

Guidance on unannounced inspections carried out by the Hungarian Competition Authority

2019.

According to Article 65/A (1) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter referred to as the Competition Act), the Hungarian Competition Authority (hereinafter referred to as ‘GVH’) is entitled to carry out an unannounced inspection at the premises of an undertaking or, if certain conditions exist, at other premises, including premises used for private purposes. In the course of the unannounced inspection (hereinafter referred to as ‘unannounced inspection’ or ‘inspection’), the case handler may enter any business or private premises of the undertaking in accordance with the permission granted in the obtained judicial warrant, against the will of the owner (possessor) or any other person present, and may open any sealed-off area, building or premises and search them, as well as the data storage (computer, mobile phone, etc.) and vehicles found there. The case handler of the GVH shall be entitled to make copies of or take documents containing information concerning the alleged infringement into custody and of the IT equipment of the persons involved in the alleged infringement.

The purpose of the unannounced inspection is to enable case handlers to search for evidence regarding the alleged infringement that is the subject of the proceeding at the premises of the undertaking involved. An unannounced inspection may only be carried out if a judicial warrant has previously been obtained.

This guidance aims to provide information to undertakings about the process of the unannounced inspection, the relevant legal background, and the rights and obligations of undertakings and of case handlers of the GVH during it. Based on the relevant provisions of the Competition Act, this guidance summarises the rules governing the unannounced inspection and presents the evolved practice. This guidance is not a legally binding document and is intended to provide practical information to undertakings involved in the unannounced inspection.

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1. Legal framework for the unannounced inspection

Generally, the Competition Act contains the governing procedural rules for the unannounced inspections carried out by the GVH¹, but in the case of several procedural acts certain provisions of Act CL of 2016 on the Code of General Administrative Procedures (hereinafter: the General Administrative Procedures Act) shall also be applied.²

In case of which infringements is the GVH entitled to carry out unannounced inspections?

Unannounced inspections may be carried out pursuant to the relevant provisions of the Competition Act in cases of the alleged infringement of the prohibition of agreements restricting economic competition (Article 11 of the Competition Act and Article 101 of the TFEU³), the prohibition of abuse of a dominant position (Article 21 of the Competition Act and Article 102 of the TFEU), or the prohibition of abuse of significant market power⁴ and, in some cases, in the course of merger investigations specified in the Competition Act.⁵

1.1. Authorisation of the unannounced inspection

Who authorises the unannounced inspection and under what conditions?

The GVH shall only carry out an unannounced inspection if a judicial warrant has previously been obtained. The application for such a warrant shall be adjudged by the Budapest-Capital Regional Court.⁶ In its application, the GVH shall demonstrate that there is just cause for assuming that other investigative measures would be unlikely to produce results, and that there are reasonable grounds for presuming that a means of proof relating to the infringement under investigation is in the location indicated in the application and that it would not be surrendered voluntarily, or that it would be made unusable.⁷

Which persons and places can be covered by a judicial warrant?

The judicial warrant may cover an inspection of the **business premises of the party** (undertaking subject to the procedure) **or of the premises used for private purposes of a natural person**⁸ related to the party.

The unannounced inspection **may not be exclusively limited to the premises of the party**; the court may, if necessary, grant authorisation to search the premises used for business or

¹ Article 65/A (3) of the Competition Act

² In the case of unannounced inspections conducted in competition supervision proceedings initiated before the entry into force of the General Administrative Procedures Act on 1 January 2018, the relevant provisions of Act CXL of 2004 on the General Rules of Administrative Authority Procedures and Services (Act on General Rules of Administrative Authority Procedures and Services) shall apply.

³ Treaty on the Functioning of the European Union [OJ C 326, 26.10.2012, pp. 1-390.]

⁴ See the provisions of Section 7 of Act CLXIV of 2005 on Trade

⁵ In the case of mergers, an unannounced inspection may be carried out if the undertakings concerned have allegedly infringed the prohibition on the implementation of a concentration pursuant to Article 29 of the Competition Act, or if the disclosure of a fact relevant to the notification of the concentration is likely to be misleading to the authority.

⁶ Article 65/A (3) of the Competition Act

⁷ Article 65/A (4) of the Competition Act

⁸ This may be a person who at the time of the unannounced inspection is, or used to be in the period investigated, the chief executive, employee or agent of the party or a person exercising actual control over the party.

private purposes of other undertakings, if there are reasonable grounds to presume that evidence of the alleged infringement can be found there. The GVH typically conducts the unannounced inspection at the registered office or premises of the undertaking concerned, however, case handlers may search any premises that are used by the undertaking to carry out its economic activities; it is not a condition that the premises are registered in the company registry. Case handlers may also inspect any vehicles that are used by a person involved in an alleged infringement.

Is it possible to seek a legal remedy against a judicial warrant authorising an unannounced inspection?

It is **not possible to seek a legal remedy against a judicial warrant authorising an unannounced inspection.**⁹ The legality of a warrant authorising an unannounced inspection may be challenged at the same time that a legal remedy is sought against a decision adopted on the merits of the case.

2. Conducting an unannounced inspection

2.1. Participants in the unannounced inspection, duration of the unannounced inspection

The unannounced inspection is carried out by the case handlers of the GVH in inspection teams.

In each case, the inspection team shall be led by a case handler in charge of the inspection, who may be contacted by the chief executive, staff or authorised legal representative involved in the unannounced inspection with any questions that may arise during the inspection.

In what cases will the police be involved in the unannounced inspection?

The case handlers may request police assistance for conducting the unannounced inspection. The police are usually notified when an unannounced inspection cannot be started without physical coercion.

Can legal representation be used during the unannounced inspection?

During the unannounced inspection, **the undertaking affected by the inspection is, of course, entitled to have the opportunity to use a legal representative.** The legal representative arriving at the premises **must prove that he/she has the right to represent the concerned undertaking by presenting a power of attorney to the case handlers.** However, **the presence of a legal representative is not a condition for the initiation of the unannounced inspection,** which means that the case handlers are not obliged to wait for their arrival at the site and the unannounced inspection may begin in the absence of the authorised legal representative.

When and for how long does an unannounced inspection last?

⁹ No legal remedy may be sought against the injunction ordering the investigation.

As a general rule, the GVH begins unannounced inspections on working days and during working hours, but this may be deviated from due to the specific circumstances of the case. While unannounced inspections typically last between a few hours and one day, depending on, among other things, the cooperation of the undertakings subject to the inspections, they may take several days in extraordinary cases. The GVH strives to limit the daily work schedule of the undertakings subject to the inspections only to the extent necessary. The GVH notes that undertakings' cooperation with case handlers may significantly reduce the duration of unannounced inspections.

2.2. Starting the unannounced inspection

Starting the unannounced inspection

Case handlers participating in the unannounced inspection shall identify themselves with their service ID card before the representative of the undertaking. The GVH initiates the competition supervision proceeding at the latest at the same time as the unannounced inspection. The unannounced inspection begins with the personal delivery of the injunction ordering the investigation and the handing over of a copy of the judicial warrant authorising the unannounced inspection.¹⁰ The delivery of the injunction ordering the investigation and the communication of the judicial warrant authorising the unannounced inspection may happen **in person in a written form, with the orders or with a copy thereof**, but in exceptional cases, typically in the event of obstruction, the content may be communicated orally.

It should be noted that **the injunction ordering the investigation and the copy of the judicial warrant authorising the unannounced inspection can be taken over by any employee of the undertaking** (even the receptionist if employed by the undertaking), as the undertaking may be represented not only by the person stipulated in under the company register in the course of the unannounced inspection.

However, during the unannounced inspection, certain legal statements can only be made by the legal representative(s) of the undertaking (e.g. power of attorney).

When communicating the injunction and the warrant, case handlers shall ensure that the recipient has sufficient time to read and become acquainted with them, in particular with regard to the exact subject-matter of the competition supervision proceeding initiated and the information on the rights and obligations of the employees involved in the unannounced inspection.

Can the takeover of the document(s) be legally refused?

In the event that the undertaking or individual subject to the procedure/inspection refuses to take over the document(s) described above, this fact and the relevant circumstances shall be recorded in detail in the minutes of the unannounced inspection. Here, however, it is

¹⁰ The premises concerned by the unannounced inspection are generally related to the undertaking under investigation. However, there may also be special cases, such as when the GVH does not initiate competition supervision proceedings against an undertaking involved in the unannounced inspection, that is, the undertaking is not a subject of the proceeding or the inspection concerns private premises, where the judicial warrant still applies. As far as these undertakings/natural persons are concerned, the case handlers shall only inform them verbally about the judicial warrant authorising the unannounced inspection and deliver a copy of it and not the injunction ordering the investigation.

necessary to draw attention to the fact that **the unannounced inspection can be commenced even in case of refusal of receipt of the orders**; this does not hinder the unannounced inspection.

Providing information to the case handlers

Following the receipt of the above-mentioned documents, the case handler in charge shall request information in order to identify the persons that are most likely to have relevant information about the alleged infringement and, furthermore, to locate and to assess the premises, computers, mobile phones and paper documents that will be inspected. The employee of the undertaking present **is obliged to provide the case handlers with reliable and accurate information.**

2.3. What are the case handlers looking for on the premises?

Means of proof

The case handlers of the GVH are entitled to search and inspect any paper-based and electronic documents found on the premises related to the alleged infringement.

After handing over the injunction ordering the investigation, the case handlers of the GVH shall review the paper-based documents available on the premises related to the alleged infringement, such as the documentation related to the conduct that is being investigated and the notes made by the employees of the undertaking. Case handlers shall **make copies of paper-based documents** related to the alleged infringement and, where reasonable, **may take the original copy into custody.** The GVH shall be entitled to make copies of, seize or take into custody any means of proof indicative of an infringement of competition law¹¹ even if such means of proof is unrelated to the subject matter of the investigation and is not covered by the judicial warrant. For such a means of proof, a judicial warrant shall be obtained subsequently.¹²

The electronic data storage to be inspected by the GVH may include the **desktop computers, laptops or mobile phones** of the employees responsible for the area or those of the manager of the undertaking, and, furthermore, may also include the **central server of the undertaking, CDs, flash drives or data storage used for archiving the electronic documents** of current/former employees responsible for the area. Case handlers are entitled to make so-called search copies on the premises of the data and documents found on the electronic data storage of the company or individual concerned in the unannounced inspection.¹³

Case handlers shall **leave a copy** of the copied electronic data, documents and mailboxes **on the computer of the person concerned.** Thus, the undertaking may identify what the case handlers of the GVH have taken from the premises in digital form, which also makes it easier for the undertaking to make statements about the documents taken.

In addition to the above, case handlers are also entitled to **search the vehicle(s) used by the person involved in the alleged infringement.**

¹¹ Article 11 of the Competition Act and Article 101 of the TFEU, Article 21 of the Competition Act and Article 102 of the TFEU

¹² Article 65/A (9) of the Competition Act

¹³ For more information on types of search copies, see Article 65 (2) and 65/B (1) of the Competition Act

What happens if the data storage to be inspected by the GVH is not on the premises?

If a data storage (computer, mobile phone, tablet or any paper document) to be inspected is not available on site, the case handler may take it into custody by issuing **the holder of the property with a decision that obliges it to make it available to the GVH** in an unchanged format, at a specified location and time (so-called distant custody).¹⁴ **From the date specified in the decision obliging the holder to make the data storage available (custody), no modification may be made to the data storage** (e.g. deletion of data).

2.4. Premises concerned by the unannounced inspection

Securing the premises

Case handlers of the GVH may secure the premises involved in the unannounced inspection in the following manner:

If more than one business or private premises need to be searched at a given unannounced inspection site, case handlers will take the items that have not yet been inspected into custody at the end of the day of the unannounced inspection [in a storage room (e.g., lockable cabinet) or in a separate room, locked and sealed].¹⁵ When taking items into custody, the GVH applies a special security sticker with a unique identifier. **The undertaking subject to the unannounced inspection is responsible for the integrity of the security sticker. Only the GVH is entitled to open a locked object or room.**

If the case handlers inspect more than one room of the undertaking subject to the unannounced inspection, it is always necessary that an employee of the undertaking is present in the investigated premises during the unannounced inspection, so that the company is able to verify the legality of the case handlers' inspection.

2.5. IT related issues during the unannounced inspection

During the unannounced inspection, the GVH **is entitled to examine the information stored** on data storage, including computer systems and mobile phones. The GVH is also entitled to examine the information stored on data carriers for private use which are also used or to be used for the economic activities of the undertaking. To this end, taking into account data storage security, the GVH **may oblige the holder of the data storage** to make the data and information stored on it **available and readable** to the case handlers.

Investigative powers of the case handlers of the GVH related to the IT systems of undertakings subject to unannounced inspections and the obligations of undertakings

If the undertaking subject to the unannounced inspection has an external server, if any, not located at the registered office of the undertaking, on which documents relevant to the inspection are to be found, **the undertaking is obliged to provide the case handlers with the necessary password, permissions and paths to access the server, which the undertaking cannot legally refuse to provide.**

¹⁴ Article 65 (5) of the Competition Act

¹⁵ See the rules on property taken into custody under Article 65 (4) of the Competition Act.

If the undertaking stores its data in the framework of a virtual, non-stationary hosting service (in the cloud), it is **obliged to provide the password necessary to access the data stored in this way**, as well as **other rights that provide access**.

In the context of the above, the undertaking cannot reasonably claim that it does not know the password for accessing its data stored on the external server or in the cloud, or that it can only be obtained, for example, from its foreign parent company. In this case, the undertaking subject to the unannounced inspection is obliged to obtain the password and to provide the data paths, which shall be carried out on the premises, following the case handlers' instructions.

IT security measures of the GVH

Case handlers are **entitled to block mailboxes that can be linked to the undertaking subject to the unannounced inspection**, and if the data and correspondence are not on the servers, case handlers are entitled to **disconnect the computer from the central system**.

Case handlers of the GVH are **entitled to block or temporarily disable the mobile phones of the employees or the managing director of the undertaking subject to the unannounced inspection** during the unannounced inspection.

2.6. Sanctions for obstructing the unannounced inspection

If the case handlers are obstructed from conducting the unannounced inspection by any employee of the undertaking concerned or by any person having a legal relationship with the undertaking concerned, the GVH may **apply the sanctions** provided in the Competition Act against the undertaking concerned or the person engaging in such conduct.

What sanctions may be applied against the undertaking or person concerned in the unannounced inspection due to the conduct demonstrated during the unannounced inspection?

A procedural fine may be imposed by the GVH on those who engage in an act or demonstrate a conduct which has the object or result of protracting the proceeding or preventing the establishment of the facts of the case, or on those who otherwise culpably fail to meet an obligation.¹⁶

The above-described provision of the Competition Act, which is of general application in competition supervision proceedings, also applies to unannounced inspections. Examples of conducts that may lead to the imposition of procedural fines during unannounced inspections are

- **obstruction of access to the premises of the undertaking,**
- **deliberate misleading of case handlers, disclosure of false information, concealment of evidence,**
- **causing the disappearance or destruction of evidence,**
- **taking evidence from the premises,**
- **deleting or amending data contained on IT devices,**

¹⁶ Article 61 (1) of the Competition Act

- **breaking the lock placed by the GVH,**
- **causing a deliberate delay in commencement of the unannounced inspection.**

The minimum procedural fine shall be two hundred thousand forints for undertakings and fifty thousand forints for natural persons not qualifying as undertakings, and the maximum shall be, in the case of undertakings, one per cent of the net turnover in the business year preceding the adoption of the injunction imposing the procedural fine, and five hundred thousand forints for natural persons not qualifying as undertakings.¹⁷

It is important to draw attention to the fact that the payment of a procedural fine does not exempt the person from the possible criminal consequences resulting from the conduct giving rise to the fine.¹⁸

3. Rights and obligations of the parties involved in the unannounced inspection

3.1. Rights of the parties involved in unannounced inspection

- The **legal representative of the undertaking may be present during the unannounced inspection**, but the GVH is not obliged to wait for the arrival of the legal representative before commencing the unannounced inspection.
- The party may **refuse to allow the case handlers to inspect documents that have been prepared for the purpose of defence**¹⁹ (communications between the party and its authorised lawyer or bar counsel). If it is clear from the nature of a document that it amounts to a document prepared for the purpose of defence, then it may not be used or copied as evidence. In the case of paper copy documents, the party (undertaking subject to the procedure) may make a statement on the spot, and in the case of electronic documents, regarding their extent, may make a detailed, reasoned statement afterwards within the time limit set by the GVH. In case of failure to meet the deadline, the GVH is entitled to inspect the documents. If the case handler does not agree with the statement made on the spot in connection with the paper copy document, he/she may take the document in question into custody and shall treat it as confidential. In case of dispute, the Budapest-Capital Regional Court will decide within 15 days.
- **With regard to documents intended to be seized or copied by the GVH, the undertaking may declare that certain documents contain business secrets or other privileged information, but this does not remove the GVH's right to seize**

¹⁷ Article 61 (3) of the Competition Act

¹⁸ See, for example, obstruction of authority proceedings under Article 279 of Act C of 2012 on the Criminal Code.

¹⁹ Pursuant to Article 65/C (2) of the Competition Act, a document prepared for the purpose of defence shall mean a document or a part thereof that was created in the course of communications between a person acting as a lawyer and a party as the client of the former, for the purposes or in the framework of the exercise of the rights of defence in the proceeding of any public authority, or that is a record of the contents of such communications, provided that such character of the document is apparent from the document itself. A document not in the possession of the party or the person concerned acting as a lawyer shall not qualify as a document prepared for the purpose of defence unless such party or lawyer is able to prove that the document was removed from his/her possession illegally or in the course of criminal proceedings.

or copy such documents. Nevertheless, the GVH shall restrict the disclosure of the documents marked as such until the adjudgement of the data considered to be business secrets or other privileged information.

The party and their legal representative may submit an objection against the inspection **within 8 days**²⁰, which, if submitted on the premises, must be recorded in the minutes. The case handler or the competition council proceeding in the case shall explain the reasons for disregarding the objection in the report or in its resolution concluding the proceeding, respectively.

3.2. Obligations of the party involved in the unannounced inspection

- **Access to the premises concerned in the unannounced inspection by the case handlers of the GVH may not be denied or obstructed.**
- Employees are **obliged to cooperate** with case handlers but are not obligated to admit an infringement. The case handlers **shall be provided with the requested data, tools and information.**
- Case handlers aim not to obstruct the day-to-day operation of the undertaking, but **may restrict free movement and communication**, e.g., they can block the mail system of the undertaking and forbid certain key people from leaving the premises.

In the event of lack of cooperation or obstruction of the unannounced inspection, a **procedural fine may be imposed.**

Leniency statement during unannounced inspection

Pursuant to the GVH's leniency policy, in cartel cases and other cases regarding agreements or concerted practices between non-competitors aimed directly or indirectly at fixing purchase or selling prices, **a leniency statement may be submitted before or after the order of the investigation**, on the basis of which the undertakings involved in the infringement may be granted full or partial immunity from fines in case of cooperation with the GVH.²¹

Only an application for immunity²² or reduction of fine²³ can be submitted on the premises, as according to Article 78/A of the Competition Act, it is not possible to submit a non-final application (so-called marker) after the unannounced inspection.

²⁰ Article 81 of the Competition Act

²¹ For more information see Notice No 14/2017 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the application of the rules on leniency pursuant to Article 78/A of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

²² Pursuant to Article 78/A (2) point (b) of the Competition Act, immunity from any fine shall be granted by the competition council proceeding in the case to the undertaking which is the first to submit an application for immunity and supply evidence which enables the Hungarian Competition Authority to prove the infringement, provided that it did not, at the time when the evidence was provided, already have sufficient evidence to prove the infringement and none of the undertakings meets the condition set out in point (a).

²³ Pursuant to Article 78/A (3) of the Competition Act, upon an application the competition council proceeding in the case shall reduce the fine if the conditions for immunity pursuant to paragraph (2) are not met but the undertaking provides to the Hungarian Competition Authority evidence of the infringement which represents significant added value to the evidence already available to the Hungarian Competition Authority at the time when such evidence is provided.

4. Minutes recorded on the unannounced inspection

Minutes of the unannounced inspection are prepared on the premises, an original copy of which is handed over by the case handler of the GVH after they have been signed.

The minutes shall include the personal data of the employees involved in the inspection, the name and chamber ID number of any authorised legal representative if present on the premises, and the names of the case handlers. The minutes provide an accurate account of the events that took place on the premises, the procedural acts performed, the premises inspected, and record the identities of the employees directly involved in the unannounced inspection.

The minutes and the orders issued on the premises record item by item, in an identifiable manner, the paper-copy documents seized by the GVH in a copy or original, and in the case of the making of an electronic copy, the data ensuring the source of the copy, the nature of the copied data, and any other necessary data enabling the copy to be uniquely identified and other necessary data to allow subsequent verification of the integrity of the data. The minutes shall also contain the party's statements made on the premises in connection with the business secret or the document prepared for the purpose of defence, as well as a description of the circumstance which may give rise to the imposition of a procedural fine. An investigative objection regarding the investigative measures of the unannounced inspection shall also be recorded in the minutes.

The unannounced inspection ends with the signing of the minutes. The case handler of the GVH hands over an original copy of the completed minutes and communicates the orders issued during the unannounced inspection to the representative of the undertaking at the premises of the unannounced inspection.

5. What happens after the unannounced inspection?

Regarding the electronic documents copied by the GVH, the undertaking subject to the procedure has the opportunity, **to make a detailed, justified statement** after the unannounced inspection, within the time limit set by the case handlers concerning the **seized document copies made for the purpose of defence**. Such documents will be selected separately, in the presence of a representative of the undertaking concerned, at a later date, at the official premises of the GVH. If the undertaking does not make this statement within the time limit, no special selection will be made and the case handlers will be entitled to examine the copied documents.