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# Facts about the Microsoft deal

**The so-called “Microsoft deal” is attracting broad public interest. There have been serious debates about the legitimacy of the HUF 25 billion invitation to tender announced for distributors of ”Microsoft or equivalent” software. As the Hungarian Competition Authority (GVH) is one of the players of the case, we feel important to make the case public.**

On 4 January 2008 the Central Board for Services (KSZF) announced an open public procurement procedure for the extention, upgrade, prolongation, version control and change of software-licences procured earlier by public administration and educational institutions, and for purchasing new ones. The value of the four-year framework agreement is HUF 25 billion. In accordance with conditions set in the call, only traders of “Microsoft” or “equivalent” software can take part in the procedure.

Since the wording of the call for tender restricts competition, on 28 January 2008 the delegate of the GVH in the Hungarian Public Procurement Council turned to the Public Procurement Arbitration Board (KDB), asking for the suspension of the procedure. According to the delegate the naming of ”Microsoft” products by KSZF is unnecessary for the unambiguous and clear definition of the subject of the procurement. In his opinion KSZF restricts competition among undertakings in the software market with this stipulation. The submitted document notes that Microsoft is already in a leading position in the software market, so strengthening its position would be a mistake. On 21 February 2008 the remedy procedure initiated following the complaint of the delegate was terminated by the KDB. The KDB argues that KSZF named the product together with its vendor simply for defining clearly the subject of the public procurement procedure, thus there was no infringement. Since most governmental institutions use Microsoft software, compatible software is needed in the future as well. On 10 March 2008 the GVH turned to the Municipal Court of Budapest and appealed the decision. In her claim the delegate of the GVH asks the Court to annul the decision of the KDB and order the KDB to institute a new procedure.

According to the GVH the call in its present form violates competition neutrality since it favours Microsoft products and would also satisfy demands by undertakings in the interest of Microsoft that could also be satisfied by other products of other market players.

The GVH states that based on the second fundamental principle of the Act on Public Procurement, the inviters of tenders must guarantee equal treatment for all the tenderers. This principle is also reinforced in the Act by the provision on technical specification, which was violated during the procurement of the software licence by KSZF, the GVH claims. In the tender invitation and in the technical specification the name of the producer Microsoft was mentioned in connection with the subject of the procurement. This grievance is not

neutralised by the expression “or equivalent” used by the tender inviter and prescribed by law.

Based on the fundamental principle of the Act on Public Procurement, it is forbidden to refer to a particular brand in the subject-identification of the procurement. If KSZF must act in conformity with the fact that most computers in operation in the institutions use “Microsoft” software and it is not everywhere possible to change from one day to another without complications, then they should think about choosing a method of procurement in a better differentiating way, the GVH claims. It could also put out a survey beforehand about the needs of the institutions insisting on using “Microsoft” and then conduct a negotiated procedure relating to the products concerned. In certain submarkets it is provisionally acceptable that competition is temporarily limited to intra-brand competition. This approach is still much fairer than calling for competition in principle (and seemingly), but preventing it in reality.

Although the exception rule can be found in the provision on the technical specification, this rule was devised for situations where a certain kind of product has already been associated with its manufacturer, they became inseparable and only with the manufacturer can it be identified clearly and unanimously. Up to the appearance of competitors, the razor blade Gillette or the photocopier Xerox were good examples of such situations. Or we can mention in these days the Rubik cube as a further example.

According to the GVH ”software licence” is satisfactory on its own as the subject of procurement, it is unnecessary for the identification to link it with any brand name, be it Microsoft or Linux. Today every computer user knows that software is a collective noun for programs indispensable for the functioning of a computer. We must take it as a fact that software market has become differentiated and enriched over the last 10-15 years and these products can be competitors in certain circumstances, thus we must treat them accordingly.

The Municipal Court of Budapest will hold the next trial of the Microsoft case on 1 September 2008.

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