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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Hungary**

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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

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Hungary

1. This contribution sets out the practice of the Hungarian Competition Authority (in Hungarian: Gazdasági Versenyhivatal, hereinafter referred to as ‘GVH’) concerning access to the case file and the processing of confidential data.

1. General considerations

2. The Hungarian Competition Act¹ (“Competition Act”) contains detailed and thorough provisions on access to the case file and the processing of confidential data.² The rules governing access to the case file differ according to

- the legal status of the person who is entitled to gain access to the case file (parties to the proceeding, witnesses, third parties)
- time of the access (the rules differ depending on the stage of the competition supervision proceeding that access to the case file is requested)
- type of data that is concerned by the request for access to the case file (including disclosure of documents, which contain business/trade secrets, or leniency or settlement submissions)

3. Article XXIV of the Hungarian Fundamental Law³ enshrines the right to a fair trial. The GVH considers that the right to access the case to file is an essential component of the right of defence, which is one of the core elements of the right to a fair trial. Consequently, the GVH is committed to facilitating the effective exercise of this right by the parties subject to competition supervision proceedings. During competition supervision proceedings, the GVH provides the parties to the proceedings with an opportunity to make their views known on the objections raised by the GVH against them. The right to access the case file includes the right to become familiar with the contents of the file, as well as to make copies of the contents of the file.

4. Before presenting the rules governing access to the case file, the various stages of a competition supervision proceeding must first be explained. A competition proceeding consists of two stages: the investigation phase, in which the case handler prepares the investigation report containing the fact-finding and the legal assessment of the alleged infringement. The second phase is the decision making phase, in which the Competition Council delivers the statement of objections to the parties and adopts the final decision on the merits of the case. The GVH adopts a resolution on the merits of the case and issues injunctions in relation to procedural issues (access to the case file, request for information, acceptance of the request for confidential treatment of business secrets etc.). It is important to note that the GVH has competence to proceed in both antitrust and consumer protection cases.

¹ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices

² Article 55-55/E, 73/A (7) and 78/D (2) of the Competition Act

³ The Fundamental Law of Hungary (25 April 2011)

2. Who is entitled to gain access to the case file of the GVH?

5. According to the provisions of the Competition Act,⁴ as a general rule the clients (parties to the proceeding) are entitled to gain access to the non-confidential documents of the case file, as well as to documents containing their own business secrets.

6. The Competition Act provides that witnesses shall have the right to access the documents containing their (witness) statements.⁵

7. The Competition Act stipulates that third parties (for example complainant, claimants of damage actions) are allowed to gain access to the non-confidential documents contained in the case file after the proceeding has been terminated by a final decision either by the Competition Council or the case handler.⁶ When requesting access to the case file in the latter mentioned situation, the third parties do not have to demonstrate any lawfully recognised interest in relation to their access to file request. However, access to the case file can be refused if the disclosure of such documents would jeopardise the legitimate operation of the GVH, including the efficiency of the GVH's enforcement actions in the public interest, in particular its leniency programme.⁷

3. When is access to the case file granted?

8. Pursuant to the Competition Act, the parties to the proceeding are able to access the case file in the second phase of the proceeding after the Statement of Objections or the investigation report has been delivered to them⁸. In this case access to the case file is automatically granted as a matter of law, the Competition Council does not adopt a formal injunction but simply notifies the addressees of the Statement of Objections that they are able to access the non-confidential case file. Any other non-confidential documents that are submitted after the Statement of Objections has been sent to the parties are accessible. The GVH provides access to the case file automatically to the parties until it adopts the resolution or the injunction about the termination of the case. After the adoption of the final decision, upon the request of the former parties the GVH may grant access to the case file via a formal injunction.

9. Prior to the delivery of the Statement of Objections/investigation report, access to the case file is provided

- by virtue of the Competition Act if it is essential for enabling the client or witness to exercise their right to appeal against an injunction against which a separate legal remedy may be sought,⁹
- upon the decision of the Competition Council, if the parties request access to the case file and it will not jeopardise the effectiveness of the GVH's proceeding in the case in question.¹⁰ The parties must submit a request, justifying why the

⁴ Article 55 (1) of the Competition Act

⁵ Article 55 (2) of the Competition Act

⁶ Article 55 (3) of the Competition Act

⁷ Article 55 (4) of the Competition Act

⁸ Article 55 (5) of the Competition Act

⁹ Article 55 (5) of the Competition Act

¹⁰ Article 55 (6) of the Competition Act

Competition Council should grant them access to the case file prior to the official grant date (Statement of Objections). When evaluating such a request, the Competition Council uses its discretion to weigh the parties' interest in gaining knowledge of the contents of the (non-confidential) documents contained in the case file against the GVH's interest in carrying out a successful enforcement action. Consequently, the outcome of the Competition Council's discretionary decision-making process differs greatly depending on the type of proceeding and the number of clients involved in the particular case in which the parti(es) request access to the case file. According to the relevant case law¹¹ of the Competition Council, access to the case file is generally refused prior to the delivery of the Statement of Objections in cartel cases involving several parties. This approach of the Competition Council is fully in line with the European Commission practice of granting access to the case file in cartel cases.¹² Consequently, the Competition Council refuses to grant access to the minutes of clients' or even witnesses' oral hearings in cartel cases because it cannot be guaranteed that clients would not coordinate their defence strategies. On the contrary, in consumer protection cases where most of the time only one client is involved the Competition Council often grants access to the non confidential or the client's own confidential documents contained in the case file, as access to the case file in such circumstances is unlikely to jeopardise the success of the enforcement action. Furthermore, if a party undertakes commitments during a proceeding this may serve as a legitimate ground for the Competition Council to grant access to the case file prior to the Statement of Objections being delivered. A separate legal remedy may be sought against the injunction of the Competition Council in which it refuses to grant access to the case file prior to the Statement of Objections. The Court shall either uphold the GVH's injunction or annul it. If the GVH's decision is annulled, the court shall order the GVH to repeat the decision and reconsider its legal view on the request for access to the case file.

10. Pursuant to the Competition Act, prior to the termination of the competition supervision proceeding, interested third parties are only allowed to access the case file if they can demonstrate that such access is necessary to enforce a statutory right or to meet an obligation arising from law or from a judicial or administrative decision.¹³

4. To which documents is access granted?

11. Access is granted to the non-confidential documents of the case file, including evidences and documents on which the Statement of Objections is based, namely both incriminatory and exculpatory documents. Documents containing a party's own restricted data (business secrets) are also accessible to that particular party.

12. First it should be noted that the term '*confidential data*' – restricted-access data as the Competition Act uses the term – is a collective term. It means data which is qualified as secret in relation to the practice of a profession or as other types of secrets by separate

¹¹ Decision No 39.Kpk.45.806/2014/10. of the Administrative Court

¹² Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 *OJ C 325, 22.12.2005, p. 7–15 paragraph 26*

¹³ Article 55(3) of the Competition Act

acts of law, as well as personal data and other information to which access is restricted by virtue of the Competition Act in the course of access to the case file.¹⁴

13. The Competition Act contains a list of the types of data that are qualified as restricted-access data, such as identification data; personal data; classified information; other privileged information (such as business and private secrets); internal documents of the GVH, the European Commission and national competition authorities; search copies, interim working copies and investigation working copies which are in connection with dawn raids. This list is not exhaustive; some leniency and settlements documents are also confidential.¹⁵

14. In this contribution the GVH will focus on the confidential treatment of documents containing business or private secrets, documents of settlement and leniency procedures and documents containing the identification data of protected witnesses and legal persons, as these documents are dealt with the most frequently in the GVH's practice.

4.1. Business secret and private secret

4.1.1. Definition of business and private secret

15. The definition of a business secret is set out in the Act on the Protection of Business Secrets¹⁶: a business secret shall include any confidential fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known in whole or in the complexity of its elements, or which are not easily accessible to other operators pursuing the same economic activities, where the proprietor of the secret has taken reasonable efforts that may be expected in the given circumstances to keep such information confidential.¹⁷

16. According to the case law, a business secret can be, for example, data about market share; the income from the sale of a product or from the provision of a service; the cost of the production of a good; strategies and business policies; the number of clients; detailed information about contracts; the essential characteristics/qualities of a product, and the production of a good.

17. In contrast, the definition of a private secret is not set out in a legal act. Instead, it is to be found in the case law, according to which it is any confidential data or fact which is not generally known, for example, personal or family status, financial position, health status, individual habits, which if it were to become public could cause damage to the person to whom the data relates.

4.1.2. Proceeding involving a business or private secret

18. According to the Competition Act, access to certain documents on the grounds that they contain a business or private secret may only be restricted if the person who provided

¹⁴ Article 43/B(1) of the Competition Act

¹⁵ Article 55/A(1) of the Competition Act

¹⁶ Act LIV of 2018 on the protection of trade secrets. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure was transposed by Act LIV of 2018 on the protection of trade secrets.

¹⁷ Article 1(1) of Act LIV of 2018 on the Protection of Business Secrets

the data or from whom the GVH obtained the data substantiates their claim for confidentiality with regard to each document

- at the time of providing the data or,
- within the time limit set in the GVH's injunction.¹⁸

19. If there are reasonable grounds for believing that certain data constitutes a business secret or a private secret of a person other than the person who provided it and the identity of the owner of such data can be established, the GVH shall contact the data owner requesting him or her to make a statement about whether the data constitutes a business secret or a private secret.¹⁹

20. The statement pursuant to the abovementioned shall clearly specify the data to be treated as a business or a private secret and the reasons for such treatment separately for each piece of data, in particular the interest to be protected which would be harmed if the data were to be disclosed to unauthorised persons.²⁰

21. It should be noted, that upon the injunction of the GVH, the person providing the data or – if the owner is different to the person that provided it – the data owner shall submit non-confidential versions of the confidential documents.²¹ These versions of the documents are part of the case file; they can be disclosed to other parties and enable the Competition Council to compile the non-confidential version of the final decision.

22. Once a piece of data has been marked as a business or private secret by the person who provided it to the GVH, the GVH treats such information as confidential until it has made its decision about whether or not such data question qualifies as a business or private secret.

23. If other statutory requirements relating to the treatment of data as a business secret or a personal secret are not satisfied, including the case where the statement does not comply with the requirements pursuant to the Competition Act, the GVH shall decide, in an injunction, on the termination of the treatment of the data concerned as privileged information. In the latter situation the person who made the statement may seek a separate legal remedy against the injunction.

4.1.3. Disclosure of a business or private secret

24. Upon a reasoned request of the parties, the Competition Council may grant access to the case file in relation to documents that contain business secrets after the Statement of Objections has been sent to the parties. The parties shall substantiate their request in relation to each document they wish to gain access to. In the injunction the Competition Council balances the interest of the parties requesting access to the case file (namely the acquisition of knowledge of what is contained in the data) against the interest of the data owner in keeping the data confidential.²² Access to confidential documents may be justified on the ground that a lack of disclosure might prejudice the proper exercise of the parties'

¹⁸ Article 55/A(2) of the Competition Act

¹⁹ Article 55/A(3) of the Competition Act

²⁰ Article 55/A(4) of the Competition Act

²¹ Article 55/A(5) of the Competition Act

²² Article 55/B(3) of the Competition Act

right of defence. For example, the documents containing business secrets may form part of the evidence on which the Competition Council has based its legal assessment of the case.

25. If it is necessary in order to exercise the right of defence, the Competition Council shall determine in its injunction the detailed rules of access to the relevant documents and

- may restrict the taking of copies or abstracts from the documents; and
- may stipulate that access to the case file shall be exercised only by an attorney or by an outside counsel of the party. In this case it is prohibited to disclose restricted access data to the party represented or to third parties.²³ The attorney/outside counsel shall declare this fact before the GVH and in the event that the information is used for a different purpose other than defence in administrative or judicial proceedings, the Competition Council may report the incident to the Hungarian Bar Association for disciplinary action.

4.2. Leniency, settlement

26. Prior to the conditional immunity injunction of the Competition Council, the immunity application shall be used exclusively to assess the leniency application or to apply for a prior judicial warrant to conduct a dawn raid. Access to the leniency file shall be granted exclusively to the case handler appointed to the case, the Competition Council and the court.²⁴

27. Apart from this specific rule, the rules of the treatment of settlement and leniency documents are quite similar.

28. According to the Competition Act:

- in the application for immunity from or reduction of the fine, the voluntary statement of the applicant undertaking made specifically for the purpose of the application (leniency statement), and the fact that an application has been submitted and the nature of the evidence submitted in relation to such application;
- the settlement submission and the fact that the submission has been lodged to the GVH

shall be treated as restricted access data until the statement of objections is delivered to the parties.

29. It is important to add that in accordance with our Leniency Notice²⁵, a potential leniency applicant may request, after the competition supervision proceeding in question has commenced, that the GVH discloses information about whether the Competition Council has already granted conditional immunity to another undertaking. The representative(s) of the potential leniency applicant in question shall handle this information confidentially.

30. After the statement of objections/investigation report is delivered to the parties, the parties may exclusively have access to the leniency application and the leniency statement or the settlement submission provided that no copies are made of these files; only notes

²³ Article 55/B(4) of the Competition Act

²⁴ Article 78/D(1) of the Competition Act

²⁵ See point 63 of Notice No 14/2017 on Leniency, available at: http://www.gvh.hu/en//data/cms1034640/szakmai_felhasznaloknak_kozlemanyek_14_2017_a.pdf

may be taken thereof. The information in the leniency application or settlement submission, which was disclosed to the other parties to the proceedings in the course of the access to file, may only be used for the purpose of exercising the right of defence in the administrative or subsequent judicial proceedings. Third parties other than the parties to the proceedings shall not have access to these files; they shall not make copies or take notes.²⁶ Due to the damages directive,²⁷ the leniency statement and settlement submission cannot be disclosed to the damage claimants in follow on antitrust litigation.

4.3. Confidential treatment of data

31. Upon a reasoned request, the case handler or the Competition Council shall order the confidential treatment of the

- identification data and home address of the witnesses or of other participants to the proceeding, or
- name, registered office and the name of the legal representative(s) of the legal person that has been ordered to provide information

32. if the natural or the legal person submitting the request proves presumptively that he/she/it is likely to suffer significant adverse consequences as a result of his/her/its participation in the competition supervision proceeding.²⁸

33. The GVH shall handle the abovementioned data separately among the files of the case, in a confidential manner.²⁹

5. How access to the case file is implemented after the delivery of the Statement of Objections³⁰

34. Prior to 2017, the Competition Council provided access to the case file by inviting the concerned parties to examine the accessible files on the premises of the GVH. The GVH provided an online appointment booking system³¹ through which clients could book a meeting for the purpose of examining the case file.

35. At the end of 2017, the GVH opened a Virtual Data Room (VDR)³² in order to provide electronic access to case files not containing any business secrets or restricted data (non-confidential documents). In the course of its competition supervision proceedings the GVH handles and stores a significant amount of documents. The number of documents accumulated in relation to one case can reach several thousand pages, thereby making access to the case file in person and the making of copies a lengthy and costly process for

²⁶ Article 73/A(7), 78/D(2) of the Competition Act

²⁷ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

²⁸ Article 54/A(1) of the Competition Act

²⁹ Article 54/A(3) of the Competition Act

³⁰ http://www.gvh.hu/en/access_to_file

³¹ <http://www.gvh.hu/idopontfoglalo/schedules>

³² The website is available at: http://gvh.hu/en/access_to_file/vdr/vdr.html

both the GVH and clients.³³ As a result of the VDR, the processes related to access to the case file and the claiming and providing of copies are much simpler and faster. In addition to electronic access to the case file, the GVH also provides the possibility of traditional access to the case file by attendance in person. (Confidential documents can only be accessed in person on the premises of the GVH.)

36. The VDR provides an online access opportunity and interface for those clients that have been approved as access-entitled users in relation to individual cases of the GVH and to the persons authorised by the clients (for example legal representatives or counsel). The users are identified through the system of the governmental Client Site. The approved and authorised individuals identified above are entitled

- to view and download a copy with a watermark and to print the documents generated in their cases and the connecting files;
- to search in the individual documents and in the files;
- to subscribe to the e-mail alerts related to the process of access to the file;
- to view the various system messages;
- to order a simple copy or a certified copy of particular documents and files;
- to schedule an appointment for access to the file, in the event that due to a technical reason (for example a file size is too big or an improper file format has been used) a document is inaccessible and
- to mark the documents with markers only visible by the client group.

37. Taking into account the experience gained on the VDR in the past two years it can be confidently stated that the VDR system has significantly strengthened the client friendly nature of the GVH's activities. Stakeholders have given positive feedback about the functioning of the VDR system.

³³ [https://one.oecd.org/document/DAF/COMP/AR\(2019\)13/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2019)13/en/pdf) Point 1.3.