

**Notice No 14/2017**  
**of the President of the Hungarian Competition Authority and the Chair of the Competition**  
**Council of the Hungarian Competition Authority**  
**on the application of the rules on leniency pursuant to Article 78/A of Act LVII of 1996 on**  
**the Prohibition of Unfair and Restrictive Market Practices \***

**I. Introduction**

1. Pursuant to Article 36 (6) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: Competition Act), the President of the Hungarian Competition Authority (in Hungarian: Gazdasági Versenyhivatal; hereinafter: GVH) and the Chair of the Competition Council may jointly issue notices describing the basic principles of the law enforcement practice of the GVH.
2. Such notices have no binding force; their function is to lay down the principles that the law enforcement agency follows when applying legal provisions, whilst also providing summaries of well-established past practice and outlining the practice that is to be followed in the future.
3. This notice provides a detailed explanation of the principles set out by legislation that the GVH follows when applying the leniency policy pursuant to Articles 78/A-78/D of the Competition Act in the course of its competition supervision proceedings. Such principles govern the scope of leniency, the types of applications that may be submitted in the framework of the leniency policy and the main rules of the proceedings to be conducted on the basis of these applications.
4. When framing the present Notice the GVH took into account the revised Model Leniency Programme of the European Competition Network.<sup>1</sup>

**II. The benefits of the leniency policy**

5. The fine imposed for a competition law infringement shall not exceed ten per cent of the net turnover, achieved in the business year preceding that in which the decision is adopted, of the undertaking or the group of undertakings which is specified in the decision and of whom the undertaking on which the fine is imposed is a member.
6. The competition council proceeding in the case shall grant immunity from the imposition of a fine, or reduce the amount of the fine to be imposed, in the case of undertakings that disclose to the GVH their participation in an infringement pursuant to Article 78/A (1) of the Competition Act (see paragraph 14).
7. Cartels are the most serious infringements of competition law, having the greatest detrimental impact on the functioning of the market economy and resulting in the most damage. Through the restriction or even elimination of competition they result in increased prices and/or a reduction of choice for consumers. By restricting competition, the

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*In case of discrepancies between the Hungarian and English versions of this Notice, the Hungarian version shall prevail.*

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

undertakings participating in the cartel cause considerable efficiency losses as they eliminate external pressures that would generate product development and the introduction of more efficient production technologies. In the long term, the conduct of the infringing undertakings may lead to a loss of competitiveness and reduced employment opportunities, which may have an adverse effect on the growth of the entire economy. Therefore, the GVH considers it a top priority to pursue action against cartels and price-fixing infringements.

8. As infringements falling under the scope of the leniency policy are by their nature secret, the concealment and destruction of evidence related to them is a natural consequence of this characteristic. Therefore, an important factor of a successful action against such an infringement is the cooperation of the undertakings involved in the infringement with the GVH, as this may enable evidence still in existence relating to the cartel to be obtained and the entire infringement to be retraced, despite the possible fragmented nature of such evidence. The leniency policy and the related rules set out in legislation aim to promote such cooperation by providing various benefits to those undertakings which choose to apply for leniency.
9. The participant of the infringement may be interested in cooperating with the GVH for a number of reasons. Factors motivating the undertaking to put an end to the cartel infringement may include: restoration of the integrity of the undertaking, reversion to the fair operation on the market, revival of the trust of businesses and consumers, avoidance of sanctions relating to the infringement, etc. However, ending the infringement is not in itself sufficient to achieve the majority of these aims, and disclosure of the infringement is necessary to fully bring about the desired cleansing. The possible imposition of severe administrative, criminal and civil legal consequences for the infringement, as well a significant reduction in the number of possibilities existing on the market, may seriously discourage even those undertakings which wish to achieve the above-mentioned aims and cleansing, from disclosing the infringement. To counter this dilemma, the leniency policy provides a mechanism through which these negative consequences can be avoided or decreased.
10. The leniency policy regulated by the Competition Act offers full immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed, for the infringing undertaking that cooperates with the competition authority in the course of its competition supervision proceeding.<sup>2</sup> In order to receive immunity from the imposition of a fine, the leniency applicant must contribute to the proceeding in a manner which proves determinant for the obtainment of a judicial warrant for an unannounced inspection pursuant to Article 65/A of the Competition Act (hereinafter: unannounced inspection), or if the proceeding has already been initiated, in return for a contribution that is the first to be filed and which proves to be determinant for proving the infringement under investigation in its entirety. The amount fine to be imposed may be reduced if the undertaking

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<sup>2</sup> For certain types of applications the Notice also indicates the denominations as they are used in the Model Leniency Programme. Immunity from fines ('immunity') and reduction of fines are collectively referred to as 'leniency' in the Model Leniency Programme.

participating in the cartel provides evidence constituting significant added value relative to the evidence already in the authority's possession. The extent of the fine reduction will reflect the degree to which the cooperation of the party, in terms of its quality and timing, has contributed to the establishment of the infringement. The undertaking that has been granted immunity from the imposition of a fine, or that has been granted a reduction of the amount of the fine to be imposed, must cooperate throughout the proceeding and must fulfil the additional requirements set out in the Competition Act.

11. Participation in an agreement restricting competition in a public procurement or a concession proceeding constitutes a crime and therefore gives rise to criminal liability. However, the employees and officials of the undertaking applying for leniency may be exempted from the imposition of a sanction or the sanction may be commuted unlimitedly. The explanatory notes<sup>3</sup> published on the website of the GVH provide more detailed information on the relationship between criminal liability and the leniency policy.
12. The undertaking which has been found to have infringed Article 11 of the Competition Act or Article 101 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) and on which a fine has been imposed may not act as a tenderer, candidate or subcontractor and may not take part in proving of ability within three years from the date of the finding of the infringement. The undertaking may also not take part in a given public procurement procedure if the contracting authority is able to prove that the tenderer has participated in a cartel relating to the given public procurement procedure. The infringing undertaking may be exempted from the sanctions relating to public procurement attached to competition law infringements provided that the conditions pursuant to the Act on Public Procurement are met.<sup>4</sup> However, these exclusions do not apply to an undertaking that has been granted immunity pursuant to the leniency policy or, in the case mentioned as second, which submitted an application giving rise to immunity from the imposition of a fine.
13. Civil claims arising from damages caused by infringements falling under the scope of the leniency policy may be directly enforced in court.<sup>5</sup> Generally, the undertakings participating in the infringement shall bear joint and several liability for the damages arising from the infringement, the payment of which may be demanded from any one of the participating infringers.<sup>6</sup> Nevertheless, in a lawsuit for a civil claim the undertaking that has been granted immunity from the imposition of a fine within the framework of the leniency policy is in a more favourable position than any other party that is liable for the same damages.<sup>7</sup> The undertaking that has been exempted from the payment of a fine shall only be joint and severally liable to pay compensation for the harm caused to its own direct or indirect purchasers or suppliers, and shall only be held liable to other injured persons if compensation may not be recovered wholly or partly from other infringers liable for the

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<sup>3</sup> [http://www.gvh.hu/en/for\\_professional\\_users/leniency\\_policy](http://www.gvh.hu/en/for_professional_users/leniency_policy) (in English, not full congruence).

<sup>4</sup> See Article 62 (1) (n) and (o), (5a) and Article 64 of Act CXLIII of 2015 on Public Procurements.

<sup>5</sup> See in particular Chapter XIV/A of the Competition Act

<sup>6</sup> The rules governing joint and several liability shall be applied with the derogations set out in Article 88/H and 88/I of the Competition Act.

<sup>7</sup> See Article 88/I of the Competition Act.

same infringement. Furthermore, if a jointly and severally liable infringer provided a service to the injured party exceeding its liability, it may demand the reimbursement thereof from an undertaking exempted under a leniency programme exclusively to the extent of the injury caused to the direct or indirect purchasers or suppliers of the undertaking exempted under the leniency programme.

### **III. Scope of the leniency policy**

14. The competition council proceeding in the case shall grant immunity from the imposition of a fine, or reduce the amount of the fine to be imposed, in the case of undertakings that disclose to the GVH agreements or concerted practices between competitors which infringe Article 11 of the Competition Act or Article 101 of the TFEU and which constitute a cartel or other agreement or concerted practice aimed directly or indirectly at fixing purchase or selling prices and their participation therein. A cartel is an agreement or concerted practice between competitors which has as its object the prevention, restriction or distortion of competition, in particular through the direct or indirect fixing of purchase or selling prices or other business terms and conditions, the limitation of production or distribution, the allocation of markets including bid-rigging and the restriction of imports or exports.<sup>8</sup>
15. On the grounds stated above, a leniency application may be submitted in the case of a cartel between competitors and other price fixing infringements between non-competitors. The latter infringement typically covers an infringement between undertakings in a vertical relationship aimed at the establishment of a fixed or a minimum resale price (resale price maintenance).
16. The expression of ‘between competitors’ refers to the fact<sup>9</sup> that in case of disclosing a cartel, the infringement revealed to the GVH must always contain a horizontal element. However, this does not preclude the submission of leniency applications relating to infringements that have both vertical and horizontal elements. Consequently, the scope of the leniency policy also encompasses horizontal cartels containing vertical elements<sup>10, 11</sup>.

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<sup>8</sup> See Article 13 (3) of the Competition Act.

<sup>9</sup> See paragraph 1 of the Guidelines of the Commission on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 11, 14.1.2011, p. 1.) pursuant to which co-operation is of a ‘horizontal nature’ if an agreement is entered into between actual or potential competitors.

<sup>10</sup> See Article 1(a) of Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102.23.4.2010, p.1.) pursuant to which vertical agreement means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

<sup>11</sup> One example might be the case where undertakings operating on the same level of the production or distribution chain participate in a cartel, while another might be the so-called hub&spoke type of infringement. In a hub&spoke cartel there is an indirect coordination and exchange of information between market players in a horizontal relationship with each other via the contribution of undertaking(s) in a vertical relationship with the former. In effect, the coordination aims at concerting the behaviours of the market players in a horizontal relationship with each other (e.g. the extent and timing of price increases, etc.) and therefore such conduct is of a horizontal nature.

17. The leniency policy of the GVH only covers purely vertical agreements that take the form of price fixing and horizontal restrictions that take the form of cartels. Having regard to the fact that the competition council proceeding in the case shall dismiss any leniency application that falls outside the scope of the leniency policy, the applicant must duly demonstrate at the time of the submission of the application that the infringement disclosed by him/her qualifies as an infringement pursuant to Article 78/A (1) of the Competition Act.

#### **IV. Conditions of immunity from a fine and the reduction of a fine**

##### **IV.1 Immunity from the imposition of a fine**

18. The GVH grants immunity from the imposition of a fine to the undertaking participating in the infringement if the undertaking is the first to submit an application for immunity and supply evidence
  - a) which enables the GVH to obtain a prior judicial warrant to carry out an unannounced inspection in connection with the infringement, provided that the GVH did not, at the time of the application, already have sufficient information to substantiate the judicial warrant for the unannounced inspection<sup>12</sup>, or
  - b) which enables the GVH to prove the infringement, provided that it did not, at the time when the evidence was provided, already have sufficient evidence to prove the infringement and none of the undertakings involved in the cartel meets the condition set out in point (a).<sup>13</sup> This means that in this case the leniency applicant must provide assistance to the GVH that is determinant for proving the infringement under investigation in its entirety; the applicant must submit evidence that is necessary and sufficient to prove the infringement.
19. It is important to emphasise that the GVH will generally consider written evidence originating from the period of time when the infringement was committed and directly relevant to the facts in question as having greater probative value than evidence subsequently established, and/or that with only indirect relevance, or requiring corroboration from other sources. The extent to which the authenticity of the evidence can be corroborated from other sources may also have an impact on the value of the evidence.
20. However, the foregoing does not exclude the possibility that an immunity application may exceptionally be successful in cases where the infringement was committed without producing any direct written evidence. In such cases the applicant must make a statement on the data of the infringement known to him/her and attach any indirect pieces of evidence confirming his/her statement, together with detailed explanations of the indirect pieces of evidence, to his/her application. (For further details on the content of the application see Section V.2.1.)

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<sup>12</sup> In the wording of the Model Leniency Programme ‘Type 1A (immunity) application’.

<sup>13</sup> In the wording of the Model Leniency Programme ‘Type 1B (immunity) application’.

21. Further conditions of the immunity from the imposition of a fine will be discussed in more detail in Section IV.3.

#### **IV.2 Reduction of a fine**

22. If there is already an immunity applicant in relation to a given case, or if the evidence submitted along with the application does not support a finding that the applicant should be granted immunity from the imposition of a fine, the GVH will reduce the amount of the fine to be imposed on the applicant in return for the provision of evidence which constitutes significant added value relative to the evidence already available to the GVH at time of the provision of such evidence.<sup>14</sup> The amount by which the fine may be reduced for the first undertaking fulfilling the above-mentioned conditions is 30-50%, for the second undertaking 20-30%, and for the third and subsequent undertakings up to 20%.
23. As regards to which evidence, in terms of its nature and quality, will actually meet the conditions set out in the previous paragraph will depend on the circumstances of the given case and the evidence available to the GVH.
24. The GVH compares the new pieces of evidence submitted by the applicant with the pieces of evidence already available to it; this means that the GVH estimates the significant added value of the evidence relative to the pieces of evidence stemming from investigative measures that have already been concluded or that have already been initiated (but not yet necessarily concluded) at the time when the evidence is provided to the GVH.<sup>15</sup>
25. Further conditions of a reduction of the fine will be discussed in more detail in Section IV.3.
26. The situation specified in Article 78/A (6) of the Competition Act represents a particular case of the reduction of a fine, dealing with the situation where an undertaking provides unambiguous evidence relating to a fact or circumstance in relation to the infringement which was not known to the GVH, and which would, to a large extent, increase the amount of the fine to be imposed.<sup>16</sup> In such a case, pursuant to Article 78/A (6) of the Competition Act, when determining the amount of the fine to be imposed the GVH shall disregard the aggravating evidence in respect of the undertaking that has provided the evidence in question.

#### **IV.3. Further conditions of the application of leniency**

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<sup>14</sup> In the wording of the Model Leniency Programme ‘Type 2 application’.

<sup>15</sup> If, for example, an undertaking submits a leniency application during the course of an unannounced inspection, the GVH estimates the significant added value relative to the documents acquired as a result of the unannounced inspection. Likewise, if the GVH has requested information from the parties and the applicant has submitted an application for a reduction of the fine after the date of issuance of the request for information but before they have responded to the request, the GVH considers both the answers that have already arrived and those that have yet to arrive as those available to it, and assesses the application on this basis.

<sup>16</sup> For example the applicant proves that the infringement affected a larger geographic territory or a wider circle of products than was known by the GVH or that the infringement lasted longer than assumed.

27. In addition to the conditions set out above, in order for the applicant to be granted immunity from the imposition of a fine, or a reduction in the amount of the fine to be imposed, the following conditions must be fulfilled:
- a) According to the first condition the applicant must end its involvement in the infringement immediately following the submission of its application. As an exception to this general rule, if the GVH is of the opinion that the undertaking's continued involvement in the infringement is necessary to ensure the success of a planned unannounced inspection, the GVH shall inform the applicant of its view via an injunction. The applicant's continued involvement in the infringement is disregarded by the GVH to the extent, and in the manner, that is necessary for ensuring the success of the unannounced inspection, so far as it is in accordance with the terms outlined in the injunction, including the limit set therein. The GVH takes such measures exclusively to ensure the success of the unannounced inspection; consequently, the undertaking cannot be obliged to continue its involvement in the infringement in order to collect further evidence.
  - b) A further condition is that the applicant must cooperate with the GVH in good faith, in full and continuously throughout the competition supervision proceeding. In the framework of the cooperation obligation, the GVH expects the applicant in particular
    - ba)* to provide the GVH in due time with all relevant information and evidence relating to the subject matter that comes into his/her possession or under his/her control;
    - bb)* to remain at the disposal of the GVH to reply promptly to any request for information that may contribute to the establishment of facts proving the infringement;
    - bc)* to take every measure that can reasonably be expected from him/her to make current and, to the extent possible, former employees and executive officers available for interviews with the GVH;
    - bd)* not to destroy, falsify or conceal information or evidence in respect of the infringement;
    - be)* not to behave maliciously even prior to the application.<sup>17</sup>
  - c) As a third condition the Competition Act prescribes that the undertaking must not disclose in any way the fact that it has submitted a leniency application or the content of evidence submitted in this context, excluding similar applications submitted to other competition authorities. The undertaking is only exempted from this obligation of confidentiality if the GVH gives its express consent; the GVH shall not refuse its

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<sup>17</sup> The cooperation obligation imposed on the undertaking binds the applicant in a narrow sense even before it has submitted its application. This means, for example, that the applicant must not destroy evidence immediately before submitting its application, nor must it disclose the fact that it intends to submit an application to the other cartel participants before doing so. Furthermore, the GVH considers the cooperation requirement to be unfulfilled if the undertakings participating in the infringement "share" the pieces of evidence among themselves, thereby allocating the types of applications that will be submitted by each of them. In all, according to the interpretation of the GVH forming a "cartel" in respect of the leniency application constitutes a breach of the cooperation obligation.

consent to granting access to the information concerned where this is essential pursuant to a statutory provision or an obligation imposed by an authority.

- d) The Competition Act prescribes, as a fourth condition in respect of the granting of immunity from the imposition of a fine, that an undertaking which was actively involved in coercing other undertakings to participate in the infringement shall not be eligible for immunity from the imposition of a fine. Nevertheless, such an undertaking is not excluded from benefiting from the reduction of a fine.

## **V. The leniency application and the related procedure**

### **V.1. Submission of the application**

- 28. In the framework of the leniency policy the following applications may be submitted:
  - a) application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed,
  - b) non-definitive application for immunity which aims at the granting of immunity from the imposition of a fine pursuant to Article 78/A (2) (a) of the Competition Act but which contains less data than the complete application [Article 78/B(3) of the Competition Act]<sup>18</sup>, or
  - c) non-definitive preliminary application which is submitted simultaneously with the submission of a leniency application to the European Commission [Article 78/B(4) of the Competition Act]<sup>19</sup>.
- 29. The application for a reduction of the amount of the fine to be imposed may be submitted at any stage of the competition supervision proceeding; however, in the case of an application submitted after the day immediately preceding the date of service of the preliminary position or the report of the case handler pursuant to Article 73 of the Competition Act, or the starting date for the access to the file in respect of any of the parties, whichever occurs earlier, the fine may only be reduced if the undertaking presents unambiguous evidence relating to facts or circumstances that have a substantial impact on the assessment of the infringement and which was not previously known to the GVH.
- 30. The non-definitive preliminary application pursuant to Article 78/B (4) of the Competition Act must be submitted simultaneously with the application to the European Commission for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed.
- 31. Independent undertakings shall not jointly submit an application for immunity from, or a reduction of the fine, and they may not act as each other's representatives in connection with the submission of such application. The requirement that the undertakings have to be independent from each other excludes an undertaking participating in a cartel from submitting a leniency application together with other undertaking(s) which do(es) not

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<sup>18</sup> In the wording of the Model Leniency Programme 'marker application'.

<sup>19</sup> In the wording of the Model Leniency Programme 'summary application'.

belong to the same group of undertakings at the time of the submission of the application (for example the former parent company).

32. Undertakings belonging to the same group of undertakings may jointly submit a leniency application. This approach ensures that each undertaking that belongs to the same group of undertakings and that has participated in, or that can be held liable for the detected infringement, may obtain the same leniency status.
33. An undertaking controlling a group of undertakings<sup>20</sup> may submit an application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed, in respect of undertakings under its control without any express authorisation. In all other cases an undertaking belonging to the same group of undertakings must obtain express authorisation from the undertakings which are not independent from it if it intends to submit a leniency application also on their behalf. If the application applies to several members of a group of undertakings, a detailed reasoning in accordance with the aspects set out in Article 15 of the Competition Act must be provided as to why at the time of the submission of the application the undertakings listed in the application belong to the same group of undertakings; furthermore, it must indicate why the individual members of the group of undertakings are submitting the leniency application and the part they played in the actualisation of the infringement.<sup>21</sup>
34. Each undertaking that can be held liable for the infringement falling under the scope of the leniency policy may submit a leniency application. Therefore, for example, in the case of the so called hub&spoke cartels the GVH treats and assesses the leniency applications equally irrespective of whether they were submitted by an undertakings in the role of the ‘hub’ (the intermediary) or the ‘spoke’ (the competitor undertaking). Likewise, an undertaking which has played a specific role in a cartel, and which may as a result be held liable according to the principle established in the AC-Treuhand case,<sup>22</sup> may still apply for leniency in respect of the cartel it has participated in. At the same time, only undertakings within the meaning of Article 11 of the Competition Act may submit a leniency application; consequently, an association of undertakings cannot be a leniency applicant even in the case of infringements falling under the scope of the leniency policy.
35. The leniency application may be submitted through the legal representative or proxy of the undertaking. An anonymous application cannot be submitted. The power of representation

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<sup>20</sup> See Article 15 of the Competition Act.

<sup>21</sup> Often in the practice of the GVH it is not only the undertaking directly participating in the infringement that submits a leniency application but also its parent company. In such a case, the undertaking that actually took part in the realisation of the infringement must be indicated and a reason must be given as to why (for example because of possible vicarious liability) the member of the group of undertakings not having participated in the infringement is submitting the leniency application.

<sup>22</sup> If an undertaking has actively and intentionally contributed to the implementation of a cartel among the other parties under investigation (for example by assisting with the organisation of cartel meetings or the concealment of them, collecting data necessary for the implementation or the monitoring of the cartel and supplying such data to the cartel participants, etc.), it can be found liable for the cartel activity, irrespective of whether it operates on the same market as the undertakings participating in the cartel. This is known as AC-Treuhand liability, which is discussed in detail in the AC-Treuhand judgment (Case C-194/14 P – AC-Treuhand v Commission) of the Court of Justice of the European Union.

of the person submitting the application on behalf of the undertaking shall duly be verified simultaneously with the submission of the application.

36. The application shall be submitted in a form that fully complies with the legislation in force. If the applicant intends to submit its application orally, the GVH takes minutes or makes a sound recording of the application and statement made by the legal representative of the undertaking present in person or the proxy of the undertaking.
37. An application in writing may be submitted in person or via post.
38. Out of the means of communication set out in Article 53/A of the Competition Act, the GVH prefers the service of the document in person.
39. The application may be submitted exclusively in Hungarian, with the exception of the non-definitive preliminary application pursuant to Article 78/B (4) of the Competition Act,<sup>23</sup> which may also be submitted in English. In the case of evidence in connection with the application that has not been prepared in Hungarian, the Hungarian translation of such evidence must be enclosed with the exception of documents prepared in English, which can be submitted in their language of origin; however, in the course of the competition supervision proceeding the GVH may oblige the applicant to also submit the translation of such documents.

## **V.2. Content of the application**

### *V.2.1. General rules*

40. As a general rule, an application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed, may be submitted with the content set out in Article 78/B (1) of the Competition Act. Accordingly, a leniency application must contain
  - a) the name and the registered seat of the undertaking,
  - b) a detailed description of the conduct (infringement) indicated by the applicant to be covered by Article 78/A(1) of the Competition Act, including
    - ba)* its nature,
    - bb)* duration,
    - bc)* the goods and the geographic area affected,
    - bd)* the identification of all the undertakings participating in the alleged infringement at the time of the submission of the application, and of those that have previously participated in the alleged infringement (including the names and the addresses of undertakings involved in the infringement within the same group of undertakings),<sup>24</sup>

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<sup>23</sup> In the wording of the Model Leniency Programme ‘summary application marker’.

<sup>24</sup> Including for instance, the aim of the infringing conduct, activities undertaken in the framework thereof, the operation of the agreement, estimated value of the relevant market volume affected, as well as dates, locations, agendas and participants of meetings constituting the infringement.

- c) the States which are parties to the Agreement on the European Economic Area where pieces of evidence relating to the infringement are likely to be found, and
  - d) the names of the competition authorities of other Member States to which the applicant has submitted, or intends to submit, an application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed.
41. An explicit acknowledgment of the infringement must be contained in the leniency application in the framework of the detailed description of the infringement.
  42. All the evidence relating to the infringement and available to the applicant at the time of the submission of the application must be attached to the application. (See also Sections V.2.2. and V.2.3. of this Notice.) In this regard, in particular in the case of an application for immunity submitted in line with Article 78/A (2) (a) of the Competition Act, the names, positions, office addresses, locations and, where necessary, the home addresses, must be indicated of all the private individuals who, to the applicant's knowledge, are or have been involved in the alleged infringement, including those individuals who have been involved on the applicant's behalf or on the undertaking's behalf, and who may be in possession of evidence related to the alleged infringement, or who may be able to provide evidence relating to the infringement.
  43. In accordance with paragraph 19 of this Notice, the leniency application is most likely to be successful if the applicant submits contemporaneous evidence to the infringement in direct support of the application. However, in addition, evidence indirectly substantiating the infringement (e.g. dial lists, invoices issued in the course of meetings, SMS messages, etc.), as well as explanations in connection with the pieces of evidence provided by the applicant, may play a crucial role when proving the infringement and must therefore also be placed at the disposal of the GVH.
  44. In the case of horizontal infringements containing vertical elements, the submission of pieces of evidence relating to horizontal infringements among undertakings is of particular importance.<sup>25</sup>
  45. If the infringement has been committed without direct written evidence, the applicant must submit all evidence indirectly substantiating the infringement as well as acknowledge the infringement and describe it in detail. In such a case, it is appropriate to supplement the statements of the undertaking by statements of former or current employees directly participating in the infringement.<sup>26</sup> The success of the leniency application may be substantially increased if the applicant reveals in detail all of the circumstances of the infringement committed (e.g. if the applicant gives reasons as to why the infringement has been committed; the market conditions under which the infringement has emerged as well as its impact on market conditions; signs of relationships among the parties going beyond the customary business relationships of cartelists).

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<sup>25</sup> For instance, in the case of hub and spoke type infringements, information relating to the role of the "spoke", namely referring to an indirect information exchange among undertakings in a horizontal relationship, is of particular relevance.

<sup>26</sup> This can be of essential value in cases when the infringing conduct of individuals participating in the infringement may only be proven on the basis of oral statements.

46. Written evidence must be provided to the GVH as sequentially numbered<sup>27</sup> attachments to the leniency application and all the evidence must be explained as follows:
- (a) the applicant must indicate the type of infringement or part thereof that can be substantiated with the evidence provided as well as the source of the evidence;<sup>28</sup>
  - (b) the applicant must explain which of the facts may be proven by the given piece of evidence;<sup>29</sup>
  - (c) in the case of evidence contemporaneous to the infringement the applicant must explain in detail how the information contained in the evidence concerned may be interpreted (if this is not entirely clear on the basis of the language of the evidence);<sup>30</sup>
  - (d) if pieces of evidence are closely interlinked with each other, these links should also be shown in the explanations attached to the pieces of evidence;<sup>31</sup>
  - (e) in the case of handwritten documents a typed version of all of the relevant parts of the documents must be attached to the application in order to facilitate the availability for use of the evidence concerned;
  - (f) in the case of multi-page documents in which unrelated information may also be found (e.g. notes, diary planner, etc.) those parts which are considered as evidence relating to the infringement must be expressly indicated by the applicant.<sup>32</sup>
47. The submission of unrelated documents and the resubmission of the same pieces of evidence should reasonably be avoided unless it represents significant added value.<sup>33</sup>
48. The applicant may also submit evidence without the above-specified explanatory notes but in such cases explanations must also be attached in the shortest time possible. It should be

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<sup>27</sup> Both paper-based and electronic documentary evidence must be sequentially numbered. In the case of written evidence submitted via a data carrier, the different pieces of evidence stored therein must be numbered and indicated in their respective file names.

<sup>28</sup> For instance, if the applicant has also entered into a number of different cartel agreements with several of its competitors, the application must clearly indicate which cartel agreement the evidence concerned relates to; additionally, it must indicate if the evidence is contemporaneous to the infringement or if a document has been compiled only in preparation for the application.

<sup>29</sup> For instance, in the case of a table or other summary compiled in preparation for the application it must be expressly stated how the data contained in the prepared written evidence substantiate the infringement (e.g. the document contains data with regard to the agreement corresponding to actual market conditions, etc.).

<sup>30</sup> For instance if figures or abbreviations contained in the evidence are ambiguous, or if statements therein are open to interpretation, these should be accompanied by appropriate notes or explanations.

<sup>31</sup> For instance, any links/relationships that can be found in correspondence relating to the organisation of cartel meetings, diary entries relating to meetings, invoices proving that meetings have taken place, contemporaneous notes taken at the meetings, as well as statements made on discussions that took place at the meetings, must be indicated in explanations attached to the evidence concerned.

<sup>32</sup> All suitable means of identifying the relevant parts of the documents are acceptable. For instance, in the application the applicant may precisely indicate or cite which pages and parts of the documents are relevant or the applicant may also submit the original entire documents and copy or highlight the relevant parts thereof.

<sup>33</sup> The resubmission of documents may represent significant added value if the applicant submits the documents in chronological order or provides detailed explanations in connection with the pieces of evidence.

borne in mind that if only the evidence submitted together with the subsequently attached explanations represents significant added value, then when ranking the application, the later submission date will be considered.

49. It is not possible to remedy any deficiencies found in a filed leniency application at a later stage; consequently, a corrected or supplemented application will be deemed to be a new application that has been submitted at a later date.

#### *V.2.2. Non-definitive application for immunity*

50. A non-definitive application for immunity pursuant to Article 78/B (3) of the Competition Act may only be submitted if the GVH does not already have sufficient information on the infringement, or as a minimum requirement, if it does not already have sufficient evidence to obtain a prior judicial warrant to carry out an unannounced inspection [this case is set out in Article 78/A(2) (a) of the Competition Act]. It must be stressed that a non-definitive application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed as set out in Article 78/A(2) (b) of the Competition Act may not be submitted.
51. The ultimate purpose of this type of application is to enable the cooperating undertaking to finalise its internal investigative procedure with a view to disclosing the infringement already within the framework of the leniency policy. If the undertaking does not yet have sufficient information or evidence in order to file an application for immunity, but it wishes to demonstrate that it possesses the necessary intention to cooperate in order to be able to qualify for leniency and to disclose the infringement before the competition authority, it may ensure its ranking for immunity by providing all the minimum information at its disposal. The GVH will then specify a certain time limit by which the undertaking must supplement its application. As the applicant may supplement its application within this specified time limit, the submission date of the non-definitive application for immunity will be deemed by the GVH as the submission date of the further pieces of supplementary evidence.
52. A non-definitive application for immunity must contain those elements listed below in paragraph 40 of this Notice as well as a justification for the delayed provision of evidence and an express commitment by the applicant that it will supplement the application with evidence at a later date.
53. No application for justification may be submitted in the case of a failure to observe the specified time limit for the non-definitive application for immunity.

#### *V.2.3. Non-definitive preliminary application*

54. In relation to an infringement in respect of which, pursuant to its Notice on cooperation within the Network of Competition Authorities<sup>34</sup>, the European Commission is particularly well placed to conduct the proceeding, the applicant may submit, simultaneously with an application to the European Commission for immunity from the imposition of a fine, or a

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<sup>34</sup> OJ C 101, 27.04.2004, p. 43-53.

reduction of the amount of the fine to be imposed, an application for the same to the GVH pursuant to Article 78/B (4) of the Competition Act. In such a case, the application is not accompanied by all the evidence available but, if the GVH initiates a proceeding for the infringement, the applicant must supplement the application within the time limit specified on the invitation of the GVH and provide all the evidence available to it.

55. The non-definitive preliminary application may be submitted both for immunity from the imposition of a fine, and a reduction of the amount of the fine to be imposed.
56. The non-definitive preliminary application may also be submitted in English.
57. It follows from the essence of this legal instrument that the submission of the non-definitive preliminary application implies that the applicant has simultaneously filed an application with the European Commission. Nevertheless, it should be emphasised that the system of leniency policies of European competition authorities is set up in such a way that a leniency application submitted to one competition authority is not considered as an application submitted to another competition authority, since leniency policies are independent legal instruments.<sup>35</sup> Therefore, the decision of the competition council proceeding in the case granting conditional immunity is only binding upon the GVH and will not be taken into account by other competition authorities. Likewise, the GVH assesses the application exclusively on the basis of information submitted to it. Thus, if the undertaking discloses an infringement before the GVH which may also be of concern in another Member State, it is reasonable to file a leniency application simultaneously with the GVH as well as with the other competition authority concerned.
58. If the GVH initiates a competition supervision proceeding for the infringement at a later stage, the applicant, on the invitation of the GVH, must supplement the application as a precondition for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed, within the time limit specified and provide all the evidence available to it.
59. If the non-definitive application is supplemented within the prescribed time limit by the applicant undertaking by providing all the necessary evidence, the date of receipt of the non-definitive application shall be considered as the date of receipt of the application in terms of its suitability for qualification for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed.
60. No application for justification may be submitted in the case of a failure to observe the specified time limit for the non-definitive preliminary application.

### **V.3. Withdrawal of the application**

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<sup>35</sup> See paragraph 38 of the Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101 27.4.2004, p. 43-53.) and judgment of the Court of Justice in case C-428/14, DHL Express (Italy) Srl vs DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del Mercato.

61. An application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed, cannot be withdrawn. The only exception to this rule concerns an application aimed at disclosing an infringement that the GVH is not yet aware of [application pursuant to Article 78/A (2) (a) of the Competition Act]. This application may be withdrawn:
  - a) before it has been assessed pursuant to Article 78/C of the Competition Act (hereinafter: conditional resolution) or
  - b) in the event of refusal, within eight days from the service of the injunction of the competition council proceeding in the case containing such refusal.
62. If the application is withdrawn, the application as well as any means of proof submitted by the applicant, together with any copies thereof must be returned to the applicant by the GVH. This does not, however, preclude the GVH from making use of its investigative powers.

#### **V.4. Procedure on the basis of the application (assessment of the leniency application)**

##### V.4.1. Provision of preliminary information to potential leniency applicants

63. After the initiation of the competition supervision proceeding, with respect to a leniency application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed pursuant to 78/A (2) b) of the Competition Act, the party may, at the oral hearing initiated by him or her as a potential leniency applicant, in the case the case handler deems it appropriate, be informed of the following:
  - a) the legal institution of leniency,
  - b) in case of a leniency application submitted pursuant to 78/A (2) a) of the Competition Act, if the competition council has already granted conditional immunity from the imposition of a fine for an undertaking in the given case, then the fact of it,
  - c) the fact the an immunity application has been submitted in the given case,
  - d) that a potential leniency applicant is bound by confidentiality obligation in relation to what has been said at the oral hearing, the breach of which the GVH considers to be aimed at preventing the establishment of the facts of the case, thus it may result in the imposition of a procedural fine (in the case of an attorney at law it may generate a signal from the GVH to the bar association).

The case handler shall prepare a minutes on the oral hearing and on the information provided to the potential leniency applicant, in which it shall record the fact of the warning in the meaning of the above subparagraph (d) and the acknowledgement thereof.

#### V.4.2. General rules in relation to the submission of a leniency application

64. A record of the receipt of the application received by the GVH will be provided and an assessment of the application will be carried out in line with the procedure set out in Article 78/C of the Competition Act.
65. The case handler prepares a minutes on the receipt of the application. The minutes contains the date of receipt of the application (year, month, day, hour, minute), as well as, exclusively in case of the application that was the first to be submitted for immunity from the imposition of a fine, the fact that the undertaking was the first to submit an application for immunity from a fine. At the request of the applicant, a duplicate of the minutes will be drawn up and handed over to the applicant. In case the application is recorded in minutes, the facts will be contained in the minutes. At the time of the submission of the application the case handler does not inform the applicant of the potential success of the application and merely records its receipt. Prior to receiving the application, the GVH may, at the request of the potential applicant, if the case handler deems it appropriate inform the potential applicant of the following:
- a) whether an application for immunity pursuant to Article 78/A (2) a) or b) of the Competition Act has already been submitted in the case concerned;
  - b) whether an application for fine reduction pursuant to Article 78/A (2) a) of the Competition Act has already been submitted in respect of which the competition council proceeding in the case granted conditional immunity from the imposition of a fine,
  - c) the obligation of confidentiality set out in paragraph 63 (d) of this notice.

The case handler shall prepare a minutes on the information provided to the potential leniency applicant, in which it shall record the acknowledgement of the confidentiality obligation set out in the above (c) subparagraph.

66. The case handler must examine, and give his/her opinion about the application and submit all the information available to the GVH relating to the infringement to the competition council proceeding in the case.
67. Once the case handler has referred the application to the competition council proceeding in the case, the competition council must adopt a decision on the application.
68. In the case of an application submitted pursuant to Article 78/A (2) (a) of the Competition Act, the competition council proceeding in the case will adopt its conditional resolution without delay, taking into account the time necessary for the assessment of the application. This means that the competition council proceeding in the case will adopt its conditional resolution at the latest prior to the launching of the competition supervisory proceeding. In the case of an application submitted pursuant to Article 78/A (2) (b) of the Competition Act, the competition council proceeding in the case will adopt its resolution at the latest by the time the preliminary position\*\* is sent to the parties.

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\*\* *Corresponds with the 'Statement of Objections' in the proceeding of the European Commission.*

69. No application for justification may be submitted against the order regarding the conditional resolution, of which only the applicant will be informed.
70. If the undertaking presents its application orally, it can request that the competition council proceeding in the case notifies it of the decision it has adopted orally. In this case the fact and date of the notification will be noted by the GVH on the resolution that is incorporated in the minutes. The signature of the representative of the applicant must appear on the resolution certifying the fact of notification.

#### V.4.2. Application for immunity from the imposition of a fine

71. The competition council proceeding in the case must assess applications for immunity from the imposition of fines in the order of their receipt, which means that it will not assess a new application until an injunction has been adopted on a previously submitted application with regard to the same infringement and the applicant has been informed of the decision.
72. The competition council proceeding in the case may adopt two different types of decisions on applications for immunity from the imposition of fines.
  - a) Where an application for immunity from the imposition of a fine meets the conditions set out in Article 78/A (2) of the Competition Act, the competition council proceeding in the case shall establish that it provides grounds for being granted conditional immunity from the imposition of a fine. In this case the competition council proceeding in the case adopts an injunction stating that the applicant will be granted immunity in the resolution closing the case on its merits if the undertaking meets the conditions set out in Article 78/A (7) and the ground for refusal pursuant to Article 78/A (8) of the Competition Act does not apply.
  - b) The competition council proceeding in the case shall dismiss, by way of an injunction, a submitted application if it does not provide grounds for being granted immunity from the imposition of a fine. In such a case the application shall be assessed as an application for a reduction of the amount of the fine to be imposed, except where it has been withdrawn by the applicant pursuant to Article 78/B(7) of the Competition Act.
73. At the time of the termination of the competition supervision proceeding the competition council proceeding in the case assesses whether the applicant meets the conditions set out in Article 78/A (7) of the Competition Act [see paragraphs 27 (a)-(c) of this Notice], as well as whether the ground for refusal pursuant to Article 78/A (8) of the Competition Act applies [see paragraph 27 (d) of this Notice], and if the above conditions are fulfilled grants immunity from the imposition of a fine in its resolution on the merits of the case. If the applicant does not meet the conditions he/she may not benefit from any favourable treatment under the leniency policy. This, however, does not prevent the competition council proceeding in the case from taking into account the cooperative behaviour of the applicant in the course of the leniency policy as a mitigating factor when imposing fines thereon.

#### V.4.3. Non-definitive application for immunity from a fine

74. If the applicant supplements its non-definitive application for immunity from the imposition of a fine so that it amounts to a complete application within the time limit specified, it must be considered as an application submitted at the time of the submission of the non-definitive application for immunity from the imposition of a fine. Consequently, the standard rules relating to a complete application for immunity from the imposition of a fine are applicable to the assessment of the supplemented application for immunity from the imposition of a fine.
75. Since the GVH assesses applications for immunity from the imposition of fines in the order of their receipt, if it receives new applications within the time limit specified for the supplementation of a non-definitive application for immunity from the imposition of a fine, the GVH will not assess the later submitted applications as long as the time limit set for the supplementation has not elapsed or before it has adopted a resolution on the supplemented complete application and the applicant has been notified thereof.

#### V.4.4. Application for a reduction of the amount of the fine to be imposed

76. A reduction of the amount of the fine to be imposed on the basis of a leniency application may take place in two ways:
- (a) ex officio legal reclassification of an application submitted for immunity from the imposition of the fine,
  - (b) submission of an application for a reduction of the amount of the fine to be imposed.
77. In such cases, the timeframe necessary to assess the application may take longer taking into account the fact that when assessing the application for a reduction of the fine the competition council proceeding in the case may assess the presence of the significant added value of the piece of evidence submitted by the applicant relative to the evidence available to the GVH at the time of submission. The above careful consideration may only be made in the light of the legal assessment of the conduct by the GVH.
78. The competition council proceeding in the case may deliver two different types of decisions:
- (a) if the application for the reduction of the fine meets the conditions set out in Article 78/A (3) of the Competition Act, the competition council proceeding in the case must establish that it provides grounds for reducing the fine to be imposed on the applicant; in this case the competition council proceeding in the case adopts an injunction stating that the applicant will be granted a reduction of the fine in the resolution closing the case on its merits, if the applicant meets the conditions set out in Article 78/A (7) of the Competition Act. In its injunction the competition council proceeding in the case refers to the applicable point of Article 78/A (5) of the Competition Act on the basis of which the fine may be reduced;
  - (b) The competition council proceeding in the case shall dismiss, by way of an injunction, the submitted application if it does not meet the legal conditions.

79. When assessing the leniency applications received, the competition council proceeding in the case takes into account the order of their receipt; however, it does not necessarily assesses them in the order of their receipt.
80. At the time of the termination of the competition supervision proceeding the competition council proceeding in the case assesses whether the applicant meets the conditions set out in Article 78/A (7) of the Competition Act [see paragraph 27 (a)-(c) of this Notice] and decides on the exact level of the reduction of the fine in its substantive decision. If the applicant does not meet the conditions he/she may not benefit from any favourable treatment under the leniency policy. This, however, does not prevent the competition council proceeding in the case from taking into account the cooperative behaviour of the applicant in the framework of the leniency policy as a mitigating factor when imposing fines thereon.

#### V.4.5. Non-definitive preliminary application

81. If the GVH initiates a competition supervision proceeding for the infringing conduct concerned, the non-definitive preliminary application will be assessed. In this case, depending on the content of the supplemented complete application and submission date of the preliminary application, the rules relating to an application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed apply accordingly.

#### **V.5. Use of the application and the evidence attached thereto**

82. The application for immunity from the imposition of a fine pursuant to Article 78/A (2) (a) of the Competition Act and any means of proof attached thereto, or supplied by the applicant in connection with such application before the conditional resolution of the competition council proceeding in the case, shall be used exclusively to assess the application or to apply for a judicial warrant pursuant to Article 65/A of the Competition Act; and access to them shall be granted exclusively to the case handler appointed to the case, the competition council proceeding in the case and the court. The application for immunity from the imposition of a fine, or a reduction of the fine itself, the voluntary statement of the applicant undertaking made specifically relating to the application ('leniency statement'), and the fact that an application has been submitted and the nature of the evidence submitted in relation to such application shall be treated as restricted access data until the time when the parties are entitled to access to the file pursuant to Article 55 (5) of the Competition Act. After this point in time the party may exclusively have access to the application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed and the leniency statement with the proviso that no copies shall be made of the leniency application and the leniency statement; only notes may be taken thereof. Third persons shall not have access neither to the application for immunity from the imposition of a fine, or a reduction of the amount of the fine to be imposed, nor to the leniency statement; they shall not make copies or take notes.

83. For the application for immunity from the imposition of a fine pursuant to Article 78/A (2) (b), for the application for a reduction of the amount of the fine to be imposed, and for the use of pieces of evidence attached to them, the rules on the withdrawal of an application for immunity from the imposition of a fine pursuant to Article 78/A (2) (a) are not applicable. This means that, the GVH may use the documents submitted together with the application from the submission date (in the case of a dismissal of the application for immunity from the imposition of a fine and from the point in time given for assessing the application as an application for a reduction of the amount of the fine to be imposed) in order to prove the infringement and the application and its attachments will not be returned to the applicant, even if the application is dismissed.

## **VI. Miscellaneous**

84. Applications for immunity from the imposition of fines may be submitted to the Cartel Detection Section of the GVH.
85. Further information regarding the rules on the application of the leniency policy and the submission of leniency applications may be requested from the Cartel Detection Section of the GVH.
86. The Cartel Detection Section of the GVH can be contacted at:

*Address:* 1054 Budapest, Alkotmány u. 5.

*Postal address:* 1391 Budapest 62. Pf.: 211

*Phone:* 472-8872, 472-8876

*Fax:* 472-8905

*Email:* [kartell@gvh.hu](mailto:kartell@gvh.hu)

87. In order to facilitate the detection of cartels and to reply to questions about cartels, the GVH operates a closed and protected chat (messaging) system<sup>36</sup> that enables persons to share their special knowledge with the employees of the Cartel Detection Section of the GVH. All types of questions relating to cartels (including cartel agreements and the leniency policy) will be answered.

## **VII. Application of this Notice**

88. This Notice is applied by the GVH in case of leniency applications submitted on or after 1 January 2018.

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<sup>36</sup> <https://www.gvh.hu/kartellchat>.

89. Paragraph 88 of the Notice No 2/2016 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority is replaced by the following:

„88. This Notice is applied by the GVH as of 15 January 2017, in case of leniency applications submitted before 1 January 2018.”

Budapest, 19 December 2017

Miklós JUHÁSZ

President of the GVH

András TÓTH

Chair of the Competition Council of  
the GVH