

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON LENIENCY FOR SUBSEQUENT APPLICANTS

-- Hungary --

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The attached document is submitted to Working Party No. 3 FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 23 October 2012.

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ANSWERS TO THE QUESTIONNAIRE ON THE PROJECT REGARDING LENIENCY FOR SUBSEQUENT APPLICANTS

1. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

2. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

Question 1

1. *The Hungarian Competition Authority (hereinafter: Gazdasági Versenyhivatal – GVH)* introduced its leniency policy in 2003. The main aim of the leniency policy was to provide an effective tool for detecting cartel agreements. The legal background of the leniency policy was set forth by Section 78 (3) of the Competition Act¹ (hereinafter HCA), which provided that in setting the amount of the fine, the “effective co-operation” of the respondent had to be taken into consideration “during the proceedings” as a factor which may reduce the amount of the fine to be imposed. Moreover, Subsection (8) empowered the GVH to set out its own leniency policy in a manner which would enable it to effectively detect cartel agreements. This meant giving the GVH the power to determine under what principles the active cooperation of an undertaking suspected of engaging in illegal conduct should be taken into consideration when setting the amount of the fine to be imposed. The criteria for the policy of permissiveness shall be defined in a notice posted in accordance with Section 36 (6). As a result of this provision, in Hungary, the first institutional appearance of the leniency policy was manifested in *Notice No 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority*. As regards to the legal nature of Presidential Notice, it was not a source of law and so was not legally binding.² Although the GVH felt itself bound by the Notice in practice, the lack of the binding nature of the Notice meant that it was not binding on the courts. As a result of this, the courts theoretically had the possibility of revising the decisions made by the GVH on leniency issues during the appeal procedure. Moreover, the GVH faced criticism from the legal community on several occasions due to the fact that under the 2003 Notice conditional leniency decisions were made by the Cartel Unit of the GVH, while final leniency decisions were made by the Competition Council on the merits. Together with the non-binding nature of the Notice, legal advisers found the system controversial and felt that legal certainty was not fully ensured.

¹ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

² According to Section 36 (6) of *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Hungarian Competition Act – HCA)* the President of the Hungarian Competition Authority may issue notices, together with the Chair of the Competition Council, which describe the basic principles of the law enforcement practice of the Hungarian Competition Authority. **Notices have no binding force; their function is to increase the predictability of law enforcement.**

2. In 2006 an amendment was made to the notice, but the organisational system was not changed and leniency was still not regulated at a statutory level.
3. In 2005, criminal sanctions were introduced for cartels which had been established concerning tenders published in connection with public procurement procedures or activity that was subject to a concession contract (hereinafter: bid-rigging cartels). These crimes can be sanctioned by imprisonment of up to 5 years. The Hungarian Criminal Code stated that the perpetrator of the criminal act would be exonerated from punishment if he/she confessed the cartel to the competition authority/police/financial supervisory authorities first hand and revealed the circumstances of the cartel. This provision was introduced to exempt immunity applicants from criminal sanctions (or at least Type 1A applicants who had revealed cartels before dawn raids), but did not work well in practice because there were a lot of open questions (where to apply, in what form, possibility of multiple applications from persons belonging to the same undertaking, etc.). Therefore, Criminal Sanctions had severe consequences for the GVH's leniency policy in bid-rigging cases.
4. *The European Competition Network (hereinafter: ECN)* published its *Leniency Model Programme in 2006*. This programme provided recommendations for introducing leniency in the EU Member States and for harmonising the existing leniency policies of the MSs. The aim of the Model Programme was not to create a fully harmonised system in every Member State, but to ensure that the common basic principles set out in the programme existed in every regime.
5. On the basis of the Model Programme, a significant amendment was made to the Competition Act in June 2009 which gave the GVH the power to act on issues related to leniency at a statutory level.
6. As mentioned above, the legislators always tried to adapt each enforcement policy to the leniency provisions which were based on the ECN Model Programme principles. Due to an amendment to the previous Public Procurement Act, significant changes were introduced regarding the scope of the candidate tenderers. The Act states that only those tenderers who were fined for cartel infringements are excluded from the tender procedures. Those tenderers who obtained full immunity under the leniency policy are not subject to exclusionary rules and can be candidate tenderers. These rules have also been upheld by the new 'Act on Public Procurement' which entered into force on 6 July 2012.
7. In leniency cases opened after 1 June 2009, the provisions of the amended HCA apply for the non-imposition or the reduction of fines and not the former Notice. In the present system, basic leniency rules are regulated in the Competition Act and detailed leniency rules on applying for leniency and the leniency procedure can be found in the "Application Form for Leniency" (hereinafter: Application Form) and in the "Explanatory Notes of the President of the GVH on the Application of the Rules concerning Leniency" (hereinafter: Explanatory Notes). Both documents are provided by the GVH and are published on its homepage.³ The new leniency policy is in line with ECN Model Programme, moreover in order to ensure legal certainty, leniency rules have become binding and both conditional and final decisions on leniency are made by the GVH's decision-making body, the Competition Council.
8. Together with the new leniency regime, some rules relating to civil damages claims were introduced in favour of leniency applicants. This resulted in the elimination of the joint and several liabilities of leniency applicants with other cartel members, and created a more favourable situation for

³www.gvh.hu

leniency applicants.⁴ It should be noted that the revision of the rules for the protection of leniency documents is under consideration.

9. Important changes will be introduced by the new *Act C of 2012 on the Criminal Code (hereinafter: new CC)* which will enter into force on 1 July 2013. The future provisions will take into account the leniency policy that is applied in the field of competition law and will extend the personal scope of those leniency applicants who are entitled to protection against prosecution. Consequently, the new criminal provisions are in line with the leniency rules of the GVH. Under the new criminal rules, those who receive Type 1A⁵ conditional immunity under the leniency rules are exempted from public prosecution if they also cooperate with the police and the public prosecutor in the criminal case. Those Type 1B and Type 2 leniency applicants who receive conditional leniency decisions from the GVH may also have their punishments mitigated without limitation in the corresponding criminal cases if they cooperate with the police or public prosecutor. The new criminal provisions apply to all present or former employees, executives and persons acting or who have acted on behalf of the undertaking. This is a novelty as under the previous criminal provisions, the former employees and executives of the company were not entitled to preferential treatment under the criminal rules. It has to be mentioned that in Type 1A cases, persons involved in the cartel may be exempted from public prosecution in two cases: a) either if their undertaking applied for leniency or b) even their undertaking did not apply, they report the cartel to the GVH or the police/public prosecutor individually. So, individuals are not bound to the decision of their company.

10. All in all, it can be seen from the above-mentioned rules that the Hungarian leniency policy from the very beginning is entirely based on the EU leniency system. If new enforcement policies (like criminal sanctions for bid-rigging, public procurement tools) were introduced to the Hungarian legal system, the Hungarian legislators main aim was not the change the already well-functioning leniency system, but to fit the other enforcement policies to it.

Question 2

11. We do not have any early termination policies.

3. In your practical experience, what is the most compelling rationale for rewarding subsequent applicants' co-operation? If your jurisdiction does not reward subsequent applicants with any benefits, or no benefits other than "amnesty plus", what is the rationale for such an approach?

⁴ According to Section 88/D of the HCA any person to which immunity from a fine has been granted under Article 78/A may refuse to pay damages for the harm caused by his conduct infringing Article 11 of the HCA or Article 101 of the Treaty until the claim can be recovered from any other person responsible for causing harm by the same infringement. This rule is without prejudice to the possibility of bringing a joint action against persons causing the harm. Lawsuits initiated to enforce claims against persons responsible for causing harm to which immunity from a fine has been granted shall be stayed until the date on which the judgment made in the administrative lawsuit which has been initiated upon the request for a review of the decision of the GVH establishing an infringement becomes legally binding.

⁵ In accordance with the provisions of the ECN Modell Programme, we use the following categories: a type 1A immunity applicant refers to an immunity applicant who files an application before the initiation of the case; a type 1B immunity applicant refers to an immunity applicant who files an application after the initiation of a dawn raid; a type 2 applicant refers to reduction of fine applicant.

4. In your experience, what is the value of the co-operation of the second-in applicant? Have there been cases in your country where a case could not have been brought to a successful prosecution due to the lack of sufficient evidence in the absence of co-operation by the second-in applicant?

Question 3 & Question 4

12. Cartel agreements generally involve several players and have wide-ranging ramifications. As a result, it is often not possible to gather sufficient evidence from one cartel member only. The GVH's opinion and practice strongly concurs with the opinion written under Section 9 of the 'Issue Paper'. We can therefore only repeat the arguments used in Section 9 of the 'Issue Paper':

- It may arise even with a Type 1A application that the GVH is not in a position to prove the infringement and that therefore the cooperation of other cartel members is essential in order for the prosecution to be successful.
- Co-operation from the second applicant is of particular value because the testimony and other evidence it provides can be used to corroborate the evidence which has been submitted by the first applicant.
- The co-operation of subsequent applicants may contribute to proving additional facts either in terms of duration, product or geographic scope or the composition of the cartel. This might be particularly useful in cases where immunity is obtained by a minor player in the cartel.

13. The GVH considers it important to obtain evidence from additional sources, especially because recent court decisions tend to send a message to the GVH that statements made by the leniency applicant vis-à-vis the denial of the other cartelists are not enough to prove the infringement.

14. As regards our practice, so far we do not have a closed case that can be referred to. However, we can easily imagine a situation where an infringement cannot be proven without the cooperation of subsequent applicants.

5. Please describe the treatment reserved to subsequent applicants in your country. In particular, focus on the incentives and requirements with respect to subsequent applicants and the evaluation of the degree of cooperation provided by them.

15. According to the provisions of the HCA and the Explanatory Notes, the following rules on the reduction of fines apply to subsequent applicants:

- If the GVH has already made a conditional immunity decision in respect of a case, the application of the next undertaking to come forward is no longer eligible to meet the conditions of immunity from fines. Therefore, while the GVH will not grant immunity from fines, it will reduce the fine imposed on an undertaking if it provides evidence which constitutes significant added value⁶ relative to the evidence already available to the GVH. The level of the reduction in

⁶ As regards the evidentiary threshold, the Explanatory Notes explain that the nature and quality of the evidence that will actually meet the conditions depends on the circumstances of the given case and the evidence available to the GVH. Nevertheless, when evaluating the provided evidence the GVH will generally consider physical evidence which originates from the period of time when the infringement was committed and which is directly relevant to the facts in question to be of greater value than evidence which has been subsequently established, that only has indirect relevance, or which requires corroboration from other sources. The degree to which the authenticity of the evidence can be corroborated from other sources

the amount of the fine is 30–50% for the first undertaking, 20–30% for the second undertaking, and up to 20% for third or subsequent undertakings.

- An undertaking which applies for a reduction in the amount of the fine to be imposed faces the same conditions as an immunity applicant as regards its obligation to cooperate and its willingness to terminate its participation in the infringement in question (see Q4 below), with the difference that an undertaking which has taken steps to coerce other undertakings to participate in the infringement is not excluded from benefiting from a reduction in the amount of the fine to be imposed.

16. As regards to the procedure which is followed when applications are made for reductions in the amount of the fines to be imposed, the following may be highlighted:

- The possible fine may be reduced in two ways: a) by reclassifying the application for immunity from fines *ex officio*; or b) by submitting an application for the reduction of a fine.
- An application for the reduction of a fine may be submitted only as a complete application, no marker procedure exists in these cases.
- Written or oral applications are accepted.
- The Cartel Unit of the GVH receives and examines the application and provides an opinion on it before submitting the information that is available to the GVH in respect of the infringement to the proceeding competition council. The Competition Council then makes a conditional leniency decision on the application on the basis of the proposal of the Cartel Unit. No separate legal remedy may be sought against an order which grants a conditional reduction of a fine or which rejects an application.
- The applicant may not withdraw its application and the GVH may use the application for a reduction of a fine and the documents attached to it from the date of their submission to prove the infringement (event in case of refusal).
- When closing the competition supervision proceeding, the proceeding competition council considers whether the applicant has met the conditions which must be fulfilled if a reduction in the amount of the fine to be imposed is to be made. If the conditions have been fulfilled, it then decides on the exact amount of the reduction in its decision on the merits of the case.

17. The HCA also acknowledges the possibility of “de facto immunity”. This instrument differs from an application for a reduction of a fine. Article 78/A(5) of the Competition Act deals with a particular case of the reduction of a fine. It covers those cases in which an undertaking provides evidence relating to an infringement which is unknown to the GVH and which is of direct importance when the GVH is considering which circumstances should be taken into account when the amount of the fine is being determined. In such cases the GVH shall not take such aggravating evidence into account when setting the fine to be imposed on the undertaking which provided this evidence.

may also have an impact on the value of the evidence. The phrase according to which the GVH correlates the evidence submitted by the applicant with the evidence already available to it, means that the GVH estimates the significant added value of the evidence relative to the evidence stemming from already closed or from already started but not yet closed investigative measures.

6. If your leniency programme includes the possibility to apply for a “marker”, please discuss how the marker system affects the race to be “first in the door” of potential applicants. Are markers also available to subsequent applicants?

18. The GVH only allows Type 1A applicants to apply for leniency on the basis of limited information and to receive a marker which will provide them with the time to file a full application. The relevant provision entered into force in Hungary on 1 June 2009. The marker procedure of the GVH is also set out in the Explanatory Notes and its mandatory contents are listed in the Application form. The granting of the marker for the undertaking is automatically ensured and it is non-discretionary. This means that if the applicant specifies the minimal information that is set out in the Application form, the GVH will automatically give the applicant the opportunity to submit a full application by a specified deadline.

19. A marker allows a company to file an application as soon as it discovers an infringement without having all the information that is necessary to file an application. This helps an undertaking file an application as quickly as possible.

7. Please explain if your leniency programme is always available during the proceedings, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore?

20. Immunity applications may be filed during the whole procedure, while an application for the reduction of a fine may be submitted, at the latest, on the day before the date of service of the preliminary position or the day before the starting date for the access to the files of any of the parties, whichever of the two is the earlier.

8. Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons?

21. A reduction which has been made to a fine can be revoked at the end of the procedure, in the final decision; if it turns out that the applicant has breached any of the following obligations:

- the applicant has failed to terminate any involvement it may have had in the infringement immediately upon the submission of its application, or after it has supplied evidence, except where the nature and extent of such involvement has been deemed by the GVH to have potential in serving the desirable outcome of the inspections;
- the company has failed to cooperate with the GVH in good faith throughout the competition control proceedings.

9. If your leniency programme does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining)?

22. This question is not applicable to the GVH.

10. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

23. See our reply to Question 1. It is important to highlight the fact that the GVH's leniency policy existed before the criminal law rules were introduced and that the GVH tried to persuade the legislator to bring the criminal law rules into line with the leniency rules.

11. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

24. There is no possibility under the present rules to have early termination policies.