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Contribution of
the Hungarian Competition Authority

to the Roundtable on
The Future of Effective Leniency Programmes

I. General overview on the development of the Hungarian leniency programme

The leniency policy in Hungary was introduced in 2003 with the aim of providing an effective tool for detecting and thus fighting cartels. The basic legal background for the introduction of the leniency policy was stipulated in the Hungarian Competition Act (hereinafter: HCA). The detailed leniency policy itself took the form of a Notice[1] of the Gazdasági Versenyhivatal (hereinafter: GVH) which as a soft law instrument defined the guiding principles of the Hungarian leniency regime.

The HCA was substantially amended in 2009, taking into account the European Competition Network's Model Leniency Programme. All the substantial rules of leniency policy were incorporated into the HCA (i.e. by raising the legal status of these provisions to the level of the HCA), thus it stipulates the basic rules, while the Notice on Leniency Policy contains the detailed rules on leniency besides the rules on the practical treatment of leniency applications. Also, the marker system was introduced in Hungary by this amendment.

In 2014 the HCA was modified again in order to harmonise the Hungarian leniency policy with the new ECN Model Leniency Programme revised in 2012. Due to this amendment of the HCA, the possibility to apply for markers in ongoing cases was abolished.

With the next amendment which entered into force in January 2017, the scope of the leniency policy was extended to hard core vertical agreements and concerted practices aimed at directly or indirectly fixing purchase or sale prices.

Since 2021, as a result of the transposition of the ECN+ Directive into Hungarian law, certain rules have been amended (such as the possibility to submit marker in ongoing cases[2]), thus bringing Hungarian legislation more in line with EU rules. Therefore, the Notice on Leniency[3] currently in force was amended in 2021.With the reintroduction of marker in ongoing cases, the GVH seeks to open up as wide as possible the possibility for potential applicants to submit leniency applications. Additionally, the detailed requirements regarding the duty of cooperation upon the applicants has been incorporated in the HCA, since these detailed rules had only been described in the Leniency Notice before.

II. Trends in connection with leniency applications in the practice of the GVH

Although the Hungarian leniency regime is fully harmonised with the ECN Model Leniency Programme and the new developments of the European Commission's practice are always incorporated in it, leniency policy in Hungary has not been as successful as it was the case between 2000-2020 in Western Europe.

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[1] Notice No 3/2003 on Leniency

[2] Therefore markers may be granted both for immunity applicants (for Type 1/A and Type 1/B applications as well) and for reduction of fines applicants too.

[3] Notice No 14/2017. English version accessible: https://www.gvh.hu/pfile/file?path=/en/for_professional_users/notices/14_2017_leniency_notice_en_final&inline=true

Various factors are cited as reasons for initial failure (e.g. lack of knowledge of competition rules and leniency procedures, aversion to "whistle-blowing", small markets where players know each other well and may fear a deterioration in their business relations or be put off by a perceived deterioration in their company's image, but also lack of harmonisation with criminal law and public procurement law, personal liability issues in the field of labour law, criminal law). Lack of knowledge of competition rules and thus of leniency policy was also a significant factor. According to a survey carried out in 2018 only 25% of the undertakings have ever heard about the GVH's leniency policy. Therefore the GVH has launched several campaigns to raise awareness, in order to improve knowledge of competition law and to strengthen compliance.

While in Western Europe the number of leniency applications declined dramatically in the last five years, in Hungary the number not only remains at the same level but there has been an increase of applications for fine reduction in the last years.

The increasing success of leniency policy is also due in particular to the high degree of ex officio case initiating and detecting by the GVH. In other words, the authority is not dependent only on the leniency applications it receives, as it has a wide range of tools at its disposal to detect cartels. It would therefore be misleading to think that the initial moderate success of the leniency policy would lead to a lack of success in the fight against cartels.

In 2021, the GVH imposed HUF 16 billion of the total fines of more than HUF 18 billion for restrictive practices, and 4 out of 6 cartel decisions in the year were public procurement cartels.

In 2022 80% of the overall fines (HUF 2.9 billion) was issued because of restrictive agreements, the vast majority of which (around HUF 2.5 billion) were cartel-type infringements. The crackdown on cartels therefore continued in 2022.

In the last 10 years more than 40 leniency applications have been submitted in Hungary, while in total around 75 since 2004. In the last 5 years (2022-2018), undertakings have submitted an average of 1 or 2 applications before launching a case, and 2-3 fine reduction applications per year, which is roughly the same number of pre-launch applications and 50% more post-launch applications compared to the previous five years (2017-2013). It can be seen from the statistics that the majority of the applications are reduction for fines applications, which means that applicants approach the GVH once the case has been launched.

Since in Hungary there is a steady or even increasing number of leniency applications, it can be said that recently the Hungarian leniency policy is successful in terms of numbers, proving that the effort to introduce new tools for ex-officio cartel detection has paid off. It should be highlighted, however, that the majority of cartel cases are ex-officio cases. Approximately one third of cartel proceedings are based on leniency applications, while two thirds are ex officio cases.

III. Tools used by the GVH to detect cartels

Existing toolkit

For detecting cartels, the GVH uses a wide variety of tools, which are the following:

- separate unit for cartel detection within the Authority,
- ex officio detection, on the basis of information obtained from another separate case,
- evidence provided by an informant ('informant reward scheme'),
- information received via Cartel Chat.

- information provided by a formal or informal complainant,
- a possible infringement indicated by the contracting authority,
- indication of the body responsible for the control of public procurement or the public procurement authority,
- infringement reported by law enforcement,
- detection of market signals, detection of market conditions (this includes monitoring of public procurement data, economic analysis as well).

The HCA receives 6-8 times more informant applications than leniency applications, however,

- the vast majority of them do not qualify as an indispensable evidence,
- the information provided is poor,
- not reliable for the HCA compared to leniency applications

Due to the above, information submitted by a leniency applicant is deemed to be more useful (more structured, relevant, more complex) than information received from an informant. Therefore the HCA incentivises undertakings to adopt well-functioning compliance programmes to increase companies' competition law awareness which might enable to identify infringements within the undertaking and to come to the HCA and become a leniency applicant. Under the Fining Guideline the GVH put the requirement on the informant to report an infringement internally first because it might result in leniency applications

New tools introduced recently

In order to further enforce the law and enhance cartel detection, while protecting the Hungarian consumers, the GVH also introduced new tools.

As of 1 January 2023 the President of the Hungarian Competition Authority has been empowered to issue a formal notice (similar to the 'warning letter' used in the United Kingdom) to the relevant undertakings in certain cases of suspected infringement, without of course finding an infringement. As a soft law instrument, the issue of formal notice can help undertakings to review and amend undesirable market behaviour based on the principle of proportionality, providing a flexible way for undertakings to correct suspected competition issues voluntarily, thereby avoiding the time and effort required for competition proceedings from both the authority and the undertakings. Companies might also realize that they have taken part in infringements, and should report it to the GVH while applying for leniency.

As of 2022, the GVH introduced a new procedure, called the 'accelerated sector inquiry'. This tool enables the GVH to quickly identify and address market problems, if (i) there are reasonable grounds to suspect that competition within the sector is distorted or restricted and (ii) urgent intervention is needed. The GVH can carry out dawn raids during the accelerated sector inquiry. Detecting problematic sectors on the markets, might lead to an increase of leniency submissions, since companies are facing growing risk of being detected by the national competition authority.

IV. Recent trends of leniency applications

Although, the number of leniency applications is sufficient, however, it cannot be said about the quality of the content of the applications and of the cooperation of the applicants. Under the HCA, it is an essential requirement on the side of the leniency applicants to cooperate with the GVH in good faith, fully and continuously throughout the competition supervision

proceeding, actively disclosing the whole infringement and their role and participation in it and hand over evidence to the Authority.

A recent phenomenon noticed by the GVH that undertakings frequently submit applications which are not elaborated to the extent expected but rather are general acknowledgements of a cartel conduct. The applications lack of a full and detailed description of the conduct and their involvement, not disclosing information available for the applicants. In some cases, the applicants even say that they are not sure if they committed an infringement, but if the GVH establishes the infringement, they are willing to acknowledge it. In the opinion of the GVH, these kinds of applications do not fulfil the requirements stipulated in the HCA, it might be rewarded in a settlement procedure.

Merely providing the applicants' hard disks or mailboxes does not meet the requirement of the required cooperation either. It is up to the applicant to collect, process and contextualise the evidence. That is how a leniency applicant ensures and facilitates the GVH's fact-finding work and it has a significant added value. However, as regards the extent thereof, the GVH may differentiate between undertakings based on their financial and human resources, and IT background as an SME and a large undertaking is in a completely different situation in that regard. The financial and technical capacity of the undertaking applying for leniency must therefore be taken into account when assessing cooperation.

It is worth mentioning that in Hungary besides leniency, settlement is also available for the undertakings. In a settlement, the fine might be reduced by 10-30% which reduction adds to the reduction reached within the leniency, therefore an undertaking receiving 50% reduction for leniency might receive and additionally 30% reduction when settling.

V. Recent case law on the evaluation of leniency applications

In a recent case[4], the GVH refused to grant leniency to two leniency applicants, due to the lack of their cooperation. In this case concerning bid riggings in public procurement the leniency applicants (both SMEs) failed to disclose all relevant information regarding their involvement in the infringement. They failed to show the modus operandi of the infringement and failed to share contemporaneous written evidence with the GVH:

- only the fact-finding activities of the national authority's investigation revealed systematic collusion between the undertakings (i.e. that the same person took the procurement decisions for all the applicants)
- applicants did not tell the authority proactively that there were weekly public procurement meetings between the undertakings, but only shared this information after a request for information was issued,
- did not disclose that certain employees sometimes handled the affairs of all the companies, certain email addresses could be accessed by employees of the other company,
- applicants stated that no written evidence of the meetings had been preserved, as they were mostly oral, but the investigation nevertheless found a number of documentary records on their computers (even recent, relevant ones).

Based on the above, the competition council did not grant leniency for the applicants, due to the lack of cooperation. The council stated, that it is essential for applicants to disclose the overall plan, the essential elements of the cooperation model, its background and forums for

[4] Case Nr. VJ/10/2018.

the negotiations in the individual tenders, the links between the individual tenders, the system of relations between the undertakings, in particular if they were conducted with the participation and/or knowledge of senior employees or officials currently working for the applicant. Leniency cannot be interpreted as an admission by the applicant of an infringement to be established by the authority, since the purpose of leniency is to facilitate the fact-finding work of the authority and the detection of infringements. Active cooperation by the applicant is required, and the applicant's fact-finding cannot be established merely by the applicant declaring, that evidence found by the authority constitutes evidence of the infringement.

In its decision the Competition Council took into consideration that the applicants were SMEs, lacking IT resources, legal support and knowledge of competition law rules. Nevertheless, the circumstances listed above were all significant information which was undoubtedly available to the applicants (even without any particular IT research, specific fact-finding, analysis or specific knowledge of competition law) and which the applicants should have brought to the authority's attention proactively and voluntarily.

During the judicial review of the case, the court found the GVH's reasoning unfounded, and stated that the leniency applications shouldn't have been refused. The court found that the applicants indeed did cooperate, they presented the tenders, attached tender documentation, explained the essential elements of their illegal cooperation on tenders, acknowledged the cooperation, handed over their computers and answered the authority's requests for information.

The GVH does not share the views of the court, and is about to have the ruling reviewed by the Curia. The GVH is on the view, that the erroneously low standard of good faith, full and continuous cooperation required from the leniency applicants, as applied by the judgment, entails a systemic risk that applicants will restrain from actively disclosing all aspects of the infringement known by them, and will passively wait for the authority's fact-finding, and maybe admitting the findings and expecting the immunity from fines or the decrease of fines.

Botond Horváth **Dávid Kuritár**