

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 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. The purpose of this Notice is to describe the details of the application of the leniency policy outlined in general terms in the notice on the fining policy of the GVH,² that is, to establish the criteria according to which undertakings participating in a cartel but actively assisting in its detection may be granted immunity from, or a reduction in the amount of, the fine which would otherwise have been imposed. The Notice may be applied to secret cartel agreements between two or more competitors which agreements or concerted practices (hereinafter: "agreements") are aimed directly or indirectly at fixing prices, sharing markets including bid-rigging or fixing production or sales quotas.
3. When designing and publishing its leniency policy, 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."*³

¹ As amended by Notice No 1/2006, on the amendment of Notice No 3/2003 on the application of a leniency policy to promote the detection of cartels, of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority; version applied as of 25 February 2006.

² The method of setting fines in antitrust cases - Notice No 2/2003 of the President of the GVH and the Chair of the Competition Council of the GVH

³ Judgement of 24 February 2003, Kf.V.39.361/2001/4, *Büki Üdítő Kft. v. GVH*.

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 benefits they can derive from quitting secret cartels and informing the GVH in an appropriate manner, and they can realise that the leniency policy of the GVH is predictable and provides adequate assurances to applicants, who wish to make use of it, by setting out clearly the criteria for, and the way of, the application of the leniency policy. This is expected to facilitate for the GVH the detection of cartels and, through this, to promote the public interest in competition matters and to protect consumer welfare.
5. 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. The framework of the leniency policy

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 leads 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 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 relies for its legal background on Article 78 of the PURA, which provides that, in setting the amount of the fine, the “*effective co-operation*” of the respondent “*during the proceedings*” is to be taken into consideration as a factor to reduce the fine.
10. It is a legitimate expectation of undertakings that based, on the contents of the Notice, they can forecast with a high degree of certainty what to expect in exchange for their co-operation. To this end, the leniency policy of the GVH
 - establishes clear and unambiguous options, rules and procedures;
 - specifies benefits for the case that the conditions are satisfied, rather than promising to reduce the fine in general; and
 - clearly states the principle of priority.
11. The leniency policy offers two alternatives to cartel members: immunity from fines or the reduction of a fine. Immunity from fines may result from the undertaking being the first to provide a decisive contribution (e.g. in the form of disclosing direct evidence) to the opening of the competition supervision proceedings (investigation) and/or to the finding of an infringement, on condition that it meets certain additional criteria specified in this Notice. A fine may be reduced in the case of the undertakings which, with their active collaboration, contribute substantially to the detection of the cartel and the finding of an infringement. The degree of reduction reflects the contribution of the party to the detection of infringement, in terms of content and timing.

III. Conditions of granting immunity from and reduction of fines

12. The GVH will grant an undertaking immunity from any fine which may be imposed if:
 - a) the undertaking is the first to submit information and evidence about a cartel hitherto unknown to the GVH which will enable the GVH to open an investigation; or
 - b) in the proceedings already commenced by the GVH, the undertaking is the first to submit new evidence and information which will enable the GVH to find an infringement, on the condition that the GVH did not have, at the time of the submission, sufficient evidence to find an infringement.
13. If in connection with a particular case the GVH has already granted conditional immunity from the fine to an undertaking, the application of another co-operating undertaking could not satisfy the criteria set out in point 12, therefore the GVH will not grant it immunity from the fine which the GVH can be expected to impose but will only appropriately reduce the fine as set out in point 14 in exchange for the evidence supplied, on the condition that the undertaking provides it with evidence which represents clearly added value with respect to the evidence already in the GVH’s possession. In this context, added value means evidence, which will facilitate a fact-finding in the case which is more complete and thorough and goes more in depth by its nature, or which is supplementary to the evidence already available. In practice, principally the production of written documents with probative force, in particular documents with full probative force, may give rise to the reduction of a fine.

14. The level of the reduction in the amount of the fine will be, as compared to the fine set in accordance with the GVH Notice on the imposition of fines, as follows. For the:
- a) first undertaking to meet point 13: a reduction of 30-50%;
 - b) second undertaking to meet point 13: a reduction of 20-30%;
 - c) subsequent undertakings that meet point 13: a reduction of up to 20%.

In addition, if an undertaking provides evidence relating to facts unknown to the GVH which have a direct bearing on the gravity and duration of the suspected agreement, the GVH will not take this aggravating evidence into account when setting the fine to be imposed on the undertaking which provided this evidence.

15. Immunity from or a reduction of the fine will be granted by the GVH only to undertakings which, in addition to those set out above, meet the following conditions:
- a) it did not take any steps to coerce other undertakings into participating in the infringement and operating the cartel agreement; and
 - b) it co-operated fully, on a continuous basis throughout the procedure, with the GVH and provided the GVH with all the evidence and information in its possession without altering the content thereof; and
 - c) ended its involvement in the cartel following the submission of evidence, no later than the time agreed to with the GVH.
16. The GVH will grant immunity or reduce a fine if, at the end of the procedure, the satisfaction of the conditions set out in point 15 can be established. Until that time, the preliminary promise by the GVH to grant immunity or reduce fines shall be considered as conditional.

IV. Procedure

IV.1. Immunity from fines

17. An undertaking wishing to apply for immunity from the fine should contact the GVH first; this may be done in one of two ways:
- a) anonymously (e.g. through an intermediary), the undertaking presenting the key elements of the cartel (e.g. price-fixing, market-sharing) and presenting a list of the evidence in its possession, accurately reflecting the content of the evidence, whilst not disclosing the participants in and the specific details of the infringement; or
 - b) the undertaking immediately submitting all the written information and evidence in its possession together with the application.
18. In either case, the GVH will provide a written acknowledgement of receipt of the application confirming the exact date (year, month, day, hour, minute).
19. Thereafter,
- a) in the case described in point 17.a) above, if the application and the list meet the conditions set out in point 12, the GVH will inform the co-operating undertaking accordingly within eight days and at the same time set a deadline

for the submission of evidence. Following the submission of the information and evidence, the GVH will verify that they correspond to the preliminary list, examine their content and finally, if they continue to meet the conditions set out in point 12, will declare its position in writing, within another fifteen days, whether it will grant immunity from the fine which the GVH can be expected to impose, in the case that the conditions set out in point 15 have been met;

- b) in the case described in point 17.b) above, the GVH will examine the evidence submitted and, if they meet the conditions set out in point 12, will declare its position in writing, within twenty days, whether it will grant immunity from the fine which the GVH can be expected to impose, in the case that the conditions set out in point 15 have been met.
20. The GVH will assess submissions received in their time sequence, and it will not consider other submissions before it has taken a position on an existing submission in relation to the same infringement, on which it will inform the applicant. An undertaking which does not receive a conditional promise of immunity, i.e. which fails to meet the conditions set out in point 12 may withdraw the evidence submitted; however, this does not prevent the GVH from using its powers of investigation in order to obtain the information. Evidence not withdrawn will be formally reclassified by the GVH as an application for the reduction of the fine.
21. At the end of the competition supervision proceedings the Competition Council, taking into consideration the conditions set out in point 15, will decide about granting immunity from the fine in its decision on the merits of the case.

IV.2. Reduction of fines

22. The possible fine may be reduced in one of 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 concurrently with the submission of evidence and information.
23. The GVH will provide a written acknowledgement of receipt of the application confirming the exact date (year, month, day, hour, minute). The acknowledgement confirming the date of receipt, issued previously in respect of a reclassified application for immunity, continues to be effective.
24. The GVH will assess submissions received in their time sequence, and it will not consider other submissions before it has taken a position on an existing application for reduction in relation to the same infringement, on which it will inform the applicant.
25. If the GVH considers that the evidence submitted by the undertaking represents substantial added value as defined in point 13, it will declare its position to the undertaking in writing, within twenty days, whether it will reduce, between the limits defined in point 14, the fine to be imposed.
26. At the end of the competition supervision proceedings the Competition Council, taking into consideration the conditions set out in point 15, will decide about granting immunity from the fine in its decision on the merits of the case. The amount of the fine, i.e., the actual percentage reduction of the fine will be decided by the

Competition Council in its decision on the merits of the case at the end of the proceedings, taking into consideration the conditions set out in point 15.

V. Closing remarks

27. The GVH will also apply this Notice to competition supervision proceedings pending at the time of its publication.
28. Until the starting date for the respondents' access to the file⁴, the GVH will assure the secrecy of the identity of the co-operating undertaking (party) and the fact of its co-operation. The application and the related responses of the Office may not be published and may not be made accessible to third persons. In line with the GVH's practice, the fact that the undertaking co-operated with the GVH during the procedure will be indicated in the decision on the merits of the case at the end of the proceedings, so as to explain the reason for the immunity or reduction of the fine.
29. The GVH practices the leniency policy in competition supervision proceedings; its application does not provide the undertaking immunity from any civil law consequences of the infringement or from any fines, which may be imposed by other (foreign) competition authorities.
30. Information about connections between the leniency policy of the GVH on the one side and the criminal sanctioning of restrictive agreements concluded in the course of public procurement and concession procedures, or the rules of tendering laid down in Act CXXIX of 2003 on Public Procurement, on the other side is given by a notice on the homepage of the GVH.

Budapest, 15 December 2003

Dr. Tihamér TÓTH,
Vice President of the Office of
Competition Authority,
Chair of the Competition Council

Dr. Zoltán NAGY,
President of the Hungarian
Economic Competition

⁴ The party and its representative may have access to the documents after the completion of the investigation, following the date set by the competition council bringing proceedings in the case 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 competition council bringing proceedings in the case 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 proceedings. (Article 55(1) PURA)

Annex

Links to the GVH in relation to its leniency policy

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