

Unclassified**English - Or. English**

22 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Hub-and-spoke arrangements – Note by Hungary**

4 December 2019

This document reproduces a written contribution from Hungary submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

Please contact Mr Antonio CAPOBIANCO if you have any questions about this document
[Antonio.CAPOBIANCO@oecd.org]

JT03455181

Hungary

1. This contribution sets out the enforcement experience of the Hungarian Competition Authority (in Hungarian: Gazdasági Versenyhivatal, hereinafter referred to as 'GVH') in relation to hub and spoke arrangements and other related questions.

1. The relevance and investigation of hub and spoke cases

2. In the GVH's practice so far there has only been one competition supervision proceeding relating to a "quasi" hub and spoke arrangement. The GVH initiated a case on a "hub and spoke" basis, because the previously gathered data indicated a presumed "hub and spoke" behaviour among a supplier and six wholesalers, which concerned a coordinated increase of the transfer price of certain products for several years via direct and indirect contact among the undertakings.

3. Three testimonies were obtained during the investigation phase, according to which the alleged hub and spoke conduct had been in operation for a number of years. The witnesses, however, were unable to substantiate their statements with contemporaneous written evidence.

4. Although the GVH obtained evidence proving certain elements of the alleged infringement, due to the lack of decisive contemporaneous written evidence proving all the elements of the alleged infringement, the GVH eventually came to the conclusion that the infringement could not be established based on the obtained testimonies as they did not enable the GVH to examine the intent or awareness of the undertakings.

5. In its final decision,¹ the GVH established that the available evidence did not prove that there was a concerted practice between the undertakings, as the conditions of intent or awareness required for that purpose were not met either by the manufacturer or by the wholesalers. The GVH examined the following conditions when assessing and deciding on the alleged infringement. As a *first condition*, it was examined whether the wholesaler had provided the manufacturer with the information, knowingly intending or reasonably expecting that the manufacturer would share the information with other wholesalers. *Secondly*, it examined whether, when the manufacturer passed on the information received from the first wholesaler to the other wholesalers, the latter wholesalers receiving the information would have been aware of the circumstances under which the manufacturer had acquired the information. If the first two conditions are met, it is appropriate to consider as an *additional criterion* whether the wholesaler receiving the sensitive information has used the information when deciding on its market behaviour.

6. On the basis of the above, the GVH did not consider that the conditions of the test set out by the GVH were fulfilled. The GVH did not find it proven that the wholesalers had indirectly coordinated their behaviour with the assistance of the manufacturer. Therefore, the proceeding was terminated against all of the concerned companies.

¹ VJ/22/2015. SCA and Others, English-language press release available at: http://www.gvh.hu/en/press_room/press_releases/press_releases_2018/the_gvh_terminated_its_cartel_proceeding_on_the_ma.html?query=22%2F2015 The non-confidential version of the decision is available in Hungarian: http://www.gvh.hu//data/cms1038591/Vj022_2015_v.pdf

7. It can be seen from the case described above, that a quasi “*hub and spoke*” infringement cannot be proved without contemporaneous written evidence covering all the elements required for establishing the infringement.

8. Despite the lack of case law, the GVH considers that the so-called “*hub and spoke*” behaviours are as serious as horizontal hardcore infringements.

9. This perception is also reflected in the modification of the Hungarian leniency program when the above mentioned case was started. The modified Notice on the leniency programme now also covers “*hub and spoke*” behaviours, which means that both the “hub” participant and the “spoke” participant of an infringement are entitled to submit leniency applications.² The Notice of the modified leniency programme explains that this type of infringement can be considered as a quasi-horizontal infringement, because it is obvious that these “hub” and “spoke” infringements are of horizontal nature and thus have horizontal market effects. Consequently, the GVH places equal importance on the fight against “hub and spoke” infringements and hardcore cartel infringements.

10. Despite the modification of the leniency programme, no immunity/leniency applications have been submitted yet. Therefore, we are unable to say at this point whether leniency can be considered as a relevant detection tool. The discussed case was initiated based on information obtained from sources not related to leniency.

11. During the dawn raid, the GVH investigated all the participants in the alleged hub and spoke infringement, paying particular attention to the “hub”, which organised the activity of the “spokes”.

12. Unfortunately *there is no case law in our jurisdiction*, or any kind of guidance, that could be used to determine the legal standards that should be applied in order to prove the existence of a hub and spoke type of collusion. From the above-mentioned case, it can only be inferred that *specific, contemporaneous written evidence is needed* to prove the infringement, which, according to the hub and spoke theory, can prove the objective and conscious elements of the infringement as well. It is understood that the GVH must be able to prove all the elements of the infringement, since in the absence of a single condition the infringement can no longer be proved.

13. The only investigation of the GVH in this area so far appears to suggest that, fast moving consumer goods (FMCG products) may be particularly affected by hub and spoke activity, because these products are typically sold in hypermarkets in all countries. It can be stated that hypermarkets, due to their significant inevitable market position, have a significant bargaining position vis-à-vis manufacturers, therefore, manufacturers (hubs) cannot automatically enforce their business policy decisions on these wholesalers. In our experience, the manufacturer (hub) also needs to have a significant market position in order to be able to act as an equal party to the hypermarkets (spokes) that represent joint purchasing power.

14. As a result, we consider that “*hub and spoke*” type collusions typically occur in markets where “*hub*” itself and all “*spokes*” together are unavoidable to exert business policy pressure on the other. This type of collusion is further facilitated by the behaviour of the spokes when they directly monitor and observe, on a regular basis, each other’s consumer prices or when they employ price monitoring companies to carry out this activity

² See point 15 of the Notice No 2/2016 on Leniency, available at: http://www.gvh.hu/en//data/cms1034640/szakmai_felhasznaloknak_kozlemenyek_2_2016_a.pdf

for them. As these behaviours typically involve price increases, the operation of price monitoring systems allows participants to verify that collusion has taken place in practice.

2. The role of RPM

15. Over the last few years the question has emerged as to whether an investigated conduct should be qualified as a vertical restraint or a horizontal restraint when both elements have been identified in the evidence gathered during the course of the concerned investigation.

16. The GVH has concluded one case so far in which this question has arisen.³ In the decision in question the conduct was treated as RPM only. In this case the competition supervision proceeding was commenced because it was suspected that a manufacturer had obliged its distributors to apply fixed selling prices and had imposed various sanctions on those distributors that violated this obligation. However, the manufacturer at a later stage of the investigation claimed that its conduct originated from a retail-level cartel, the members of which had urged the manufacturer to introduce RPM. The GVH revealed that the distributors had been using the Internet to continuously monitor each other's selling price; furthermore, they had issued warnings via email to those distributors that failed to comply with the fixed prices and in some instances they directly informed the manufacturer of violations. The active participation of the retailers in the monitoring efforts added an important horizontal element to the vertical restraint. However, the core element of the conduct was in fact vertical price fixing, which caused the retailers affected to react in various ways (i.e. compliance with the RPM with or without participating in the enforcement of the restriction vis-à-vis other retailers, sporadic deviations from the price levels set by the manufacturer).

17. The GVH noted, in its decision, that the fact that certain retailers cooperated to some extent in the enforcement of the RPM, did not turn the vertical price fixing into a horizontal agreement. It only demonstrated that certain retailers had stronger incentives to comply with the RPM compared to others.⁴ The GVH found that it was in the interest of the manufacturer to restrict price competition in its distribution network, and contemporaneous evidence showed that the conduct was planned and initiated by the manufacturer.⁵

18. This example illustrates the difficulty faced when qualifying the conducts under investigation; namely, whether such situations should be qualified as involving both vertical and horizontal restraints or one qualification (restrictive or horizontal) should prevail over the other. The qualification of a conduct as either a vertical restraint or a horizontal restraint in these mixed situations relies strongly on the actual evidence.

³ VJ/103/2014 Husqvarna – for the English-language press release, see: http://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the_gvh_imposes_a_fine_of_huf_100_million_on_husqv.html. The non-confidential version of the decision is available in Hungarian: http://www.gvh.hu//data/cms1040632/Vj103_2014_m.pdf

⁴ Paragraph 176 of the Decision

⁵ Paragraph 181-182 of the Decision

3. Developments in e-commerce

19. The GVH has become aware of the fact that the growing popularity of e-commerce is posing particular challenges for those retailers whose business strategies rely on (fully or to a large extent) brick-and-mortar selling. There are signs that certain retailers with long-established business relationships with manufacturers have the incentive to exert pressure on manufacturers to introduce RPM in order to limit price competition generated by online retailers. However, in those sectors where particular importance is placed on consultations before the conclusion of transactions and on after-sales services, manufacturers also have strong incentives to provide adequate margins to brick-and-mortar stores.

20. The proliferation of e-commerce (notably price comparison websites and online marketplaces) certainly facilitates the monitoring of prices by market players, and incentivises price-fixing.

21. The commonality of interest for price fixing of manufacturers and certain types of retailers may lead to challenging qualification issues. Such challenges may be strongly mitigated by carrying out inspections in RPM cases: an analysis of the evidence gathered by a competition authority enables the dominant element of the conduct in question to be identified. This was the case in the investigation described above, where written evidence directed the focus of the competition authority, which had been subject to the conflicting claims of the manufacturer and the retailers regarding the nature of their conduct.

4. Guidance and compliance

22. Besides its enforcement activities, the GVH puts considerable effort into disseminating information among market players, thus raising the awareness of companies about the importance of competition law compliance.⁶ The GVH has also successfully advocated the extension of the leniency programme to vertical price fixing, enabling companies (at all levels of the distribution networks) to obtain immunity from fines in RPM cases.

⁶ See for example the compliance website operated by the GVH: <http://gvh.hu/en/compliance/compliance/agreements>