HUNGARIAN COMPETITION AUTHORITY

Notice No 1/2020

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 for infringements of antitrust type of prohibitions*

(consolidated version with amendments made by Notice No 1/2021)

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 detailing the basic principles of the law enforcement practice of the GVH, whilst also providing summaries of well-established past practice and outlining the practice that is to be followed in the future.

2. The purpose of this Notice is to set out the typical circumstances considered in the context of the imposition of fines in proceedings concerning the enforcement of prohibitions relating to anti-competitive agreements, concerted practices, decisions of organisations of undertakings (hereinafter together: anti-competitive agreements) and abuse of a dominant position stipulated in Articles 11 and 21 of the Competition Act and in Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), and also in proceedings concerning the enforcement of the prohibition of abuse of significant market power and non-compete obligation pursuant to Articles 7 and 7/B of Act CLXIV of 2005 on Trade (hereinafter: Act on Trade). However, it should be noted that the GVH may also take into account circumstances not mentioned in this Notice within the legal framework for the imposition of fines. In view of the specific circumstances of a particular case, the GVH may deviate from the provisions of this Notice. In such cases, the GVH must provide an appropriate justification for the deviation in its decision.[1]

II. Principles

3. The aim of imposing a fine is to deter undertakings from engaging in unfair market practices while at the same time ensuring fair economic competition. When setting a fine, the GVH bears in mind that the purpose of the imposition of fines, as also acknowledged by the Constitutional Court,[2] is twofold: to serve as a punishment and to provide specific and general deterrence. These objectives can only be achieved by imposing a fine that is proportionate to the economic significance of the infringement and higher than the benefit derived (or harm resulting) from the infringement. In addition, a fine which pursues these objectives must place a considerable financial burden on the

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

[1] See Chapter III. of the decision of the Constitutional Court No. 1392/B/2007. and the injunction of the Supreme Court No. Kfv.II.37.497/2010/14. (VJ/102/2004.)

[2] See paragraph 60 of Constitutional Court decision No. 30/2014. (IX. 30.) according to which *the aim of the fine is […] partly to sanction the committed infringement (repression) and to prevent future infringements (prevention).*

undertaking which committed the competition law infringement, thereby leading to a significant financial disadvantage.[3] Therefore, the GVH pays special attention to ensuring that the fines imposed are not only proportionate to the conduct assessed to be unlawful, but also accurately reflect the financial capacity of the undertakings subject to the proceedings.

4. The GVH also considers, as priorities, the detection of infringements and the prevention of new ones, the possible compensation of consumers and undertakings that have suffered harm or that are in a less advantageous position due to infringements, and the most efficient use of its own resources. The fining practice may also contribute to the above-mentioned policy goals by taking into account undertakings' various forms of cooperative behaviour as a fine-reducing factor.

III. Fine calculation method

5. Pursuant to Article 78 (3) of the Competition Act, the amount of the fine shall be established taking into account all of the circumstances of the case, in particular the gravity of the infringement, the duration of the infringing situation, the benefit derived from the infringement, the market position of the party infringing the law, the culpability of the conduct, the cooperation of the undertaking during the proceeding and the repetition and frequency of the infringement. The gravity of the infringement shall be established, in particular, on the basis of the extent of the threat to economic competition and the range and extent of the harm to the interests of ultimate trading parties.

6. Article 78 (3) of the Competition Act contains a non-exhaustive list of the circumstances that must be assessed when imposing a fine. Thus, this provision does not preclude the consideration of other factors.[4] It is not necessary to evaluate and take into account all of the listed circumstances in every case, as only those circumstances that are relevant to the case in question must be considered.[5] In this context, the GVH also pays attention to the enforcement of the legal principle of the prohibition of double assessment.

7. Thus, in determining the amount of the fine, the GVH takes into account the circumstances set out in Article 78 (3) of the Competition Act that are relevant to the given case and any other applicable factors based on the case law, as set out below.

III.1. The gravity of the infringement and the duration of the infringing situation

8. In determining the substantive fine to be imposed in the cases referred to in paragraph 2 of this Notice, the GVH shall, as a general rule, consider the relevant turnover achieved – or estimated – by the infringing undertaking on the relevant market during the infringement period, depending on the gravity of the infringement. This ensures that the sanction imposed appropriately reflects the benefit derived (or the harm resulting) from the infringement and the duration of the infringing situation.[*]

9. When assessing the gravity of the infringement, the GVH takes into account the type of conduct in the context of the threat to competition. The GVH considers the conducts specified in Article 13 (3)

[3] See the judgment of the Supreme Court No. Kf.III.27.599/1995/3. (VJ/200/1992.).
[4] See the judgment of the Supreme Court No. Kfv.II.37.453/2009/5. (VJ/114/2007.), the judgment of the Curia No. Kfv.VI.37.232/2011/13. (VJ/025/2004.) and the judgments of the Budapest Court of Appeal No. 2.Kf.650.032/2015/28. and No. 2.Kf.27.525/2009/9.
[5] See the judgment of the Capital Court No. 7.K.32.143/2004/7. (VJ/016/2004.)
[*] Amended by point 64 of Notice 1/2021 of the GVH. Regarding its application, see point 46.

of the Competition Act[6] to be particularly serious violations, especially anti-competitive practices in connection with the procurement of organisations that are fully or partially publicly funded and projects that are (co-)financed by the European Union[7], and conducts stipulated in Commission Regulation (EU) No 330/2010 on the application of Article 101 (3) of TFEU to categories of vertical agreements and concerted practices.

10. When assessing the scope and extent of the violation of the interests of the final business partners, the GVH may also assess the actual and probable and/or potential impact of the infringement and the extent to which the conduct was actually implemented. This may also be influenced by the relevant market, other product and customer characteristics, and the possible spill-over effects of the infringement.

III.2. Benefit derived from the infringement

11. The benefit derived from an infringement can rarely be quantified with a sufficient degree of reliability. However, if in fact the benefit can be quantified, the fine to be imposed must, as a general rule, be higher than the amount of the benefit derived from the infringement. Otherwise, the amount of the fine would not be appropriate to achieve the deterrent effect of the fine, since to penalise an infringement only to the extent of the advantage that has been achieved by it would not deter potential offenders from infringing. Therefore, if the fine calculated on the basis of the relevant turnover is not higher than the benefit derived from the infringement, the GVH may increase the amount of the fine to an amount that exceeds the quantified benefit by up to three times.

III.3. Market position of the infringer

12. The market position of the undertaking(s) in case of practices falling under Article 11 of the Competition Act or Article 101 of the TFEU, and in case of the abuse of a joint dominant position, depends on the joint market shares of the undertakings concerned. However, the GVH also takes into account other factors, such as other circumstances that determine the market power of the undertaking(s), e.g., the contestability of the market or whether the undertaking is a new entrant).

III.4. Imputability (culpability)

13. The GVH takes into account, as an aggravating circumstance, the extent to which the imputability exceeds the level of the mere infringement of the law.[8] The GVH considers a conduct to be of a high degree of imputability if it can be proven that the infringement was intentionally committed in the awareness of its unlawful nature. The GVH considers a circumstance to be classified as intentionally committed if, in particular, the infringement was committed in the course of a public procurement procedure (bid rigging), in the procurement tender of a (fully or partially) publicly funded organisation, in a tender (co-)financed by the European Union,[9] or if an undertaking took steps to

[6] Agreements or concerted practices between competitors which have as their object the restriction, prevention or distortion of competition, in particular the direct or indirect fixing of purchase or selling prices and other business conditions, restrictions on production or distribution, market sharing, including collusion on competition, restrictions on imports or exports (‘cartels’) and any other agreement or concerted practice aimed directly or indirectly at fixing purchase or selling prices.

[7] Comp. point 115 of Decision No. VJ/19-80/2017, Point 755. of Decision No. VJ/41-195/2016., confirmed by resolution No. 101.K. 700.240/2019/56. of the Budapest Capital Regional Court.

[8] The mere fact that a conduct is imputable, i.e., that it deviates from the generally expected and accepted conduct, cannot be regarded as an aggravating circumstance; only a higher degree of imputability can be regarded as an aggravating circumstance.

[9] See the judgment of the Court of Appeal No. 2.Kf.27.232/2007/14. (VJ/028/2003.)

keep its conduct secret or to ensure that the infringement was implemented in a more efficient manner. It may also imply a higher degree of imputability if senior officials were (also) involved in the infringement.

14. The GVH may take into account the role of the undertakings subject to the proceeding in the infringement when assessing their imputability. Participation as the organiser/leader in the infringement or the presence of retaliatory or other coercive measures against other undertakings may be considered as aggravating factors. However, if an undertaking subject to the proceeding can be proven to be in a vulnerable position and its initial or continued participation in the restriction of competition can be shown to result from the imposition of coercion or retaliatory measures by other undertaking(s), this finding may be taken into account as a mitigating circumstance.

15. When assessing the role that the undertaking subject to the proceeding played in the infringement, the following may also be taken into account: whether the undertaking implemented the infringement or tried to avoid it by engaging in a competitive conduct, or whether it terminated the infringement as a result of, or even before, the initiation of the competition supervision proceeding (unless the investigated conduct constitutes a cartel).

III.5. Recidivism and frequency of the infringement*

16. Repeated infringements will result in a more severe sanction, depending on the number of repetitions, the degree of similarity between the previous and the new conduct, and the time that has elapsed between the decision in the previous and in the new case; in such cases, the amount of the fine may be increased by up to 100% per repetition. It can be qualified as a repeated infringement if an undertaking (or its legal predecessor, in the case of an another undertaking within the same group of undertakings if the group of undertakings is resident in Hungary, or a foreign member of a group of undertakings, if it directly or indirectly controls the undertaking subject to the competition supervision proceeding) commits the same or a similar infringement continuously or repeatedly after the GVH, Commission or other competition authority of a Member State has established an infringement of the provisions of Article 11 or 21 of the Competition Act and Article 101 or 102 of the TFEU.

17. Recidivism will only be taken into account in respect of decisions adopted within 10 years prior to the final decision adopted in a given case.

III.6. Other factors: external circumstances, deterrence, legal maximum, liability of groups of undertakings

18. In determining the level of the sanction in certain cases, the GVH takes into account that external factors (e.g., ambiguity surrounding the infringing nature of the conduct in question, state intervention) may also have played a role in the implementation of the infringement, and further circumstances may also be considered that may contribute to the increase of the amount of the fine.[10]

19. If, in the opinion of the GVH, a fine calculated taking into account the factors outlined in the fine notice would not have a deterrent effect in accordance with the principles of special and general

*The numbering was amended by point 65 of Notice No 1/2021 of the GVH. This also concerns the numbering of chapters III.6. and III.7.

[10] These are, for example, the cases described in points 22, 92 and 93 of Notice No 10/2017 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the settlement procedure (hereinafter referred to as Settlement Notice). Introduced by point 66 of Notice No 1/2021 of the GVH.

prevention, the GVH may consider further increasing or proportionating the fine in order to ensure that a deterrent effect is achieved.

20. In light of the specific nature and financial performance of small and medium-sized enterprises[11], the GVH pays special attention to ensuring that the fines imposed on all undertakings are proportionate to their financial capacity and not only to the gravity of the infringement.[12]

21. In determining the amount of the fine, the GVH examines whether the fine planned to be imposed, in the light of all the individual circumstances of the case, exceeds the limit of 10% stipulated in Article 78 (1b) of the Competition Act. In cases where a group of undertakings can be identified in the given case, the net turnover of the group of undertakings is applicable, if the amount of the fine to be imposed would exceed 10% of the undertaking's net turnover achieved in the preceding business year.[13] If the GVH condemns and imposes a fine on several members of the group of undertakings for the infringement, the 10% of the net turnover of the group of undertakings functions as an upper limit on the maximum amount also regarding the aggregate amount of the fine to be imposed on the undertakings belonging to the same group of undertakings. In the case of a group of undertakings, the financial liability of each member undertaking may not exceed 10% of its net turnover achieved in the business year preceding that in which the decision is adopted.

22. Pursuant to Article 78 (5) of the Competition Act, if the infringement is committed by a member of a group of undertakings, the undertaking and the members of the group of undertakings that have been identified in the decision shall be jointly and severally liable to pay the fine. In such cases the member of the group of undertakings identified in the decision will also be called into the competition supervision proceeding as a party.[14]

23. In case of association of undertakings, if the fine imposed is not paid voluntarily and the enforcement procedure does not result in the collection of the total amount of the fine[15], the competition council proceeding in the case may by an injunction oblige the association of undertakings concerned to pay the fine by requesting contributions from its members to cover the fine imposed. If these contributions do not cover the amount of the fine imposed on the association of undertakings, the competition council proceeding in the case may, pursuant to the provisions of the Competition Act, decide on the joint and several liability of certain members of the association. The GVH may oblige the member undertakings identified in its decision to pay the fine imposed jointly and severally in proportion to each other, in the same way as their group level net turnovers achieved in the preceding business year are proportionate to each other.[16]

III.7. Cooperative conduct that facilitates the proceeding

24. The GVH considers it important that fines, besides functioning as an instrument of general and special prevention, also promote the detection and prevention of infringements, the protection of

[11] See Article 3 of Act XXXIV of 2004 on Small and Medium-sized Enterprises and the Support Provided to Such Enterprises.
[12] See paragraph 104 of case No. C-413/08. P., paragraph 85 of case No. C-408/12. P. and cf. decision of the Curia No. Kfv.II. 37.076/2012/28. (Vj-130/2006.)
[13] See paragraph 60 of the Constitutional Court decision No. 3100/2015.
[14] See the judgment of the Curia No. Kfv.III.37.690/2013/29.
[15] Article 78 (6) of the Competition Act
[16] The GVH applies the proportionality between the jointly and severally liable parties in accordance with the European Union and Hungarian law and practice, especially with Recital 48 of Directive No. (EU) 2019/1 of the European Parliament and of the Council ("ECN Plus Directive"), the decision of the Curia No. Kfv.II. 37.076/2012/28. (Vj-130/2006.), and the provisions of the civil law, such as Article 6:2 (3) of the Civil Code and the commentary explanation attached to Article 6:29 of the Civil Code.

the interests of consumers and undertakings that are in a disadvantaged position due to the damage caused by infringements, and the efficient use of available resources. In order to facilitate the achievement of these policy objectives, the GVH aims to encourage undertakings to cooperate in proceedings by providing them with the possibility of obtaining a (further) fine reduction. This cooperation can take several forms, such as the leniency policy, settlement agreement, proactive reparation, compliance efforts and other means of cooperation. The incentive may take the form of only a reduction in the amount of the fine or, additionally to the fine reduction, in the imposition of an obligation to engage in a certain conduct. When determining such obligations, the party subject to the procedure may also be given the opportunity to propose measures to protect the public interest and remedy the investigated competition issue. When determining the extent of the fine reduction for the various forms of cooperation, the GVH, within the framework provided by the provisions of the Competition Act, takes into account that the various forms of cooperation do not prevent or disincentivise the application of other forms of cooperation and should, where possible, act to reinforce one another.*

25. In addition, with regard to the factors to be assessed within the framework of cooperation, it must also to be emphasised that they are taken into account in parallel to each other; thus, each form of fine reduction granted on the basis of certain factors shall be added together (with the exception of other means of cooperation, if the factors to be assessed in their context are, at least in part, already inherent in the special forms of cooperation).

26. Moreover, it must also be emphasised that the fine reductions granted within the framework of cooperation will be deducted from the amount of the fine calculated after taking into account all other factors (including the provisions on the legal maximum) in order to encourage the use of the various forms of cooperation as much as possible.

27. The GVH also considers the description of the forms of cooperation explained below to be important because they may also provide an opportunity for self-cleaning[17] as stipulated in the Act CXLII of 2015 on Public Procurement (referred to as Public Procurement Act), because they may establish a circumstance that can be considered as active cooperation by the undertaking, as required by the Public Procurement Act for self-cleaning.

III.7.1. Leniency policy

28. The leniency policy may be applied in case of infringements pursuant to Article 78/A (1) of the Competition Act, in accordance with Notices No 2/2016 and 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 the Competition Act.

III.7.2. Settlement procedure

29. The settlement procedure can be applied in proceedings initiated because of a conduct prohibited in Article 11 or 21 of the Competition Act and Article 101 or 102 of the TFEU or Articles 7 and 7/B of the Act on Trade, at the initiative of the competition council proceeding in the case in line with the Settlement Notice. Pursuant to Article 79 of the Competition Act, the GVH shall reduce the amount

*Amended by point 67 of Notice 1/2021 of the GVH. Regarding its application, see point 46.

[17]The advantage of self-cleaning for undertakings is that they cannot be excluded from public procurement procedures.

of the fine to be imposed by at least 10%, but not more than 30%, with respect to an undertaking that has made a settlement submission. When determining the extent of the specific fine reduction according to the spectrum of discretion set out in the Competition Act, the GVH assesses in particular the following factors.

30. In addition to the basic 10% reduction, a further reduction of up to 10% may be granted to reward the acceleration of the procedure. In this context, consideration must be given to the period of time within which a common understanding pursuant to Article 73/A (2) of the Competition Act can be reached (regarding cases specified in paragraph 29 of the Settlement Notice, possibly already on the first hearing of the party), the amount of time spent on the hearing and the period of time within which the undertaking introduces its statement on its willingness to engage in the settlement procedure pursuant to Article 73/A (2) of the Competition Act, its settlement statement pursuant to Article 73/A (3) of the Competition Act, its statement regarding correspondence pursuant to Article 73/A (4) of the Competition Act, and whether the undertaking takes advantage of the deadline of the legal statement pursuant to paragraphs 65 and 70 of the Settlement Notice.

31. Depending on the gravity of the infringement and the size of the undertaking, a further fine reduction of up to 10% shall be granted for those small and medium-sized enterprises that cannot benefit from the setting aside of fines pursuant to Article 78 (8) of the Competition Act.

32. The GVH shall also grant a further fine reduction of up to 10% if the case in question has proven to be particularly high resource-intensive, for instance, having regard to the significant number of parties subject to the proceeding, the large number of tenders/projects concerned, and the absence of certain parties from the settlement procedure (e.g., hybrid type of settlement procedure).

III.7.3. Proactive reparation*

33. The GVH qualifies a conduct as proactive reparation (compensation), when the undertaking that committed the infringement repairs the negative effect of the infringement either partially or completely. When an undertaking offers a commitment aimed at providing proactive reparation, the GVH may, in particular, consider the following facts:

i. whether the proactive reparation offered is directly related to the issue subject to the competition supervision proceeding;
ii. whether the commitment is specifically intended to remedy the competition issue subject to the proceeding and is not a measure that has already been decided and will be taken in any case;
iii. how the value, cost (or fiscal effects) of the measure (e.g., investment) relates to the amount of the calculated fine;
iv. whether proactive reparation directly benefits a wide range of consumers (and at least those affected by the infringement);
v. the impact of the commitment on job creation, market access, foreign trade and tax revenues;
vi. whether the commitment contributes to sustainability or environmental protection, thereby increasing consumer welfare;
vii. whether the commitment is sufficiently substantiated when the proactive reparation is offered, whether the benefits to be achieved by the commitment can be substantiated by data or analysis and after its implementation, whether the effects of the commitment can be verified by audited results and thus accounted for.

* Amended by point 68 of Notice 1/2021 of the GVH. Regarding its application, see point 46.

34. Taking into account the above considerations, the GVH decides on the extent to which it recognises proactive reparation as a fine reducing factor when establishing the infringement. To this end, the GVH also assesses how the public interest effect arising from the above criteria relates to the deterrent effect that can be achieved through the possible fine (the sending of a deterrent message to the market). This assessment may lead to the rejection of the proactive reparation, the full remission of the full when establishing the infringement, or a fine reduction. In the framework of this assessment, the GVH takes into account the gravity of the infringement, the socio-economic context in which the infringement took place, its novelty or the maturity of the related case law, recidivism, the extent of the harm caused and whether businesses or consumers (or a vulnerable group of consumers) are affected. In the framework of fine reduction, the GVH only accepts forms of proactive reparation that are undertaken voluntarily by the undertaking subject to the proceeding.

III.7.4. Appreciation of compliance efforts

35. Both ex-ante and ex-post compliance efforts may be considered by the GVH as a fine reduction factor. However, it should be noted that proven ex-ante compliance efforts represent a higher fine reduction factor.

36. Nevertheless, the existence of a compliance programme cannot in itself be assessed as a fine reducing factor. In order to achieve this the undertaking

    a. must prove its sufficient compliance efforts,

    b. after noticing the infringement, must terminate the infringing conduct,

    c. must prove with objective and credible evidence that the termination of the infringement was due to the compliance programme established voluntarily or obliged by the GVH in the course of a previous proceeding.

37. A further condition for assessment as a mitigating factor is that high-ranked corporate executes are not involved in the infringement. In such cases, taking into account the ex-ante compliance programme, the GVH shall reduce the amount of the fine by up to 7%. If, in addition to the above, the undertaking is able to provide the GVH with evidence in the context of a compliance programme that is unknown or represents significant added value to the evidence already available and it can prove, based on objective and credible evidence, that the compliance programme contributed to the obtaining of the evidence, the amount of the fine shall be reduced by up to 10% with regard to the ex-ante compliance programme.

38. Ex-post compliance efforts, i.e., compliance programmes established after the initiation of a competition supervision proceeding or offered during a proceeding (including the development of existing compliance programmes that could not be taken into account in the course of the ex-ante compliance efforts) can neither contribute to the clarification of the investigated conduct nor to the effectiveness of the proceeding; they can only promote compliance with the law in the future. Accordingly, the GVH rewards an undertaking's commitment to establish and implement an ex-post compliance programme with a lower, up to 5% fine reduction, compared to the reduction of the fine in case of an ex-ante compliance programme, as long as it is established and implemented together with participation in the leniency policy, the settlement procedure and/or with proactive reparation. The GVH, if it finds it acceptable pursuant to paragraph 39. below, shall impose an obligation on the undertaking to fulfil this commitment in its final decision and shall monitor the fulfilment of the commitment in the course of a follow-up investigation.

39. When assessing compliance programmes, the GVH examines in particular the following conditions:

a. clear and unambiguous public commitment to competition law compliance throughout the undertaking (from top to bottom),

b. availability of staff and financial resources that are necessary to ensure the effective application of the compliance programme,

c. application of measures which ensure that the undertaking's employees possess the appropriate awareness and training regarding the compliance programme,

d. operation of effective signalling, monitoring and control mechanisms (including: the sanctions applied in case of serious violations of the compliance programme),

e. use of feedback, continuous review and improvement of the programme in light of the experience gained.

40. When applying Articles 79/A and 79/B of the Competition Act, the GVH ensures, with regard to Article 79/A (5a), that the enforcement of these provisions is carried out in accordance with the promotion of the efficient operation of compliance programmes. Accordingly, a person providing evidence to the GVH pursuant to Articles 79/A –79/B of the Hungarian Competition Act is obliged to

a. prove that at the time of obtaining the evidence, at the time of its presentation to the GVH, or in the interim period, it was not or it is not subject to a corporate compliance programme, whereby the evidence to be provided should be brought to the attention of the employer (hereinafter: organisation) in order to allow the organisation to take the necessary legal measures to detect or terminate the infringement (hereinafter referred to as internal rules of procedures), or

b. prove that it has fulfilled its obligation under point (a) in accordance with the internal rules of procedures applicable to it, but that the organisation referred to in point (a) has breached the prescribed internal rules, or

c. it is likely that it will suffer serious disadvantage as a result of its participation under point (a).[*]

III.7.5. Other forms of cooperation

41. The GVH may also take into account other forms of cooperation not mentioned above as a fine reducing factor, as a result of which it may reduce the amount of the fine overall by up to 20%.[**]

42. A fine reducing factor may be, in particular, a level of cooperation during the proceedings that facilitates the effective detection of the infringement, such as the voluntary provision of the evidence proving the infringement, the clarification of the facts of the infringement, the confession of the infringement or not contesting the facts. As a further factor, the GVH considers the voluntary waiver of the right of appeal. In this context, the GVH shall also consider, as a fine reducing factor, participation in the settlement procedure if the settlement submission is legitimately withdrawn or if the settlement procedure is terminated because the competition council proceeding in the case, on the basis of the facts and circumstances of the case in question, does not consider it possible to continue the settlement procedure with the result that the criteria taken into account in the selection

[*] Amended by point 69 of Notice 1/2021 of the GVH. Regarding its application, see point 46.
[**] Amended by point 70 of Notice 1/2021 of the GVH. Regarding its application, see point 46.

for participation in the settlement procedure are overruled, or if the public interest does not justify the continuation of the settlement procedure.[*]

43. At the same time, data provided in the context of the obligation to cooperate or a mere statement by the undertaking that it will refrain from committing similar infringements cannot be considered as a mitigating factor, as neither of these affect the assessment of the consequences arising from the undertaking's past infringing conduct nor facilitate the avoidance of future infringements; furthermore, they also do not constitute a guarantee for the future. Similarly, the submission of a (not yet accepted) commitment pursuant to Article 75 of the Competition Act cannot itself constitute a fine reducing factor.

III.8. Considering payment difficulties

44. In order to take into account payment difficulties, i.e. an application submitted for a fine reduction or for payment in instalments during the proceeding (or in case of requests submitted before the termination of the payment deadline pursuant to Article 62/C of the Competition Act, relating to an application for payment in instalments or delayed payment in competition supervision proceedings initiated after 1 January 2018) the undertaking must prove in detail, primarily by providing supporting documentary evidence, its economic situation closest to the time of the decision and its fulfilment of the conditions necessary for its request. However, during the adoption of its decision the GVH will take into account the undertaking's financial statements from previous years as well as its future financial forecasts.

IV. Application of this Notice

45. This Notice is applied by the GVH as of 1 January 2021 in proceedings (including any repeated proceedings) in which the preliminary position pursuant to Article 73 of the Competition Act has not yet been sent by the date of the publication of this Notice.

46. The provisions of this Notice, as amended by Notice No. 1/2021 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority amending certain previous notices, are applied by the GVH in proceedings (including possible repeated proceedings) in which the preliminary position pursuant to Article 73 of the Hungarian Competition Act has not yet been sent by the date of publication of this Notice.[**]

Consolidated:

Budapest, 22 April 2021

Csaba Balázs RIGÓ	dr. András TÓTH
President of the Hungarian Competition Authority	Chair of the Competition Council of the Hungarian Competition Authority

[*] Amended by point 71 of Notice 1/2021 of the GVH. Regarding its application, see point 46.
[**] Consolidated by point 72 of the Notice No. 1/2021 of the GVH