

**EXPLANATORY NOTES
OF THE PRESIDENT OF THE HUNGARIAN COMPETITION
AUTHORITY
ON THE APPLICATION OF THE RULES CONCERNING
LENIENCY
PURSUANT TO ARTICLES 78/A AND 78/B OF THE PURA**

I. Introduction

1. The several times amended Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: "PURA") specifies the fundamental rules on the leniency policy of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH).
2. Articles 78/A and 78/B of the PURA specify the scope of leniency, the types of applications that may be submitted in the frame of the leniency policy and the main rules of the proceedings to be conducted on the basis of the former. The application form published on the homepage of the GVH regulates the format, content of the applications, and the way of their submission.
3. Present Explanatory Notes give information on the practice of the GVH in respect of leniency, thereby assisting in the interpretation of the leniency application form. Subject to future amendments of the legal background or in the light of the experience through further enforcement practice, present Explanatory Notes may be reviewed in the future or their contents may be detailed or clarified.
4. When framing present Explanatory Notes the GVH took account of the Model Leniency Programme of the European Competition Network.¹

II. The framework of the leniency policy

5. The proceeding competition council shall grant immunity from fines or reduce the fine imposed on undertakings that disclose to the GVH, in a manner specified by the PURA, agreements or concerted practices between competitors which infringe Article 11 of the PURA or Article 81 of the EC Treaty and which are aimed directly or indirectly at fixing purchase or selling prices, sharing of markets – including bid-rigging –, or at the allocation of production or sales quotas (hereinafter: cartel or infringement).
6. Cartels are especially harmful to the functioning of the market economy as they restrict or even exclude competition, resulting in increased prices and/or reduced choice for the consumer. By restricting competition, undertakings participating in the cartel cause efficiency losses as they eliminate pressures that would generate product development and the introduction of more efficient production technologies. In the long term, their conduct may lead to a loss of competitiveness and reduced employment opportunities, which may have an adverse effect on the growth of the entire economy. Consequently, the GVH considers it a top priority to take action against cartels.
7. Cartels by their nature are implemented in secrecy, consequently the concealment and destruction of evidence is also inherent in them. Thus the "breaking of silence" and through this the discovery and acquisition of decisive evidence is the key to successful action against

¹ <http://ec.europa.eu/competition/ecn/documents.html>

cartels. This is difficult, if not impossible, to achieve with the traditional methods of investigation, therefore it is expedient to offer various incentives to cartel members for exposing their restrictive agreement. The introduction of the leniency policy serves to promote co-operation with the authority.

8. The leniency policy is based on the assumption that certain undertakings involved in secret agreements would be willing to put an end to their participation and provide information about the existence of the cartel and its operation, but they are afraid of the penalties, which would be imposed on them as sanctions for their practices. The leniency policy offers an option to such undertakings; under this policy, the competition authority rewards co-operation with the authority by means of the reduction or non-imposition of fines. The GVH considers that the public interest in ensuring that secret cartels are detected and eliminated outweighs the public interest in fining the undertakings that participate in the cartel but enable the authority to detect such cartels.

9. The leniency policy as specified in the PURA offers two alternatives to cartel members: immunity from fines or reduction of a fine. Immunity from fines may result from the undertaking being the first to provide a decisive contribution to obtain in advance a judicial authorisation to carry out investigative measures specified by Article 65/A of the PURA (hereinafter: targeted inspections) and/or to the finding of the infringement, on the conditions that the undertaking meets certain additional criteria specified in the PURA. Fines may be reduced in the case of undertakings, which, with their active collaboration, contribute substantially to the detection and the finding of an infringement. The degree of reduction reflects the contribution of the party to the detection of the infringement, in terms of content and timing.

III. Conditions of granting immunity from fines and reduction of fines

III.1. Immunity from fines

10. The GVH will grant immunity from any fine to an undertaking participating in an infringement, which is the first to submit an application for immunity and submit evidence

a) which enables the GVH to obtain in advance a judicial authorisation to carry out targeted inspections in connection with the infringement, provided that the GVH did not, at the time of the application, already have sufficient information constituting the ground for the judicial authorisation of targeted inspections or had not already carried out such investigative measures; or

b) which enables the GVH to prove the infringement, provided that it did not, at the time of the application, already have sufficient evidence to prove the infringement and none of the undertakings meets the conditions set out in point a).

11. The application form specifies the content of the immunity application in details.

12. Nevertheless, it is to emphasize in respect of both types of applications that in its assessment, the GVH will generally consider physical evidence originating from the period of time when the infringement was committed and directly relevant to the facts in question to have a greater probative force than evidence subsequently established, and/or that with only indirect relevance, which require corroboration from other sources. The degree to which the authenticity of the evidence can be corroborated from other sources may have an impact on the value of the evidence as well. However, the foregoing do not exclude the possibility that an immunity application may be successful exceptionally in cases where the infringement was committed without producing any direct written evidence. In such cases the applicant shall

make a statement on the data of the infringement known to him and has to attach the indirect evidences confirming his statement to the application.

13. In order to qualify for immunity from fines three further conditions have to be met:

- A. According to the first condition the undertaking shall end its involvement in the infringement immediately following its application. Exceptionally, if in the GVH's view the undertaking's continued involvement in the infringement would be necessary to preserve the integrity of the targeted inspections, the GVH announces its view to the undertaking by the order on the conditional resolution pursuant to Sections 28 and 57. The GVH regards the continued involvement in the infringement to the extent and of the nature specified by order until the time limit set by the order as if the applicant had not participated in that part of the infringement. A GVH takes such measures exclusively to preserve the integrity of the targeted inspections; the undertaking cannot be obliged to continued infringement in order to collect further evidence.
- B. The second condition of granting immunity from fines is that the applicant shall cooperate genuinely, fully and on a continuous basis with the GVH until the conclusion of the competition supervision proceeding. In the frame of the cooperation obligation the GVH expects the applicant in particular
- to provide the GVH in due time with all relevant information and evidence that comes into the applicant's possession or under its control;
 - to remain at the disposal of the GVH to reply promptly to any requests that may contribute to the establishment of facts proving the infringement;
 - to do their best to make current and, to the extent possible, former employees and directors (executive officer) available for interviews with the GVH;
 - not to destroy, falsify or conceal information or evidence in respect of the infringement;
 - not to disclose the fact or any of the content of the leniency application before the GVH has notified its preliminary position to the parties or granted access to files, unless otherwise agreed with the GVH or the undertaking is obliged to do so by law or another authority.
 - The cooperation obligation of the applicant includes also that the applicant must not present mala fide conduct even prior to the application.²
- C. As the third condition of the leniency the PURA stipulates that an undertaking, which took steps to coerce other undertakings to participate in the infringement, shall not be eligible for immunity from fines.

III.2. Reduction of fines

14. If the GVH has already brought a conditional resolution on the immunity from fines (see Section 28) in respect of a case, the application of the next undertaking to come forward is not able to meet the conditions of immunity from fines anymore. Therefore although it will not grant immunity from fines, the GVH will reduce the fine for an undertaking in return for

² The cooperation obligation of the undertaking burdens the applicant in a narrow sense already prior to the application. This means for example that the applicant must not destroy evidence immediately prior to the application; or disclose the fact to other cartel members prior to the application that it is contemplating an application. Likewise, the GVH regards as non-compliance if the undertakings participating in a cartel "share" the evidences among them thereby allocating the types of applications that will be submitted by each of them. To sum up, according to the interpretation of the GVH forming a "cartel" in respect of the leniency application constitutes a non-compliance, a breach of the cooperation obligation.

providing evidence, if such evidence constitutes significant added value relative to the evidence already available to the GVH. The level of the reduction in the amount of the fine for the first undertaking may be 30-50%, for the second undertaking 20-30%, the third or subsequent undertakings up to 20%.

15. The nature and quality of evidences that will actually meet the conditions set in the previous Section depend on the circumstances of the given case and the evidence available to the GVH. Nevertheless, when evaluating the provided evidences the GVH will generally consider physical evidence originating from the period of time when the infringement was committed and directly relevant to the facts in question to be of greater value than evidence subsequently established, and/or that with only indirect relevance, which require corroboration from other sources. The degree to which the authenticity of the evidence can be corroborated from other sources may have an impact on the value of the evidence as well.

16. The phrase according to which the GVH correlates the evidences submitted by the applicant with the evidences already available for it, means that the GVH estimates the significant added value of the evidence relative to the evidences stemming from already closed or from already started but not yet closed investigative measures.³

17. The other conditions of the reduction of a fine correspond to those specified in respect of the immunity from fines (see Section 13) with the difference that an undertaking, which took steps to coerce other undertakings to participate in the infringement is not excluded from benefiting from the reduction of a fine.

18. The situation specified in Article 78/A(5) of the PURA represents a particular case of the reduction of a fine, that is the undertaking provides evidence relating to facts in connection with the infringement, which are unknown to the GVH and which have a direct importance with respect to the circumstances to be taken into account when the amount of the fine is determined.⁴ In such a case the GVH shall not take such aggravating evidence into account when setting the fine to be imposed on the undertaking, which provided this evidence.

IV. Procedure

IV.1. Immunity from fines

19. An application for immunity from fines pursuant to Article 78/A(2)a) and b) of the PURA may be submitted in the form and with the content specified by the application form.

20. An undertaking wishing to apply for immunity from fines should contact the GVH first; this may be done by submitting

- A. a complete application for immunity from fines
- B. a non-final application, which contains fewer data than the complete application, or
- C. a provisional application parallel to the leniency application submitted to the European Commission.

21. It must be emphasised in connection with the application that the rule pursuant to Article 78/A(8) of the PURA, according to which neither more than one undertaking jointly

³ If for example an undertaking submits a leniency application in the course of a targeted inspection, the GVH estimates the significant added value relative to the documents acquired as a result of the targeted inspection. Likewise, if the GVH requested information from the parties and the applicant submitted an application for reduction of a fine after the date of the request of information but before the answers have arrived, the GVH regards the answers already arrived and to arrive as those available for it and assesses the application according to that.

⁴ For example the applicant proves that the infringement affected a larger geographic territory or a wider circle of products, or that the infringement lasted longer than assumed.

nor one undertaking on behalf of more than one undertaking are allowed to apply for immunity from, or a reduction in the amount of, the fine, does not prevent those members of a group of undertakings, which participated in the infringement, to apply for immunity from fines. In such a case it is expedient for the undertaking exercising control to submit the leniency application, in which it provides data on those members of the group of undertakings, which participated in the infringement besides him, as well. An authorisation by the undertakings, which participated in the infringement, has to be attached to the application, pursuant to which the undertaking exercising control may act as a proxy in respect of submitting the leniency application.

IV. 1. 1. The complete application for immunity from fines

22. The complete application for immunity from fines means that the application contains all information specified in the application form.

23. The Cartel Section of the GVH (hereinafter: CS) receives the application for immunity from fines. The application has to be submitted in accordance with the formal requirements specified in the application form. If an undertaking wishes to present its application orally, it may do so per its legal representative or proxy, in person, on the date agreed in advance with the CS. The investigator makes a record or sound recording of the oral application or makes a memorandum of it. Afterwards a memorandum has to be made of the sound recording. The applicant shall sign the memorandum.

24. At the time of the application the CS does not give information on the likely successfulness of the application, it merely acknowledges the receipt of the application. Nevertheless, if the proceeding competition council already granted conditional immunity from fines for an undertaking, the CS gives information on this fact (with keeping the personality of the applicant in secret).

25. The CS makes a record of the receipt of the application, which certifies the exact date (year, month, day, hour, minute). At the applicant's request the record shall be made in two copies, one of which belongs to the applicant.

26. The CS examines the application and gives opinion on it and submits the information available for the GVH in respect of the infringement to the proceeding competition council for resolution.

27. The proceeding competition council decides on the application on the basis of the proposal of the CS. Should the proceeding competition council deem it necessary, it may hear the applicant prior to adopting its orders. The proceeding competition council adopts its orders immediately taking only the time necessary for carrying out its assessment. In case of an application submitted according to Article 78/A(2)a) this means that the proceeding competition council brings a conditional resolution at latest by the initiation of the competition supervision proceedings. In case of an application submitted according to Article 78/A(2)a), the proceeding competition council delivers a conditional resolution at the latest by the initiation of the competition supervision proceedings. In case of an application submitted according to Article 78/A(2)b), the consideration of an application may take longer time – months if necessary – considering that it is a condition for the assessment of the application that the GVH evaluates and compares all the evidence at its disposal with the submitted application. The GVH may use the application and attached documents exclusively to consider the application until the conditional resolution is delivered (see 32.)

28. The proceeding competition council may order in two ways:

- The proceeding competition council shall grant conditional immunity from fines, if the application of the undertaking meets the conditions set out in Article 78/A(2) of the PURA. In this case the proceeding competition council establishes by order that an immunity from fines will be granted for the applicant at the time of the decision on the merits of the case, provided that the applicant will meet, at that time, the conditions set out in Article 78/A(6) and (7) of the PURA.
- If the application does not meet the conditions set out by law and the applicant does not withdraw its application,⁵ the proceeding competition council either rejects the application by order, or, ex officio, assesses the application for immunity from fines as application for the reduction of a fine, where it may constitute the ground for a reduction in the amount of the fine.

29. It must be emphasised in respect of the assessment of the application that in case the application, which has been submitted as a complete application, suffers minor, remediable failures, it is possible to complete the application (for example via hearing) afterwards. If, however, the amount of information available for the undertaking is so small that it is evidently not sufficient to obtain a judicial authorisation for targeted inspections or to the proving of the infringement, it is expedient for the undertaking to submit a non-final application (see Chapter IV.1.2.) instead of a complete application.

30. No separate legal remedy may be sought against the orders on granting conditional immunity from fines and on rejecting the application. Furthermore the GVH conveys such orders only to the applicant.

31. If the undertaking submitted its application orally, it may request the proceeding competition council to convey its resolution in respect of the application orally. In such a case the GVH either notes the fact and the date of the conveyance on the memorandum (record), which contains the leniency application or makes a memorandum. The applicant shall sign the resolution, which was noted on the memorandum (record) or putted down in the memorandum.

32. Before a resolution is made by the proceeding competition council, the GVH may use the application for immunity and the documents attached to it exclusively to the assessing of the application or the applying for a judicial authorisation for targeted inspections; only the investigator appointed to deal with the case, the proceeding competition council and the court may have access to them. Where the application is rejected or withdrawn, the GVH shall return, upon request of the undertaking, the application and the documents attached to it, together with the copies possibly prepared of them, to the undertaking submitting the application, concurrently with the conveyance of the order rejecting the application.

33. The proceeding competition council assesses the applications received in their time sequence, and it will not consider other applications before it has conveyed its resolution in respect of an existing application in relation to the same infringement.

34. When closing the competition supervision proceedings the proceeding competition council considers, whether the applicant meets the conditions in Article 78/A(6)-(7) of the PURA and decides on the immunity from fines in its decision on the substance of the case. If the applicant has not met the conditions, he will not benefit from any favourable treatment under the leniency policy. However, this does not prevent the proceeding competition council from assessing the cooperation the applicant showed in connection with the leniency as a mitigating circumstance when imposing fines.

⁵ Pursuant to Article 78/B(3) of the PURA applications for immunity from fines may be withdrawn before they are assessed.

IV.1.2. Non-final application for immunity from fines

35. Article 78/B(1) of the PURA rules on the non-final applications. Pursuant to the Act the GVH may consider applications for immunity from fines as being submitted, even if the evidence required by the Act was not submitted at the time of the application. In such cases a time limit shall be set for the completion of the non-final application.

36. On the basis of the above, if the undertaking decides to submit an application for immunity from fines, if, however, the evidence/information available for it is not yet sufficient to submit a complete application for immunity from fines, by providing the minimum information specified by the application form it may submit a non-final, so called marker application⁶ to the GVH.

37. For the submission of a marker application the rules contained in Section 23 apply accordingly.

38. Provided that all information specified in the application form has been presented, the CS acknowledges the receipt of the marker application without any further assessment and concurrently with that it sets a time limit by order for the completion of the application (for the submission of evidences to be attached to the complete application).

39. For the information on and the certificate in respect of the application Sections 24-25 apply accordingly.

40. If the undertaking completes its application fully within the time limit, it shall be deemed, as if the complete application would have been submitted on the date when the non-final application was submitted. For the assessment of the complete application submitted on the basis of the marker Chapter IV.1.1. applies accordingly.

41. If the undertaking does not complete its application within the time limit, the GVH deems the application to have been withdrawn and returns the application, upon its request, to the undertaking.

42. The marker application may be withdrawn. In such a case the GVH returns the application, upon its request, to the undertaking.

43. The GVH assesses the applications in their time sequence. If another application arrives to the GVH within the time limit set for the completion of the marker application, the GVH will not consider the other application before it has brought a resolution in respect of the complete application submitted on the basis of the marker application and has conveyed its resolution to the applicant.

IV.1.3. Provisional application for immunity from fines

44. Pursuant to Article 78/B(2) of the PURA in cases where the European Commission is particularly well placed to conduct a proceeding in accordance with its Notice on Cooperation within the Network of Competition Authorities,⁷ the undertaking may file a provisional application with the GVH where the undertaking considers the GVH might be well placed to proceed in the case under the Notice.

45. A provisional application may be submitted in connection with an application pursuant to Article 78/A(2)a) of the PURA. It follows from the essence of this legal institution that a precondition to the submission of a provisional application is that the applicant submitted a

⁶ A marker is a certificate of the applicant's place in the queue of undertakings, which have applied for immunity from fines.

⁷ OJ C 101, 27.04.2004, p. 43-53.

parallel application to the European Commission or contemplates to submit such an application.

46. The provisional application is not a complete application, it must contain only a restricted circle of information specified in the application form and there is no need to submit physical evidence.

47. The provisional application shall be submitted to the CS as determined in the application form. If the applicant wishes to present its application orally, Section 23 applies accordingly.

48. The CS makes a record of the receipt of the application, in which it acknowledges the exact date (year, month, day, hour, minute) of the receipt of the application. At the applicant's request the record shall be made in two copies, one of which belongs to the applicant. If the legal representative or proxy of the undertaking, in person, presents the application, the CS informs the applicant present also on its place in the queue of applicants. The record on the receipt of the application contains the fact of the information and its content, too. If the undertaking submits its application in other ways (for example per post or per delivery), the CS informs the applicant on its place in the queue of applicants in writing.

49. The GVH may request information from the undertaking relating to the provisional application, however, no resolution on conditional immunity from fines may be made on the basis of the application.

50. Should the GVH later initiate a competition supervision proceeding in the given case, by setting a time limit it shall request the undertaking to submit the complete application, which contains the evidence qualifying it for immunity from fines. If the undertaking submits the required evidence, in terms of eligibility for immunity from fines, its application shall be deemed as have been submitted on the date when the provisional application was made.

IV.2. Reduction of fines

51. The possible fine may be reduced in two ways:

- A. by reclassifying the application for immunity from fines *ex officio*; or
- B. by submitting an application for the reduction of a fine.

52. An application for the reduction of a fine may be submitted only as a complete application, it has to contain all enclosures specified by the application form.

53. The application for the reduction of a fine is received by the CS as determined in the application form. For the submission of the application Section 23 applies accordingly.

54. At the time of the application the CS does not give information on the likely successfulness of the application, it merely acknowledges the receipt of the application. The CS makes a record of the receipt of the application, to which Section 25 applies accordingly. The record in respect of the date of receipt, which was previously made in connection with the reclassified application for immunity from fines, continues to apply.

55. The CS examines the application and gives opinion on it and submits the information available for the GVH in respect of the infringement to the proceeding competition council.

56. The proceeding competition council decides on the application on the basis of the proposal of the CS. Should the proceeding competition council deem it necessary, it may hear the applicant prior to adopting its orders. The proceeding competition council adopts its orders immediately taking only the time necessary for carrying out its assessment. In such cases it takes more time to assess the application as during the assessment of an application for a reduction of a fine the proceeding competition council decides on the significant extra

value of the submitted documents based on the evidence at its disposal at the time of the application. This assumes the evaluation of the complete scale of documents of the investigation and the judicial assessment of the behaviour. Thus the decision usually takes place at the same time as the notification about the preliminary position is sent to the parties. The proceeding competition council communicates the order to the applicants at the same time as sending the preliminary position.

57. The proceeding competition council may order in two ways:

- The proceeding competition council brings a conditional reduction of the fine, if the application of the undertaking meets the conditions set out in Article 78/A(3) of the PURA. In this case the proceeding competition council establishes by order that a reduction of a fine will be granted for the applicant at the time of the decision on the merits of the case, provided that the applicant will meet, at that time, the conditions set out in Article 78/A(6) of the PURA. The proceeding competition council specifies in the order also the point of Article 78/A(4) of the PURA, pursuant to which a reduction of a fine can be granted to the applicant.
- If the application does not meet the conditions set out by law, the proceeding competition council rejects it by order.

58. No separate legal remedy may be sought against the orders on granting conditional reduction of a fine and on rejecting the application. Furthermore the GVH conveys such orders only to the applicant.

59. If the undertaking submitted its application orally, it may request the proceeding competition council to convey its resolution in respect of the application orally. In such a case the GVH either notes the fact and the date of the conveyance on the memorandum (record), which contains the leniency application or makes a memorandum. The applicant shall sign the record or the memorandum.

60. The GVH may use the application for a reduction of a fine and the documents attached to it from the date of their submission to prove the infringement; the GVH shall not return to the applicant any of these even if the application will be rejected.

61. The proceeding competition council assesses the applications received in their time sequence, and it will not consider other applications before it has conveyed its resolution in respect of an existing application to the undertaking that submitted it in relation to the same infringement.

62. When closing the competition supervision proceeding the proceeding competition council considers, whether the applicant meets the conditions in Article 78/A(6) of the PURA and decides on the exact amount of the reduction of the fine in its decision on the merits of the case. If the applicant has not met the conditions he will not benefit from any favourable treatment under the leniency policy. However, this does not prevent the proceeding competition council from assessing the cooperation the applicant showed in connection with the leniency as a mitigating circumstance when imposing fines.

63. When assessing the application for the reduction of a fine the GVH automatically considers, whether the application meets the conditions pursuant to Article 78/A(5) of the PURA, in which case there is no need to submit a separate application for a reduction of a fine.

V. Closing remarks

64. Until the starting date for the respondents' access to the files,⁸ the GVH will assure the secrecy of the identity of the co-operating undertaking (party) and the fact of its co-operation.

65. Civil claims arising from the infringement of Article 11 of the PURA and Article 81 of the EC Treaty may be enforced before courts directly. The GVH applies its leniency policy in the course of competition supervision proceedings, therefore it does not grant the applicant immunity from possible civil law consequences in connection with the infringement, however, those parties, whom the GVH granted immunity from fines, in a lawsuit initiated for enforcing civil claims may refuse to pay damages for the harm caused by his illegal conduct until the claim can be recovered from any other person responsible for causing harm by the same infringement.⁹

66. Participation in restrictive agreements concluded in the course of public procurement or concession procedures falls under criminal liability and may have an impact on the condemned undertaking in respect of its future participation in public procurement procedures.

Budapest, 11 July 2013

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⁸ The party and its representative may have access to the documents after the completion of the investigation, following the date set by the proceeding competition council and they may make copies or take notes thereof. The starting date for the access shall be set early enough so as to enable the party to prepare for making a statement. Specifying the documents concerned, the proceeding competition council may give its consent to the party or its representative having access to the documents before the completion of the investigation where this does not jeopardise the effectiveness of the proceeding. (Article 55(1) of the PURA)

⁹ Article 88/D of the PURA