

THE METHOD OF SETTING FINES IN ANTITRUST CASES

NOTICE No 2/2003 OF THE PRESIDENT OF THE HUNGARIAN COMPETITION AUTHORITY AND THE CHAIR OF THE COMPETITION COUNCIL OF THE HUNGARIAN COMPETITION AUTHORITY¹

I. Introduction

1. Pursuant to Article 36(6) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices as amended (hereinafter: "PURA"), the President of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH), together with the Chair of the Competition Council, may issue notices explaining the foundations of the law-enforcement practice of the GVH. Such notices have no binding force; their function is to state how the law enforcer will apply the legal provisions, summarising past experience and outlining the practice to be followed in the future.
2. This Notice details the considerations set out in law and used by the GVH to determine the amount of competition supervision fines imposed in antitrust cases (restrictive agreements and abuse of a dominant position). Article 78 PURA provides for the (substantive) competition supervision fine, giving a non-exhaustive overview of some considerations, which are to be taken into account on setting the fine. The Notice explains the process of setting the fine, the relevant considerations, their content and relative weight, thereby describing the method of determining the amount of the fine.
3. When designing and publishing the method of setting fines, the GVH took into consideration the position of the Supreme Court stating that – *"in the course of the review of discretionary decisions, the court may examine whether the administrative authority has taken into consideration all aspects which may be taken into consideration at the weighing and whether it has explained their acceptance or rejection. If no infringement [committed in the procedure of the law-enforcement body] can be established, the amount of the fine may not be changed as the court may not exercise powers to reconsider the matter."*²
4. By publishing this Notice, the GVH aims to promote legal certainty, and the transparency and predictability of its actions, thereby contributing to the uniform and non-discriminatory application of the law. In light of the Notice, undertakings can assess the gravity of the possible consequences of their anticompetitive market actions. Furthermore, knowing the published method of fine calculation those who follow the decisions of the GVH, and in particular the courts reviewing such decisions, will find it easier to evaluate whether the fines imposed by the decisions are justified. To this end, the GVH will attach explanations in the level of detail provided for in this Notice to the fines imposed, as part of the reasoning of the decisions.

¹ As amended by Notice No 2/2005, on the amendment of Notice No 2/2003 on the method of setting fines in antitrust cases, of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the GVH; version applied in competition supervision proceedings started after 1 November 2005

² Judgement of 24 February 2003, Kf.V.39.361/2001/4, *Büki Üdítő Kft. v. GVH*.

5. No predefined set of criteria or calculation method can provide full certainty and predictability. Even apparently unambiguous methods used for the calculation of fines cannot be applied without upholding the discretion of the enforcement agency within the limits of the method. In certain cases, the method may not even be applicable due to the special features of the case. In such, strictly exceptional, cases the GVH will depart from the contents of this Notice, the reasons for this being disclosed by the reasoning to the fine-setting in the explanatory part of the decision of the Competition Council.
6. The amount of the fine set in line with the Notice takes into consideration the fact that after the completion of the transition into a market economy, in light of the competition enforcement practice of over ten years, undertakings can be expected to be familiar with the competition rules and to respect them, and the deterrent sanctioning of infringements is also justified in order to protect the public interest.
7. For agreements containing hard-core restrictions, the Notice applies in conjunction with the GVH Notice on the leniency policy towards the parties to such agreements.³
8. If the GVH deems it necessary in light of the experience it will gain through its further enforcement practice, this Notice may be reviewed in the future or its contents may be detailed or clarified.

II. Considerations in setting the fine

9. The setting of the substantive fine imposed in antitrust cases is a multi-step process: the GVH first determines a basic amount starting from the turnover of the offender on the relevant market (relevant turnover), which may then be modified in several steps to take account of additional considerations.

II.1. Setting the basic amount

10. The GVH determines the basic amount based on the threat to competition, the impact of the infringement on the market, the attitude of the offender towards the infringement as well as other considerations arising from the overall circumstances of the case. (These considerations are further detailed and classified into sub-points, a rough scheme of which is shown in Diagram 2 of the Annex.) In the course of the calculation, the threat to competition and the impact of the infringement on the market (these two factors determining the gravity of the infringement), as well as the attitude of the undertaking to the infringement are accorded equal weight (of 30% each), while the other circumstances receive a lower weighting at 10%.

³ The application of a leniency policy to promote the detection of cartels: Notice No 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the GVH.

11. When converting the scores into amounts, the GVH starts from 10% of the relevant turnover, which means that in the most severe case possible the fine would equal 10% of the relevant turnover. The relevant turnover used in calculating the basic amount means the annual turnover made by the offender on the market affected by its infringing conduct, which can reach the total turnover of the undertaking only in extreme cases. Generally, the relevant turnover is the net sales revenues of the undertaking on the market in question in the year of the infringement; if no reliable data are available, estimates may also be used to determine it. In the case of infringements the duration of which is more than one year, the turnover of the infringing undertakings will be determined based on the data reached in the last full calendar year. The duration of the infringement will be taken into account later as one of the aggravating circumstances (see point 21 below).
12. The first factor of the calculation of the basic amount is the gravity of the infringement. This in turn consists of two equally important elements: the threat to competition and the impact of the infringement on the market. The GVH imposes higher sanctions on hard-core cartels, which represent the greatest threat to competition, than on other restrictive agreements entailing a lower level of threat and the various cases of abuse of dominance. Hard-core cartels are clearly restrictive agreements or concerted practices which result as their quintessence, without producing any efficiencies or other social benefits, in the restriction of competition, unlike other agreements causing this only as a secondary consequence of their operation. They include price-fixing, market sharing, the allocation of customers and bid-rigging. In addition to restricting competition without producing any benefits, hardcore cartels may ultimately result in the elimination of competition. Accordingly, the GVH regards these restrictions as the infringements representing the greatest threat to competition. Other restrictive agreements (and among them the majority of vertical agreements) as well as certain kinds of abuse of dominance, may expect a more lenient treatment in comparison to what is accorded to hardcore cartels. These restrictive agreements are not always illegal, hence penalizing them would not always be justified either. Abuse-of-dominance cases can be classified as two main groups covering practices exploiting the consumers (such as unfair pricing, discriminating, tying, etc.) or directly restricting competition (such as predatory pricing, vertical exclusion through tying, etc.), as the case may be. The latter group receives a more severe legal assessment, which may amount to the same negative level as that found in hardcore cartels. (The assessment of the type of the infringement is only one of all the aspects taken into account, therefore situations may occur where a case with a not very severe assessment will receive a more severe sanctioning, based on all the aspects mentioned, than some of the hardcore cartels.) In assessing the degree of the threat to competition the risk of a reduction in the intensity, or a total elimination, of competition is also taken into account.
13. The impact of the infringement on the market depends primarily on the share of the undertaking in question on the relevant market. The GVH imposes more severe sanctions on undertakings with higher market shares. The GVH also takes into consideration other factors, though with less weighting, such as other factors affecting the market power of the undertaking (e.g. the contestability of the market or whether the undertaking is a new entrant), as well as other characteristics of the relevant market, the product or the consumers (whether the product is essential for the consumer, whether some especially vulnerable consumer group is affected, if there is a spill-over effect on other markets). In assessing the impact on the market, the GVH

takes into account not only the real impact exerted on the market but also the potential effects of the infringement (e.g. a hard-core cartel not implemented), though naturally with lesser weight accorded to it.

14. Another factor in determining the basic amount is the attitude of the undertaking to the infringement. In assessing this, the GVH takes into account active reparation, if any, the imputability of the conduct of the undertaking, the factors affecting its attitude to the infringement and, in the case of restrictive agreements, the role of the undertaking in the infringement. On this basis, the score arrived at based on the previous two considerations may also be reduced.
15. In the context of imputability, it is necessary to emphasise that even though liability under competition law, the establishment of an infringement relies on objective bases but, pursuant to Article 78 PURA, the imputability of the conduct is one of the considerations which should be taken into account when setting the amount of the fine. This raises the question whether undertakings similar to the offender can be generally expected to be aware of the anticompetitive nature of the conduct concerned.
16. The GVH considers such conduct to be active reparation where the infringing undertaking admits to the infringement and provides, or undertakes to provide, reparations for the adverse effects of the infringement. Examples may include remedying the injury caused to consumers (or competitors, as the case may be), or effective actions to prevent the repetition of the infringement. Active reparation may occur either prior to the discovery of the infringing conduct or also after the commencement of the competition supervision proceedings. Naturally the fact that an infringement has been committed can be established even in the former case but, due to the voluntary nature of the reparation, it will be more favourably assessed for the purposes of setting the fine than in the latter case.
17. In certain cases the GVH, when deciding on the level of sanction, takes into account the fact that external factors may also have played a part in the infringement. Such an external factor may arise where previous practice has not clarified that the conduct in question constitutes an infringement. Influences behind the infringement exerted by the State (in particular, legal regulations or other state measures suggestive of exemption from the provisions of the PURA) may also constitute attenuating circumstances. The GVH does not apply this latter approach to cases where the influencing by the State was initiated by the undertaking itself to conceal the infringement or reduce the sanction.
18. The weighing as regards the role of the respondent in the infringement is relevant only in the case of restrictive agreements. Participants in the agreements, especially in the case of hard-core cartels, often play different roles; they may be organisers or leaders in the agreement, actively contributing with their conduct to the operation and maintenance of the agreements. On the other hand, other undertakings may be in a vulnerable position and participate in, or stay inside, the restrictive arrangements due to the threats of the leader(s) to take retaliatory measures.
19. The method of setting the fine also allows for the consideration of other case-specific factors not classified in the Notice, with significantly less weight than the aforementioned factors.

II.2. Adjustment of the basic amount

20. Account is taken, once the basic amount has been calculated, of the duration of the unlawful situation, the repetition of the infringement, if any, the gains derived from the infringement, the maximum amount of the fine as defined in Article 78 PURA, as well as, lastly, the application of the leniency policy (the co-operative behaviour of the infringing undertaking).
21. The GVH imposes more severe sanctions on repeated infringements. It will consider practices to be repeated infringements in particular where the object or effect of the conduct is essentially identical with that of a previous unlawful conduct even if the subsisting facts of the case are different from those previously subsisting. An example of such a repeated infringement may be a situation in which a dominant undertaking attempts to restrict competition by preventing entry to its market, and to this end first it engages in restrictive tying, then in discriminative business practices with the same object or effect. The GVH will also consider infringements committed by undertakings, other than those previously committing the same infringement, which are members of the same group of undertakings identified in the decision, to be repeated infringements. Repeated infringements may have as a consequence (depending on the number of repetitions) a significant increase in, and even a doubling of, the amount of the fine.
22. Gains derived from the infringement can rarely be quantified. However, where this is possible, the fine imposed by the GVH, to ensure that it has a sufficiently deterrent effect, is increased to three times the quantified gain, except if it would have exceeded that amount in the first place.
23. The next step of the setting of fines is the consideration of the ceiling as laid down in the PURA; accordingly, the fine imposed may not exceed 10% of the annual (aggregate) net turnover of the group of undertakings (identified in the decision) committing the infringement, achieved in the business year preceding that in which the decision establishing the infringement is made. In this way, the GVH takes into consideration the financial strength of the undertaking in question. Where no authentic data of this kind is available on the date of the decision-making, the turnover achieved in the last business year with an authentic annual closing is taken into consideration. When counting the maximum amount of the fine, also the turnover achieved abroad by the members of the group of undertakings may be taken into consideration, in particular in cases in which the infringements is not limited to the territory of Hungary.
24. The last step of the setting of fines is the application of the leniency policy. The leniency policy may be applied in relation to agreements infringing the provisions of the PURA and, in respect of such agreements, it is relevant for hardcore cartels. Essentially, to promote the detection of secret agreements, if certain conditions are satisfied, the GVH provides immunity from, or a significant reduction in the amount of, fines to be imposed on the undertakings participating in the infringement. The details of the application of the leniency policy are set out in a separate notice of the GVH.⁴

Budapest, 15 December 2003

⁴ *Ibid.*

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Annex

Diagram 1: The process of setting fines, steps of adjusting the basic amount

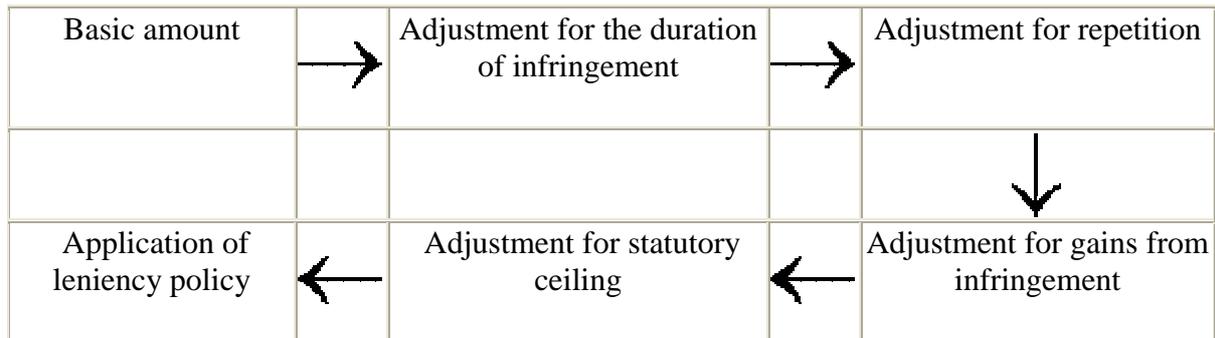


Diagram 2: Factors of setting the basic amount

A. The gravity of the infringement	
A.a. Threat to competition	max. 30 points
Type of infringement (e.g. hardcore cartel or other type of restriction/exploitative practice)	
Impact on the other aspects of competition	
A.b. Impact of the infringement on the market	max. 30 points
Market share of the infringing undertaking	
Other considerations:	
- Contestability of the market	
- Nature of the consumers and products affected	
- New entrant or incumbent	
- Spill-over effect on other markets	
B. Attitude to the infringement	max. 30 points
B.a. Role in the infringement (organiser - passive)	
B.b. Active reparation	
B.c. Imputability	
B.d. External and other factors	
- Absence or different nature of prior GVH decisions	
- Influence of state measures	
C. Other considerations	max. 10 points
Total	max. 100 points