

HUNGARIAN COMPETITION AUTHORITY

NOTICE NO 1/2012 OF THE PRESIDENT OF THE HUNGARIAN COMPETITION AUTHORITY AND THE CHAIR OF THE COMPETITION COUNCIL OF THE HUNGARIAN COMPETITION AUTHORITY

ON THE METHOD OF SETTING FINES IN CASE OF MARKET PRACTICES INFRINGING ARTICLES 11 AND 21 OF ACT LVII OF 1996 ON THE PROHIBITION OF UNFAIR AND RESTRICTIVE MARKET PRACTICES AS AMENDED (HEREINAFTER: "PURA"), AND ARTICLES 101 AND 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

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 experiences and outlining the practice to be followed in the future.

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3. This antitrust fine notice (hereinafter: notice) explains those aspects – determined by law – according to which the GVH calculates the amount of the fines imposed in its proceedings¹ relating to anticompetitive agreements, coordinated practices (hereinafter: anticompetitive agreements) and abuses of dominant positions prohibited by Articles 11 and 21 of the Hungarian Competition Act (hereinafter: HCA) and by Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) [earlier Articles 81 and 82 of the Treaty establishing the European Community (EU Treaty)]. The notice does not relate to procedural fines imposed under Article 61 of the HCA, to non-compliance of commitment fines imposed under Article 75 of the HCA, to fines imposed for failures to submit applications for authorisations under Article 79 of the HCA, or to enforcement fines according to Article 90.

4. Article 78 of the HCA deals with fines that are to be imposed on persons violating the provisions of the HCA. Paragraph (3) of Article 78 enumerates examples of the circumstances to be assessed for fine calculation – this list of examples is not exhaustive and other considerations may also be taken into account.² It is not necessary to assess each of the circumstances listed among the examples in every case, only if they appear among the relevant circumstances of the case in question³.

5. The notice sets out the basic principles of the GVH's fining policy and furthermore, it presents the process for imposing a fine and the considerations which must be taken into account. In addition, it also evaluates the content of the abovementioned considerations and clarifies their relative weight to one another. By publishing this Notice, the GVH aims to promote legal certainty and the transparency and predictability of its actions, thereby

¹ Inclusive of abuse under Article 7 of Act No. CLXIV of 2005 on Trade

² See the judgment of the Supreme Court No. Kfv.II.37.453/2009/5 (Vj-114/2007).

³ See the judgment of the Supreme Court No 7.K. 32.143/2004/7 (Vj-16/2004).

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, by having knowledge of 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.⁴ 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.

6. 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 exceptional cases, the method may not even be applicable due to the special features of the case. In such cases the GVH will depart from the contents of this Notice, the reasons for this being disclosed by the reasoning attached to the fine-setting in the explanatory part of the decision of the Competition Council.⁵

7. In case of restrictive agreements which directly or indirectly fix selling or purchase prices, share the market or allocate production or quotas (hereinafter: hard core cartels), the notice is applied pursuant to 78/A and 78/B of PURA (hereinafter: leniency policy).

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 elaborated upon or clarified.

II. Considerations in setting fines

9. The setting of the substantive fine imposed, according to point 3, is a multi-step process: the GVH first determines a basic amount by calculating the turnover of the offender and the turnover stemming from the prohibited market activities of the members of the association of undertakings on the relevant market (relevant turnover), which may then be modified in several steps to take account of additional considerations.

10. Within the framework of the correction, the GVH takes into account that the purpose of setting fines is the specific and general deterrence beyond the punishment. The amount of the fine imposed must be suitable to correct the infringing market practice of the undertaking and must also serve as a deterrent to prevent the undertaking in question, as well as other undertakings in similar positions, from committing further offences.⁶ This goal can be achieved through the setting a fine which places a considerable financial burden on the undertaking committing the competition law offence.⁷

⁴ Pursuant to the position of the Supreme Court, the court is entitled to analyse in the course of the review of the decision made at its discretion, whether the administrative authority has taken into account all the aspects of assessment; and has accounted for the acceptance or refusal of these aspects. If the breach of law cannot be determined, then the fine can not be changed, and the court is not entitled to review the decision. (See the judgment of the Supreme Court No Kf.V.39.361/2001/4. (Vj-30/2000.)) The Supreme Court stated in its other decision that during the application of the notice it is significant which criteria were taken into account to determine the fines. In case of applying the notice, the fine will be calculated pursuant to the criteria of the notice; thus in the course of the court review, the same criteria will also be evaluated by the court when it is determining whether they were sufficiently applied by the GVH.. (See the judgment of the Supreme Court No Kfv.IV.37.058/2009/12. (Vj-30/2000.))

⁵ See the III. Chapter of the decision of the Constitutional Court No 1392/B/2007. The GVH thus meets the requirement set by the Supreme Court, that in case of relevant circumstances arising from an individual case, the individual decision may be different from the notice. However, to support this differential a detailed reasoning must be provided at the same time which highlights the circumstances justifying the individualisation of the decision. (See the judgment of the Supreme Court No Kfv.IV.37.058/2009/12. (Vj-30/2000.))

⁶ See the judgment of the Supreme Court No Kfv.III.27.599/1999/3. (Vj-200/1992.), and the judgments of the Metropolitan Appeal Court No2.Kf.27.531/2007/6. (Vj-180/2006.) and 2.Kf.27.314/2007/9. (Vj-193/2001.).

⁷ See the judgment of the Supreme Court No Kf.III.27.599/1995/3. (Vj-200/1992.).

11. The GVH considers it important that any fine that is imposed is proportional to the infringing market practice. To this end, a fine that is imposed on an undertaking pursuant to the notice falls into line with the gravity of the infringement in question and the mitigating and aggravating factors, and not with the fines imposed on other undertakings involved in the infringement.⁸

12. The mitigating and aggravating factors that are taken into account when the fine is being set do not amend the amount of the fine which directly results from the application of the method set out by the notice, but are taken into account when the considerations described below are examined in the course of determining the basic amount. Aggravating factors work to increase the amount of the fine (e.g. pursuant to the increase of the scores concerning a specific factor), while mitigating factors work to decrease the amount of the fine. A lack of aggravating factors does not qualify as a mitigating factor.

II.1. Setting the basic amount

13. The GVH determines the basic amount based on

- a) the gravity of the infringement, and
- b) the attitude of the offender towards the infringement.

14. The GVH places greater importance on the gravity of the infringement, and therefore it is given a weight of 60 percent, while the undertaking's attitude towards the infringement is given a weight of 40 percent.

15. When calculating the basic amount, the GVH starts from 10% of the relevant turnover, which means that in the most severe case possible - in case of reaching a score of 100 - the fine would equal 10% of the relevant turnover. The basic amount is the sum of the scores received, which is first divided by 1000 and then multiplied by the amount of the relevant tariff.

16. The relevant turnover used in calculating the basic amount:

- a) generally, the relevant turnover is the net sales revenues of the undertaking on the market in question in the year of the infringement;
- b) if the duration of the infringement exceeds the 12 months time frame, then the relevant turnover is the net sales revenues for the total duration of the infringement.

17. In case of public procurement transactions, - depart from the general solution, described in points 15-16 - the amount of the relevant turnover is the triple of the value of the tender (which is typically equal to the value of the winning tender).

18. In lack of credible data, the relevant turnover of the undertaking is estimated by the GVH. The method of the estimation is set out in a separate decision of the GVH.

II.1.1. The gravity of the infringement

19. The first factor of the calculation is the gravity of the infringement, which is divided into the following two parts, each having equal importance: the threat to competition and the impact of the infringement on the market.

⁸ See the judgment of the Supreme Court No Kfv.II.37.291/2009/29. (Vj-45/2006.) and the judgment of the Metropolitan Appeal Court No 2.Kf.27.665/2008/3. (Vj-181/2006.).

A) Threat to competition (0-30 scores)

20. In assessing the threat to competition of the anticompetitive conduct or agreement in question, the degree to which the conduct or agreement lessens competition, or whether competition has been completely eliminated, is taken into consideration.

21. The most egregious violations are the hardcore cartels which are purely anticompetitive in nature, having as their aim the restriction of competition (as opposed to those where the restriction of competition is a secondary effect), and which at the same time create no efficiency or welfare gains. Typically such behaviour includes price fixing, the sharing of markets or customers, and bid rigging. In such cases the scores given by the GVH will be the highest possible.

22. Abuses of dominant positions which do not, or only very slightly, restrict competition by their very nature (i.e. exploitative abuses). In such cases the score given by the GVH will be the lowest possible.

23. In the framework of assessing the threat to competition, with regard to the circumstances of the case, the GVH considers whether the given conduct affects the most important and relevant dimensions of competition (e.g. competition in price, quality, innovation) or all of them.

B) Impact of the infringement on the market (0-30 scores)

24. The impact of the anticompetitive behaviour on the market is in closely connected to the position of the undertaking on the market and depends on its market share, and in case of market practices falling under Article 11 of the PURA or Article 101 of the Treaty, on the joint market shares of the undertakings concerned. The bigger the market share, the more severe the sanction will be. Though to a lesser extent, other factors are also taken into consideration, e.g. factors determining the market position of the undertaking (e.g. contestability of the market, whether the undertaking is a new market entrant), and the characteristics of the relevant market, and that of the products and customers (basic goods, vulnerable consumers, repercussion effects).

25. In assessing the effect of the conduct on the market, the GVH takes into account not only the effect that has already befallen in the market, but also the presumed effect, though less weight is attached to it. A further circumstance that the GVH takes into account is the extent to which the conduct (e.g. price fixing) has materialised.

II.1.2. Attitude to the infringement (+/- 40 scores)

26. The attitude of the undertaking to the infringement is a further aspect to the calculation of the basic amount. In the assessment of this factor the GVH considers possible active reparation, the imputation of the behaviour of the undertaking, other factors influencing the attitude to the infringement and the role of the undertaking in the anticompetitive agreement or abuse of joint dominance. In the context of this assessment, the points associated to the role of the violation may increase by 40 points, or – on the basis of titles B)-D) below – may decrease to the same extent.

A) Degree of imputability

27. As regards imputability it is important to emphasise that although the finding of an infringement in competition law is based on objective criteria, when calculating of amount of a fine pursuant to Article 78 of the HCA, the imputability of the behaviour in question is among the factors to be considered. A behaviour may be imputed if it differs from behaviour which

may generally be reasonably be expected and accepted in a society⁹. Imputability may be stated if the defendant was aware of the violating nature of its behaviour, or, this could have been expected. Stemming from the objective viewpoint, imputability increases the amount of a fine, at the same time the lack of imputability may not result in a decrease in the amount of a fine, i.e. when assessing the factor of imputability the GVH never calculates a negative score.

B) Role in the infringement

28. An assessment of the role of the defendant in the infringement is relevant in the cases of restrictive agreement and abuse of joint dominance. It frequently occurs that parties to an agreement – mainly in the case of hard-core cartels – play different roles, they may be organisers or leaders of the violation by contributing actively to the operation and maintenance of the agreement, while other undertakings may be in a defenceless situation and participate or stay in the restrictive agreement only due to the threat of the leading parties.

C) Active reparation and co-operation during the procedure

29. The GVH deems a behaviour as active reparation when the undertaking violating the law acknowledges the infringement and repairs or undertakes to repair the negative effects of the infringement. Active reparation may be made prior to the detection of the violation or after the commencement of the competition proceeding. If reparation is made prior to the detection of the violation, and thus before the initiation of the competition proceeding, the GVH looks upon this behaviour more favourably than if reparation is made after the initiation of the competition proceeding.

30. Furthermore, the GVH also considers the attitude of the undertaking during the proceeding, in particular its willingness to co-operate. In the framework of co-operation the supply of data and information does not qualify as a mitigating circumstance as it is a legal obligation, it therefore may not decrease the amount of the fine. Co-operation, which serves to foster the result of the detection may be considered as a mitigating circumstance (excluding the co-operation in the framework of the leniency policy, which is assessed in the course of fine calculation in a separate step, applying the rules on leniency policy).

D) External factors

31. In certain cases, when contemplating the measure of the sanction the GVH considers whether external factors could have contributed to the realisation of the violation. If there is an unclear feature of the violation, or if there is state influence (in particular, if there is a regulation or other state measure which gives the impression of an exemption from competition law), then these may qualify as external factors influencing the infringement. The GVH does not apply this latter approach to cases where the undertaking played a decisive role in the existence of the external factor, e.g. when the state influence was originally initiated by the undertaking itself, in order to hide the violation or to reduce the sanction.

II.2. Adjustment of the basic amount

32. Account is taken, once the basic amount has been calculated, of

- a) the severity of the infringement,
- b) the benefit obtained by the infringement,
- c) the deterrent effect,
- d) the maximum amount of the fine as defined in Article 78 PURA,

⁹ See the judgment of the Metropolitan Appeal Court No. 2.Kf. 27.798/2006/7 (Vj-74/2004).

- e) the application of the leniency policy (the co-operative behaviour of the infringing undertaking), and
- f) the payment difficulties of the undertaking.

II.2.1. Repeated infringement

33. The GVH imposes more severe sanctions on repeated infringements.

34. 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. (An example of such a repeated infringement may be a situation in which an undertaking participates in a market sharing agreement several times or a dominant undertaking attempts to restrict competition by preventing entry to its market, and to this end it first engages in restrictive tying, then in discriminative business practices with the same object or effect).

35. The GVH will also consider infringements committed by undertakings, other than those previously committing the same infringement, which are its predecessor¹⁰ or members of the same group of undertakings identified in the decision, to be repeated infringements.

36. The GVH is also allowed to establish the repeated infringement of the undertaking(s) under investigation if the infringement decision of the GVH, reviewed by the administrative court, has not yet been confirmed or entered into force.¹¹

37. In case of a repeated infringement – if the latter and the current conduct, the statement of facts and the evaluated circumstances show a significant similarity¹² – the amount of the fine calculated on the basis of the abovementioned facts will increase by a 100% (for instance, if the third very similar unlawful conduct is identified, the basic amount of the fine will increase threefold). In other cases the fine will increase by a lower rate, taking into consideration the degree of recidivism (e.g. the degree of similarity).

II.2.2. Benefit obtained by the infringement

38. Gains derived from the infringement can rarely be quantified. However, where this is possible, the fine imposed by the GVH is increased to three times the quantified gain, except if it would have exceeded that amount in the first place.

II.2.3. Deterrent effect

39. The GVH places a special emphasis on the deterrent effect of the fines; according to this, the basic amount of the fine –established in line with the principles laid down by this notice - can be increased regarding those undertakings that have a particularly significant turnover above the relevant net turnover relating to the value of the sales of goods or services to which the infringement relates, and thus, the fine imposed on the basis of the net turnover will not place a significant burden on their shoulders. However, the GVH will also present in these cases the amount of the fine calculated on the basis of the relevant turnover relating to the value of the sales of goods or services to which the infringement relates and the relating reasoning.

40. Within this factor, the GVH considers the special circumstance in which the relevant turnover of the undertaking-group realised in the preceding business year of the conclusion of the resolution decreases due to an organisational modification.

¹⁰ See the judgments of the Supreme Court No 2.Kf.27.676./2008/9. (Vj-127/2007.) and 2.Kf.27.146/2003/6. (Vj-5/2002.)

¹¹ See the judgment of the Supreme Court No Kfv.II.37.453/2009/5. (Vj-104/2005.) and the judgment of the Metropolitan Appeal Court 2.Kf. 27.531/2007/6. (Vj-180/2006.).

¹² See the judgment of the Supreme Court No Kfv.II.37.453/2009/5. (Vj-114/2007.).

II.2.4. The maximum amount of the fine

41. The fine-calculation steps will be followed by the application of the legal maximum of the amount of the fine described by PURA, according to which the maximum fine shall not exceed ten per cent of the net turnover, achieved in the business year preceding that in which the decision establishing the violation is reached, of the undertaking or, where the undertaking is member of a group of undertakings, which is identified in the decision, of that group of undertakings. Where no information which could be considered as authentic on the net turnover, achieved in the business year preceding that in which the decision establishing the violation is reached, of the undertakings or the group of undertakings is available, the last business year with an authentic annual closing shall be taken into consideration when determining the maximum fine. When calculating the maximum amount of the fine, the net turnover realised abroad shall also be taken into consideration, especially if the benefits gained by the infringement were realised by the foreign members of the undertaking-group and not by the Hungarian members.

II.2.5. Application of the leniency policy

42. The last step to be undertaken in the setting of fines is the application of the leniency policy pursuant to Articles 78/A and 78/B of PURA. The leniency policy may be applied in relation to agreements containing hard-core restrictions infringing the provisions of PURA. 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.

II.2.6. Taking into consideration a difficult economic situation, reduction of the fine

43. In exceptional cases, the GVH may, upon the request of the undertaking under investigation, take account - as a fine-reduction consideration - of the undertaking's inability to pay in a specific social and economic context- if, the inability cannot be alleviated by allowing the undertaking to pay in instalments. Fine reduction cannot be granted if it would be solely based on the unfavourable financial situation of the undertaking¹³ or its secession from the market concerned. A reduction can also not be granted solely on the basis that the undertaking has a credit loan.

44. Fine reduction can be granted if the proposed fine - due to the social and economic context -, will significantly eliminate the structural circumstances of the competition by resulting in a "failing firm" effect. This latter does not solely mean the termination of the undertaking or its secession from the market - as it is imaginable that new undertakings will enter into the market -, but the proposed fine could jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value¹⁴, which would generally result in the destruction of the undertakings relating to the failing undertaking in the chain of production and the significant increasing of unemployment.

45. The undertaking has to provide an objective, primarily documented and detailed evidence - reflecting its economic situation close to the date of the conclusion of the decision - in order to fulfil the requirements of obtaining fine reduction. However, before establishing its

¹³ See the judgment of the Supreme Court No 2.K.32.916/1995. (Vj-65/1992.).

¹⁴ See the Guidance on the methods applied by the GVH in merger control procedures, as well as the necessary information and the data requirements - General Methodology 3.d.; The relevant aspects when assessing the non-coordinative effects of concentrations 11.1.

decision, the GVH will also take into consideration the financial sheets of the undertaking from the preceding years and the possible future indicators relating to its economic situation.

II.2.7. Paying in instalments

46. In line with Article 74 (1) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services, if the type of obligation allows for it, the authority may authorise that the fine be paid in instalments.

47. In lack of the abovementioned exceptional and special economic circumstances resulting in fine reduction, it can be justified to obtain payment in instalments having regard to the difficult economic situation of the undertaking(s). Paying in instalments can be obtained if paying the amount of the fine in a lump sum would result – having regard to the current paying opportunities of the undertaking – in an extremely disproportionate burden on the undertaking(s) concerned. According to the provisions relating to the competition supervision proceedings, paying in instalments can only be granted if the undertaking requests it before the conclusion of the GVH's decision. As Article 44 of PURA excludes the application of Article 74 (2)-(5) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services, the GVH is not allowed to modify the decision after its conclusion, thus, the application for paying in instalments can only be submitted before the decision-making.

III. Application of the notice

48. This notice is applied by the GVH in procedures when the preliminary position pursuant to Article 73 of PURA still has not been sent to the parties.

Budapest, 25 January 2012.

dr. Juhász Miklós

President of the Hungarian Competition
Authority

dr. Tóth András

Vice President of the Hungarian
Competition Authority, Chair of the
Competition Council

Annex

Diagram 1: The process of setting fines

A. The gravity of the infringement	
A.a. Threat to competition	max. 30 scores
Type of infringement (e.g. hardcore cartel or other type of restriction/exploitative practice)	
Impact on the other relevant aspects of competition in a specific case	
A.b. Impact of the infringement on the market	max. 30 scores
Market share of the infringing undertaking	
Other considerations: <ul style="list-style-type: none"> • 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	min. -40- max. 40 scores
B.a. Imputability	
B.b. Role in the infringement (organiser-passive)	
B.c. Active reparation and cooperation	
B.d. External and other factors <ul style="list-style-type: none"> • Absence or different nature of prior GVH decisions • Influence of state measures 	
Total	max. 100 scores