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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Hungary

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More documentation related to this discussion can be found at: oe.cd/sctr.

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Remedies and Commitments in Abuse Cases

- Contribution from Hungary -

1. Commitments and remedies in the GVH's proceedings

1. The Hungarian Competition Authority has been promoting the application of commitments and remedies in its proceedings. Sanctions are important, however, the GVH finds that commitments or remedies can, on one hand, serve as a possible compensation for consumers and undertakings which have suffered harm or which are in a less advantageous position due to infringements, and, on the other hand, may help the more efficient use of institutional resources. Commitments and remedies are considered important legal instruments to resolve competition concerns in a more flexible and effective way than the imposition of fines, and they may also contribute to cost and time savings. To facilitate the achievement of these policy objectives, the GVH aims to encourage undertakings to cooperate with it through offering commitments in proceedings and providing them with the possibility of obtaining a fine reduction. For the undertaking, the acceptance of commitments or the imposition of remedies may also be beneficial, as it can take part actively in resolving the competition concerns. In certain circumstances, if a commitment statement is deemed to be reasonable, the undertaking can avoid the full competition supervision proceeding and the possible finding of an infringement.

2. The GVH, as an authority having the powers to act in both antitrust and consumer protection cases, has been promoting commitments and remedies for years, and have established case law and soft law documents in which circumstances and how commitments could be acceptable. As to remedies, until now in abuse cases, the GVH has mainly applied behavioural remedies. In the last 5 years, the GVH closed four abuse cases: in one case it was established the infringement and imposed an obligation on the undertaking, and three cases were closed with commitments.

2. Legal Framework

3. The Hungarian Competition Act¹ provides the legal framework for the acceptance of commitments and the imposition of remedies, laying down the basic, general rules of these legal instruments and the procedure regarding their application. The GVH has issued notices² that lay down the basic principles of law enforcement concerning these issues. These soft law documents include specific rules and detailed aspects on the basis of which

¹ Article 75 and Article 76(1)(i) of Act LVII of 1996.

² See: Notice No 1/2018 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the commitments pursuant to Article 75 of the Hungarian Competition Act (hereinafter: Notice on Commitments) and Notice No 1/2020 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the method of setting fines for infringements of antitrust type of prohibitions amended by Notice No 1/2021 (hereinafter: Notice on fines).

the GVH assesses commitment statements and imposes remedies, as well as provide guidance to undertakings.

4. There is a significant difference between the acceptance of commitments and the imposition of remedies. In a competition supervision proceeding closed by a commitment, the GVH does not completely clarify the facts of the case and does not carry out the substantive assessment of the conduct in detail. The GVH can order the fulfilment of a commitment under Article 75 of the Competition Act only without establishing the infringement and the imposition of a fine.

5. By contrast, the imposition of remedies comes with the establishment of the infringement under Article 76(1), where the GVH prescribes certain obligations, including behavioural or structural remedies and, depending on the gravity of the infringement and the form, scale, success of the cooperation with the undertaking, the GVH can decide on not imposing a fine or providing a fine reduction.

3. Commitments

6. In a competition supervision proceeding, if the undertaking offers commitments to bring its conduct in a specified way in line with the applicable legal provisions and if the efficient protection of the public interest can be ensured in this manner, the acting Competition Council can, in its decision, oblige the party to abide by such commitments without establishing the existence or the absence of an infringement.³

7. The GVH considers on a case-by-case basis whether, taking into account the principles of special and general prevention, it is more justified, considering the nature and gravity of the harm to the public interest, to clarify the facts of the case fully and classify a given conduct, possibly establishing an infringement and imposing a fine, than the benefits to be obtained by closing the competition supervision proceeding by a commitment. There are cases which, however, are not considered appropriate to be closed with commitments, but in these cases remedies may still be taken into account.

8. The Competition Act provides the GVH with a wide power of discretion regarding the assessment (adoption or rejection) of the commitment. In the Notice on commitments, the GVH aims to provide guidance to undertakings on what essential elements should be included in the statement and what other criteria should be met, adapted to the examined conduct and circumstances. Deciding on the admissibility of the offered commitment, the acting Competition Council will evaluate the following criteria.

9. The commitment shall be relevant to the competition concerns and shall result that the conduct presumably cannot be committed in the future, as well as it also ensures effective protection of the public interest. The effective protection of the public interest means that the conduct results in an advantage, even in an indirect one, both for the market and, at the same time, for a wide range of consumers.

10. The commitment must be credible, which means that in the statement of the undertaking, the process of implementation of the commitment is precisely described, highlighting that when and what kind of measures are (have been) taken in order to change or eliminate the infringing conduct, which tools are planned to be used, how much it will cost to carry out that commitment and that the undertaking does have the budget and the resources needed.

³ Article 75 of the Hungarian Competition Act.

11. The undertaking must demonstrate the time frame within which it can implement its commitments, as an immediate measure, can lead to the dismissal of the competition concern promptly. The undertaking must also establish the period within which it undertakes to maintain its commitment.

12. The GVH does not deem commitments acceptable in cases when the compliance with the commitment is difficult to verify. When submitting its statement of commitment, the undertaking must submit a detailed plan on how it intends to prove the fulfilment of its certain commitments to the GVH. The means of certifications can be a report, an account, the appointment of an independent supervisor, website backups, invoices proving the implementation of the commitments, and/or return receipts proving the specific consumer information, etc.

13. The commitment must be formulated in its wording with such precision and clarity that no dispute over interpretation may arise during the monitoring of its fulfilment. For example, the GVH does not accept ambiguous and/or unclear commitments.

14. The acting Competition Council obliges the undertaking to abide by its commitments in its final decision. The commitments could be open for a market test before adopting the final decision, however, in the event of a proceeding pursuant to Article 101 or 102 of TFEU, the market test is obligatory.

15. Concerning the case law in 2017, the GVH initiated a competition supervision proceeding⁴ against a leading telecommunications company (Telekom), because it was noticed that the undertaking had only introduced its new triple-play service package, called Flip, only in those areas where it faced strong competitive pressure. On the contrary, in other municipalities, where its network would have also been suitable for providing the Flip service, it had enforced higher fees. This raised suspicions that Telekom was setting unfairly high prices for consumers living in the latter areas. As a result of the GVH's procedure, in 2019 the telecommunications operator undertook to introduce in all municipalities in question a new tariff package which includes all three service elements and whose favourable tariff results in appreciable savings for consumers compared to buying those services separately from the company. In the follow-up investigation, the fulfilment of commitments was attested.

16. In another case, the undertaking offered commitments voluntarily to eliminate the competition concerns. The GVH investigated the conduct of Balatoni Shipping Zrt. (Bahart),⁵ the company that is entitled to establish the fees and conditions for the use of the public ports of Lake Balaton, and is also an operator on the market for passenger transport, including non-schedule cruises and program boating. The Competition Authority assumed that the company, dominant in the market for public port services at Lake Balaton, had established the fees and conditions for the use of the docks in a way that were capable to restrict competition and foreclose. After receiving the Authority's statement of objections, the undertaking offered commitments. It reduced its fees for using the docks, increased the available port areas for its competitors, as well as provided more room for the advertisements of its competitors during the proceeding. As a structural commitment, the undertaking offered to separate its accounting rules for its public port services from the accounting rules for passenger transportation, and it undertook to reform its pricing mechanism and port arrangements. It also committed to carry out the renewal of its

⁴ Case no. VJ/56/2017.

⁵ Case no. VJ/14/2015.

accounting and charging system under the supervision of independent experts to prevent competition concerns as regards pricing.

4. Remedies

17. When ordering obligations as remedies, the GVH establishes an infringement under Article 76(1) of the Hungarian Competition Act. One form of such remedies could be the proactive reparation by the undertaking.

18. The GVH qualifies a conduct as proactive reparation (or compensation), when the undertaking that committed the infringement corrects the negative effect of the infringement either partially or completely. When an undertaking offers such reparation, the GVH may, in particular, consider facts such as:

- whether the proactive reparation offered is directly related to the issue subject to the competition supervision proceeding;
- whether it is specifically intended to remedy the competition issue subject to the proceeding and is not a measure that has already been decided and will be taken in any case;
- how the value, cost (or fiscal effects) of the measure (e.g., investment) relates to the amount of the calculated fine;
- whether proactive reparation directly benefits a wide range of consumers (and at least those affected by the infringement);
- its impact on job creation, market access, foreign trade and tax revenues;
- whether it contributes to sustainability or environmental protection, thereby increasing consumer welfare;
- whether it is sufficiently substantiated when the proactive reparation is offered, whether the benefits to be achieved by the commitment can be substantiated by data or analysis and after its implementation, whether the effects of the commitment can be verified by audited results and thus accounted for.

19. Taking into account the considerations mentioned above, the GVH decides on the extent to which it recognises proactive reparation as a fine reducing factor when establishing the infringement. To this end, the GVH also assesses how the public interest effect arising from the above criteria relates to the deterrent effect that can be achieved through the possible fine. This assessment may lead to the rejection of the proactive reparation, the full remission of fines when establishing the infringement, or a fine reduction. In the framework of this assessment, the GVH takes into account the gravity of the infringement, the socio-economic context in which the infringement took place, its novelty or the maturity of the related case law, recidivism, the extent of the harm caused and whether businesses or consumers (or a vulnerable group of consumers) are affected.

20. In case VJ/43/2016, the undertaking infringed Act CLXIV of 2005 (hereinafter referred to as the Trade Act) by abusing its significant market power.⁶ As set out in Article

⁶ Abuse of significant market power is an abuse-type legal instrument, where the threshold of intervention for the Authority is lower than in abuse of dominance cases. Despite its misleading name, abuse of significant market power is like an abuse of economic dependence.

7 of the Trade Act, the abuse of significant market power against a supplier shall be prohibited. In the event of a possible infringement, it falls within the competence of the GVH to conduct an investigation and carry out the proceeding pursuant to the rules on abuse of dominance. The proceeding was initiated against SPAR Magyarország Kft. (the Hungarian subsidiary of the multinational retailer SPAR) on the basis that it had infringed Article 7 of the Trade Act by abusing its significant market power against its suppliers – mostly small or medium sized companies – by requiring its suppliers to pay a so-called progressive bonus. The investigation confirmed that the practices used by SPAR placed an unjustified and unilateral burden on a significant portion (80%) of the suppliers that entered into an agreement requiring the payment of a progressive bonus. In addition to establishing the fact of the infringement, instead of the imposition of a fine, the GVH – in its decision made on 12 December 2020 – required SPAR (which was actively taking part in forming its commitments) to comply with obligations that took into account the interests of the suppliers who suffered damages as a result of its practices. SPAR was required to establish six regional supply centres aimed at improving the opportunities of local domestic small producers, thus contributing to the development of the local economy and stimulating demand for local goods. For the implementation of the programme, SPAR calculated with an audited budget of HUF 1.7 billion (EUR 4.9 million). Ninety percent of the opportunities created by this regional system will be offered to micro, small and medium-sized suppliers, and the system will simultaneously increase the amount of goods procured from the existing small producer partners of the supermarket chain. Last but not least, the commitment will result in the creation of 23 jobs. The realisation of the reparation is currently being monitored by the Authority.

5. Monitoring after the acceptance of commitments or remedies

21. Both commitment decisions and decisions with remedies are made by the Competition Council. They are obligatory for the undertaking concerned and enforceable. Furthermore, undertakings must submit certifications and documents to prove that they have fulfilled the obligations. The deadline for such justification is determined in the decision of the Competition Council. After the deadline, the GVH always monitors the undertaking. The monitoring can either take the form of a formal investigation (follow-up investigation) or can be informal. In the latter case, the submitted documents and the facts available can substantiate the fulfilment of the obligation. If the competition supervision proceeding has been closed with a commitment decision, the GVH carries out a follow-up investigation in all cases. If the undertaking has not fulfilled its commitments or obligations under the enforceable decision of the Competition Council, the GVH may decide to impose a fine on the undertaking, enforce the decisions, or may revoke the decision and re-open the competition supervision proceeding.