation based on the claims stated in the plaintiff's action.

17 These data were provided to the ECN questionnaire on the functioning of national justice systems when applying EU competition law in early 2019. The 2017 data are prior to the entry into force of the new Code of Administrative Litigation. Since the entry into force of the new Code on 1 January 2018, the first cases conducted demonstrate that the length of first instance court procedures have been reduced to 150 days. As regards to second instance procedures, a number of appeals are still in progress.

18 Case no. VJ/96/2010 and VJ/8/2012

19 http://www.gvh.hu/en/resolutions/resolutions_of_the_gvh/resolutions_2012/vj_8_2012_1751.html

2.2. Does your competition authority take action, alone or with other authorities, to ensure that judges have the knowledge and the expertise required in each case?

22. The GVH, in association with the Regional Centre for Competition, regularly holds conferences and seminars for national and European judges. These events enable the participants to discuss current issues of competition law.

2.3. Does your jurisdiction provide for external expert advice to the court? If so, how does this work? Who can request it — the judge, the parties, or both?

23. The presiding judge may seek the advice of an external expert, either on his/her own initiative or at the request of the concerned parties. If any of the concerned parties lodges a claim for expert advice, this claim must be reasoned and must prove the link between the analysis and the subject matter of the court review. In their actions for review, undertakings primarily request expert advice in cases where market definition is key to the review or in cases where they claim that the GVH has failed to meet the necessary standards to establish the theory of harm. The register of independent court experts also includes economic experts, from which judges can freely choose.

2.4. For judicial review, is there a specialised competition court, or a competition chamber in a general court? Was this always the case or was there a reform of the system (or is a reform contemplated) based on considerations linked to the effectiveness of the review?

24. The administrative courts proceeding in competition matters are not specialised courts. Their workload is varied and covers many areas, for example, energy, media, migration and taxation matters. Consequently, administrative judges in the Hungarian system must have knowledge of many different branches of substantial administrative law. Since 1 January 2018 the first instance court in competition cases comprises of three judges and the second instance court also comprises of three judges with decades-long administrative litigation expertise which brings more administrative law expertise into the review cases.

25. Last year the Hungarian Assembly passed a new law, according to which a new Administrative High Court will be introduced from 1 January 2020. The newly designed system will introduce specialised chambers for certain matters, for example relating to taxation; however, the new law will not, for the time being, introduce a specialised chamber for competition matters.

2.5. What are the advantages and disadvantages of your review system? How could the effectiveness of review improve?

26. Hungarian administrative judges are well-trained and possess in-depth knowledge of the operation and functions of the GVH. Judges serving at the Regional Court of Budapest rigorously follow the case law of the Curia and they keep their legal reasoning in line with the *racio decidendi* of the high court's decisions. The Curia's understanding of both the *acquis communautaire* and the case law of the ECHR can be seen in its practice relating to the full review of competition law decisions.

27. As regards to the areas where further improvement could be made in the future: (i) new technical rules introducing digitalisation in administrative litigation may consist an obstacle for undertakings; (ii) the Constitutional Court should not prevent administrative authorities such as the GVH from launching a constitutional complaint if necessary; (iii) the verbatim interpretation of the parties' statements should be entered into the court records by default; (iv) a specialised chamber for dealing with competition matters should be created in the new Administrative High Court; and (v) judges should be required to have a greater understanding of digitalised sectors and market conducts.