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Competition Compliance Programmes – Note by Hungary

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-compliance-programmes.htm.

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1. Authority Policies and Experience with regard to Compliance Programmes and Sanctions

1. The Hungarian Competition Authority (hereinafter: GVH, or the authority) has been promoting the application of compliance programmes since 2012. Partly as a result of open consultations with market players, the GVH came to the conclusion that in order to foster effective competition compliance it should, beyond advocacy, issue non-binding written notices on the method of setting fines for infringements of prohibitions of anti-competitive agreements and practices. Consequently, in 2017 it issued its first notice[1] that provided guidance to undertakings on the features of an effective compliance programme. This was followed by a further notice[2] in 2020, which came into effect on 1 January 2021 (hereinafter: the Notice). The criteria of an effective compliance programme are the same in both notices; the listed requirements have equal weight and must be fulfilled in order for an undertaking to have its compliance programme taken into account by the GVH in the course of the imposition of a fine. While both ex ante and ex post compliance efforts and programmes of undertakings are taken into consideration, ex ante compliance efforts represent a higher reduction factor. Furthermore, pursuant to the Competition Act[3] the GVH may, in addition to imposing an obligation on a party to establish a compliance programme, issue a warning instead of imposing a fine in the case of small and medium-sized enterprises (SMEs).

2. Detailed Rules of the Notice – Requirements of an Effective Compliance Programme

2. Compliance programmes are assessed on a case-by-case basis.

3. The conditions which are, particularly, but not exclusively, taken into account when assessing the existence of a compliance programme are the following:

- clear and unambiguous public commitment to competition law compliance throughout the undertaking (from top to bottom),
- availability of staff and financial resources that are necessary to ensure the effective application of the compliance programme,
- application of measures which ensure that the undertaking's employees possess the appropriate awareness and training regarding the compliance programme,
- operation of effective signalling, monitoring and control mechanisms (including the sanctions applied in case of serious violations of the compliance programme),

[1] Notice No 11/2017 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 the prohibitions of anti-competitive agreements and concerted practices, abuse of a dominant position and abuse of significant market power

[2] 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 prohibitions

[3] Act LVII of 1996 on the Prohibition of Unfair and Restricted Market Practices

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

4. However, the existence of an ex ante compliance programme with the above-mentioned criteria cannot in itself be assessed as a fine reducing factor. As far as conducts contrary to the prohibitions on antitrust infringements are concerned, in order for the GVH to take into account the compliance programme of an undertaking as a mitigating factor, the concerned undertaking

- must prove its sufficient compliance efforts,
- after noticing the infringement, must terminate the infringing conduct,
- 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, and
- must demonstrate that no high-ranked corporate executive was involved in the infringement.

3. Corporate Compliance Programmes with other Forms of Cooperation

5. Ex post compliance efforts, i.e., ex post compliance programmes established after the initiation of a competition supervision proceeding or offered during a proceeding 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. Moreover, an ex post compliance programme cannot be accepted on a stand-alone basis; it may only be considered together with participation in the leniency policy, the settlement procedure and/or with proactive reparation. However, it must be emphasised that the introduction of a compliance programme is not a requirement for a valid settlement, leniency policy or proactive reparation.

4. Extent to which a Compliance Programme Constitutes a Fine Reducing Factor

6. In ex ante cases the GVH shall reduce the amount of the fine by up to 7%. If an undertaking – in addition to the above – in the context of a compliance programme is able to provide the GVH with evidence, which is unknown or represents significant added value to the evidence already available; furthermore, if the undertaking proves with 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.

7. The GVH rewards an undertaking's commitment to establish and implement an ex post compliance programme with a fine reduction of up to 5%, provided it is established and implemented together with participation in the leniency policy, the settlement procedure and/or with proactive reparation.

8. If the GVH accepts an undertaking's commitment to establish and implement a compliance programme, it shall impose an obligation on the undertaking to fulfil this commitment in its final decision. In addition to obliging the undertaking to present all the evidence proving its fulfilment of the commitment by a certain date, the GVH has the possibility to monitor the fulfilment of the commitment in the course of a follow-up investigation as well.

5. Assessment of Effectiveness

9. The GVH evaluates the compliance programmes of undertakings in its decisions, the strengths, and weaknesses of which are then reflected in the amount of the granted fine reduction.

10. Factors identified as strengths in compliance programmes:

- introduction of company-specific content in addition to meeting established international standards, broad reach of the programme to a wide range of employees,
- practical examples in the code of compliance to make employees understand the principles of competition law and the essence of compliance with these principles,
- and the designation of a corporate compliance officer that has the competence to determine, investigate and respond to competition law risks.

6. Number of Cases where a Compliance Programme has been accepted as a Mitigating Factor

11. In the last few years, the number of decisions where compliance programmes were offered and accepted has been increasing.

12. Of the cases closed by the Competition Council in 2017, there were no cases in which the concerned undertakings offered or implemented a compliance programme.

13. In 2018, out of 4 restrictive agreement cases (involving both horizontal, vertical agreements and the decision of an association of undertakings) 3 cases concerned cartels, from which in 1 of these 3 cases an undertaking implemented a compliance programme.

14. In 2019, out of 7 restrictive agreement cases 5 concerned cartels, from which in 3 of these 5 cases the undertakings implemented compliance programmes. Moreover, in both vertical agreement cases the GVH also accepted compliance programmes.

15. In 2020, the Competition Council closed 1 restrictive agreement case that did not concern a cartel, and no compliance programme was accepted in this case.

16. In 2021, (up until 2021 April) out of 4 restrictive agreement cases 3 concerned cartels, and in all 4 cases the undertakings implemented compliance programmes.

17. To sum up, from 2017 to date (April 2021) there were 16 restrictive agreement cases, out of which in 10 cases the companies implemented compliance programmes. From these 10 cases 7 cases concerned cartels, and in all of the cases the programmes implemented were ex post efforts. Taken together, the implemented compliance programmes resulted in a total fine reduction of HUF 368 755 469 for the concerned undertakings.[4]

[4] To date, Compliance programmes have not been offered and implemented in cases concerning abuse of dominance. They are more common, however, in cases concerning unfair commercial practices: in such cases the implementation of compliance programmes resulted in a total fine reduction of more than HUF 402 727 000 between 2016-2021.

7. Assessment of Compliance Programmes – Examples

18. To the GVH's best knowledge, the above-mentioned compliance efforts have so far decreased the likelihood of competition law infringements: since implementing the programmes the concerned undertakings have not been involved in any new competition law infringements.

19. In case no Vj/61/2017, the Association of Hungarian HR Consulting Agencies aimed to restrict competition among its members by provisions in its ethical code. Although one of the members of the organisation implemented an ex post compliance programme during the competition supervision proceeding, since it was not established and implemented together with participation in the leniency policy, the settlement procedure and/or with proactive reparation, the GVH could not take it into account when determining the fine to be imposed.

20. Nevertheless, the GVH is willing to be as flexible as possible. In case no Vj/19/2016, the GVH established that the concerned undertakings had participated in bid rigging for the purpose of maintaining the status quo. As a direct result and shortly after the initiation of the competition proceeding, Philips – one of the undertakings involved in the cartel – implemented an ex post compliance programme before introducing its settlement procedure. Despite this, the GVH took the effort into account and reduced the imposable fine by 5% due to the fact that the programme had already been developed before the end of the competition supervision proceeding. In the same case, Siemens Healthcare Kft. – another undertaking involved in the cartel – further developed its already existing compliance programme (even though it met the expected standards) into one that reflected the findings of the competition supervision proceeding in question; consequently, a 4% fine reduction was granted due to the ex post compliance programme.

21. In case no Vj/80/2016, the GVH established that the concerned undertakings had attended meetings and shared information for the purpose of market sharing and determining the bid prices and identity of the contractor concerning two neuropacemaker procurements. Medibis Kft., one of the involved undertakings, introduced a comprehensive compliance programme while engaging in the settlement procedure, which it then implemented before the GVH's final decision in the case. The undertaking's efforts in introducing and implementing the compliance programme, the key elements were the introduction of a compliance manual, a compliance officer and an external compliance legal expert. However, in the same case another undertaking's (Unicorp) compliance programme was not taken into account, as the company initially offered to introduce a compliance programme together with proactive reparation but later revoked the latter offer due to financial difficulties.

22. In case no VJ/54/2017 SMHV, one of the concerned undertakings asked the GVH to consider its compliance programme in order to obtain a fine reduction. However, it denied the infringement and refused to participate in the leniency policy, settlement procedure or to offer proactive reparation; therefore, the GVH was not in the position to accept it as a mitigating factor.

23. In case no Vj/43/2015 the GVH, in accordance with the Notice, concluded that the mere existence of a compliance programme could not in itself result in a fine reduction. Consideration of the undertaking's (Spectrum Brands) ex ante programme by the GVH was conditional upon the undertaking presenting evidence for direct causality between its programme and the termination of the infringement. Since the programme was not able to detect the infringement and lead to its termination, the GVH could only reward the undertaking's ex post efforts, i.e., the Spectrum Brands' commitment to further develop its compliance programme.

8. Compliance and Debarment

24. As far as debarment from participation in public tenders is concerned, in accordance with EU law, active cooperation with the GVH can also lead to what is known as *self-cleaning* in a procedure before the Public Procurement Authority. Pursuant to the Public Procurement Act,[5] since November 2015 an undertaking has been able to submit a request to the Public Procurement Authority to prove its reliability. As a result, apart from certain grounds for exclusion provided for in the Public Procurement Act, an undertaking may not be excluded from a public procurement procedure if, according to the definitive decision of the Public Procurement Authority, or according to a final court decision in the case of an administrative action brought against such decision, the measures the undertaking has taken before the time of submission of the tender or request to participate are sufficient to demonstrate the undertaking's reliability despite the existence of the relevant ground for exclusion due to its previous infringement. Cooperation with the GVH (leniency, settlement, waiver of legal remedy, proactive reparation, implementation of a compliance programme) may be considered as self-cleaning that meet the requirements laid out in the Public Procurement Act. In order to prove its reliability, the undertaking is obliged by law to demonstrate that it has met three requirements: firstly, it has paid or undertaken to pay compensation for the damages caused by the infringement; secondly, by actively collaborating with the competent authorities it has clarified the facts and circumstances in a comprehensive manner; and thirdly, it has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offenses, misconduct or infringement.

9. SMEs – Compliance Commitment with Warning as a Sanction

25. The GVH may, under certain specified circumstances, differentiate between SMEs and non-SMEs when it comes to the imposition of a fine: pursuant to the Competition Act, since 2015 the GVH may, in addition to imposing an obligation on a party to establish a compliance programme, issue a warning instead of imposing a fine in the case of an SME's first infringement. The GVH may monitor the fulfilment of the commitment in the course of a follow-up investigation and may issue a fine on the SME if it fails to fulfil its commitment. However, the authority must not set aside the imposition of a fine if the infringement takes the form of an agreement aimed at the fixing of prices or the sharing of markets in the course of a public procurement procedure; or if the infringement has been committed against persons who, due to their age, gullibility, mental or physical disability, belong to an especially vulnerable, clearly identifiable group of persons. Although in such cases the SME cannot benefit from the above-mentioned setting aside of fines, if it participates in the settlement procedure it may – depending on the gravity of the infringement and the size of the undertaking – obtain a further fine reduction of up to 10% (beyond the 10% automatic reduction applicable for settlements).[6]

26. In case no Vj/19/2017, the concerned undertakings took part in bid rigging relating to the procurement of PACS systems in two hospitals. Silver Wood – one of the involved undertakings – introduced a compliance programme, participated in the settlement procedure and swiftly reached a common understanding with the authority. Consequently, the GVH granted the undertaking the maximum 10% fine reduction for being an SME.

[5] Act CXVIII of 2015 on Public Procurement

[6] Between 2016-2020 there were 8 cases in which the GVH issued warnings for a total of 9 SMEs; however, none of the cases concerned cartels or other restrictive agreements.

(The GVH could not close the proceeding by issuing a warning, as the infringement concerned bid rigging.) In case no Vj/19/2016, Hoge Orvosi Műszer Kft. and Euromedic Technology Kft. were both given large fine reductions for participating in the settlement procedure as SMEs.

10. Advocacy

27. The GVH has been promoting the application of compliance programmes since 2012. In this context, it ran a 2-year-long campaign from 2012-2014 with the involvement of the media; it held a conference focused on SMEs' competition compliance; and it established (and continues to operate) a number of compliance websites (www.megfeleles.hu , www.GVHelp.hu , Kartell@gvh.hu). Furthermore, the GVH offers a monetary reward to informants who provide it with essential evidence about cartel infringements. However, the main goal is that infringements are disclosed by the involved undertakings – preferably through leniency applications – as a result of existing compliance programmes, as opposed to through the signalling of informants; this is because the GVH's experience shows that company submissions are far more valuable and comprehensive. Therefore, if an undertaking has a compliance programme, an informant will only receive a reward if he/she can prove – among others – that the undertaking did not take any further steps to terminate the infringement despite his/her signalling to the undertaking; or that the undertaking infringed the internal protocol that should have been be applied in such situations; or that he/she would have been subjected to serious detriments by the undertaking for signalling the infringement.

28. The GVH believes that SME compliance can be strengthened by encouraging larger businesses to promote third-party compliance when SMEs are closely related as suppliers, distributors or subcontractors. It welcomes compliance programmes where larger undertakings provide their subcontractors with compliance trainings and/or codes of compliance.

29. In case no Vj/103/2014, in its decision the authority obliged a main distributor, Husqvarna Magyarország Kft., to develop its existing compliance programme, among others, as follows: to provide trainings on compliance with competition rules at conferences for the distributors of the company's brands; to add a compliance clause to its model distribution contract requiring distributors to operate without engaging in any anti-competitive practices; and to apply the clause in all new and renewed distribution contracts.

30. In its decision in case no Vj/57/2017, the GVH obliged the undertakings to fulfil their commitments concerning, among others, their model contracts, which were expected to be brought in line with the provisions of the Competition Act and the TFEU. Furthermore, the undertakings were expected to carry out a contract revision, replacing their existing agreements with their domestic and foreign partners with the new model contracts; and to provide leaflets and lectures to inform their domestic distributors about the competition law issues that are relevant to them when it comes to their contractual relations with the concerned undertakings.