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Criminalisation of cartels and bid rigging conspiracies – Note by Hungary

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This document reproduces a written contribution from Hungary submitted for Item 1 of the 131st OECD Working Party 3 meeting on 9 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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Hungary

1. Availability and scope of sanctions

1. The Hungarian Competition Authority's (Gazdasági Versenyhivatal - GVH) procedures are administrative in nature, which means that only administrative sanctions may be imposed. The GVH's investigations focus on the conduct of undertakings and therefore administrative fines are imposed on undertakings. The GVH does not participate in procedures in which criminal sanctions may be imposed, nor does it have any investigative rights in relation to criminal procedures. Two thirds of the cartel cases in the GVH's practice are bid rigging cases and it should be noted that the GVH has imposed the largest fines in cartel cases concerning public procurement cartels.
2. Criminal sanctions are to be imposed only in criminal procedures. Since 2005 agreements restricting competition in public procurement and concession procedures are qualified as crimes. Applying the provisions of the Criminal Code¹, criminal courts may impose imprisonment, a criminal fine, community service, or a combination of these sanctions. Criminal sanctions may only be imposed in the case of public procurement cartel offences. In such cases, a maximum imprisonment term of five years may be imposed.²

2. Process for obtaining criminal sanctions

3. In bid rigging cases the criminal investigations are conducted by the criminal investigation authorities. Generally, the criminal procedure is commenced on the completion of the GVH's administrative procedure, in which a competition law infringement in the form of bid rigging has been established and sanctioned. The GVH sends its decision to the criminal investigative authorities. If there are parallel ongoing administrative and criminal procedures, neither authority has to postpone its procedure and wait for the decision of the other one. Administrative and criminal authorities are not bound by each other's decisions.
4. The following investigative tools are available to the GVH in its administrative procedure: dawn raids, informants, leniency, oral hearings for both undertakings and (protected) witnesses, requests for information for both undertakings and third parties.
5. In addition to these investigative tools, the GVH and the criminal investigation authorities may choose to cooperate with each other in certain cases. In bid rigging cases, the GVH may obtain evidence from the criminal investigative authorities if there is an ongoing parallel criminal inquiry. The admissibility of such evidence – which is often collected in the course of secret data surveillance – has only recently been clarified in the GVH's proceedings. In a court decision³ adopted in 2019 it was established that the use of police wiretap recordings by the GVH to prove the infringement in its administrative cartel procedure was lawful. According to the court, evidence collected by the police can lawfully be used in the GVH's procedure under three conditions. Firstly, the evidence must have been lawfully collected by the police and it was necessary for the police and for the GVH to establish the infringement. Secondly a statutory provision must exist that allows the

¹ Act C of 2012 on the Criminal Code

² Art 420 (1) of Act C of 2012 on the Criminal Code

³ The decision is under appeal

evidence of a criminal proceeding to be used in administrative proceedings. Thirdly, the defence must have access to the evidence in order to ensure that the rights of defence are not violated.⁴

6. In order to acquire evidence that has lawfully been collected by another authority the GVH must make a formal request. Upon such a request, the documents can be made available to the GVH to use in its procedure. Any sensitive information contained in the documents that has been formerly used in a criminal procedure must be classified.
7. Since the GVH is allowed to request information from other authorities, it also has to provide requested data to them. As a result of this cooperation, other authorities have the right to use evidence collected by the GVH in their proceedings as well. However, the rules relating to access to the file differ from authority to authority. Consequently, the proceedings of the criminal investigative authorities may harm the effectiveness of the GVH's proceeding given, that they are entitled to reveal information classified by the GVH in its administrative procedure. If such classified information is revealed to the undertakings subject to an administrative cartel procedure of the GVH, these undertakings may then use this information to coordinate their defence tactics with the aim of making it more difficult for the GVH to establish the competition law infringement. The police and the public prosecutor are not bound by the classification of the GVH on account of the fact that the success of the criminal investigation is of a higher social interest, thereby necessitating the application of higher evidential standards.
8. While the GVH does not directly participate in the sentencing process of the criminal court, the case handler of the GVH responsible for investigating the bid rigging competition law infringement might be interrogated as a witness in order to prove the criminal offence. The GVH may also interview the accused of the criminal investigation, either as a witness or a representative of an undertaking. This does not directly influence the defendant's situation in either of the proceedings. On the other hand, it may influence his/her position indirectly, as the authorities are entitled to request each other's minutes and use them in their proceedings.

3. Leniency and corporate compliance

9. Undertakings may submit leniency applications, both before the start of an investigation and during an ongoing investigation. Therefore, in our jurisdiction, leniency applications enable new cases to be initiated, while also serving as a tool for supporting enforcement in ongoing cases. In the practice of the GVH most of the applications are submitted before the start of an investigation.
10. The leniency rules have been harmonised with the Criminal Code, with the result that the submission of a leniency application may also have a positive effect on the outcome of a criminal procedure concerning the perpetrators of bid rigging in public procurement procedures. The perpetrator shall not be prosecuted, either if he/she confesses the act to the criminal investigation authorities, or if his/her undertaking submits an immunity leniency application to the GVH before it launches an investigation. The penalty to be imposed on the perpetrator may be reduced without limitation or even dismissed, if his/her undertaking submits a leniency application for a reduction of the penalty or a leniency application for immunity to the GVH.⁵

⁴ Decision of the Metropolitan Regional Court of Budapest - 13.K.700.024/2018/43.; in case VJ/28/2013.

⁵ Act C of 2012 on the Criminal Code Paragraph 420, Sections (4)-(6)

11. The GVH's notice on the method of setting fines for infringements regulates the extent to which an undertaking's compliance efforts should be taken into account.⁶ In the course of imposing a fine the GVH is entitled to take into account both the ex-ante and ex-post compliance efforts and programmes of undertakings. The existence of an effective compliance programme can assist the GVH's enforcement efforts. As the GVH aims to foster the implementation of effective compliance programmes, the existence of such a programme can be taken into account as a mitigating circumstance when setting the fine.
12. In order for an ex-ante compliance programme to result in a fine reduction, the undertaking in question must prove that the infringement was terminated as a result of a compliance programme that was voluntarily established or obliged by the GVH in the course of a previous proceeding.
13. If the undertaking did not have a compliance programme prior the investigation, it is also possible to achieve a reduction of the fine. In this case a compliance programme has to be established and implemented. If the GVH accepts the undertaking's commitment to implement an ex-post compliance programme, it shall grant a fine reduction.
14. On the other hand, if an undertaking operates its compliance programme in a negligent manner it may receive a higher fine. Therefore, if an undertaking has been obliged by the GVH in a prior competition law proceeding to establish a compliance programme and, as a consequence of this, it was in possession of information which indicated an infringement but it failed to act appropriately, a higher degree of imputability may be established resulting in a higher fine.
15. The rules of the fining guidelines concerning the compliance programmes has an effect on how a natural person can become an informant. Due to the possible reward, the employees of undertakings may find it more lucrative to report competition law infringements to the GVH rather than to their compliance officers or superiors. This possibility is harmful to the effectiveness of the GVH's proceedings, because an undertaking is more likely to submit a leniency application if it discovers an infringement by itself. In the GVH's experience leniency applications provide a lot more detailed and useful information about infringements compared to the information that is provided by informants, as such applications are prepared by professional law firms. To avoid this scenario, the person intending to be an informant has to prove either i. he/she was not subject to a compliance programme at the moment of obtaining or providing the evidence to the GVH; ii. he/she was subject to a compliance programme and he/she therefore reported the infringement within the company, but the company failed to respond, thereby infringing its compliance programme or; iii. if he/she would have reported the infringement within the company, he/she would have been exposed to serious harm.

4. Enforcement of criminal sanctions

16. If during its investigations the GVH establishes any behaviour that also constitutes a criminal act it is obliged to report this fact to the criminal investigating authorities. If the GVH establishes that the parties subject to its proceeding have been engaged in bid rigging it is likely that the perpetrators of this competition law infringement have also committed a criminal offence, and the GVH must therefore report this to the criminal investigating

⁶ Notice No 11/2017 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 the prohibitions of anti-competitive agreements and concerted practices, abuse of a dominant position and abuse of significant market power

authorities. After the GVH has reported the case, the criminal investigation authorities shall conduct a criminal investigation if necessary. While these authorities are not bound by the GVH's decision in any way, they may base their investigation on it and take it into account. The GVH is not involved in the criminal investigation.

17. In the last few years there have been at least 3 cases where the prosecutor filed charges against individuals in bid rigging cases. Imprisonment has only been imposed in one case, although the person was given a suspended imprisonment.
18. Undertakings may face sanctions in public procurement procedures as well.
19. A contracting authority may exclude a bidder for infringing competition law rules in the following circumstances.⁷ Firstly, if the bidder has infringed Article 11 of the Hungarian Competition Act (or the equivalent provision of European Union competition law) in a bidding process and this has been established by a definitive and executable decision of the GVH and the GVH has imposed a fine on the particular firm.⁸ Secondly, if the contracting authority finds during its proceeding that the undertaking's behaviour is contrary to competition law.⁹ Such exclusion is not compulsory and is merely an option that is available to contracting authorities and which can be used by them depending on their considerations.
20. The GVH runs an up-to-date database on its website that allows contracting authorities to find out which undertakings might be excluded from public procurement procedures as a consequence of the GVH's decision.
21. In Hungary, in addition to administrative and criminal sanctions, private enforcement is also available. While damaged parties primarily make use of this possibility, it is also available to the authority.

5. International cooperation

22. Under Hungarian competition law there is no special cooperation mechanism that enables cooperation with foreign competition authorities in criminal cases. However, although the GVH carries out its activities under an administrative regime, within the framework of the ECN it is able to cooperate with competition authorities that operate under both criminal and non-criminal enforcement regimes. In practice such cooperation does not take place frequently. The cooperation between the authorities is focused on competition law enforcement rather than on criminal enforcement.

⁷ Act CXLIII of 2015 on Public Procurement

⁸ Art. 62 (1) of the Public Procurement Act

⁹ Art. 62 (1) o.) of the Public Procurement Act