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Alternatives to Leniency Programmes – Contribution from Hungary

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More documentation related to this discussion can be found at: oe.cd/atlp.

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Alternatives to Leniency Programmes

- Contribution from Hungary -

1. General overview on the Hungarian cartel detection situation

1. Fight against cartels has always been always a top priority for the Hungarian Competition Agency (hereinafter: GVH). For many years now, the GVH has taken the approach, that cartel detection should not solely rely on leniency but on ex officio detection as well, the two ways strengthening each other. Leniency policy in Hungary was introduced in 2003, and is harmonised with the European Competition Network's Model Leniency Programme. The scope of the leniency policy is extended to hard core vertical agreements and concerted practices aimed at directly or indirectly fixing purchase or sale prices.

2. For many years now the GVH has a separate Cartel Detection Unit, as well as a separate Cartel Enforcement Unit, dealing with leniency applications and ex officio case initiations.

2. Recent trends and recent experience in connection with leniency applications in the practice of the GVH

3. In the early years, leniency policy in Hungary has not been as successful as it was the case between 2000-2020 in Western Europe. Various factors are cited as reasons for initial failure. 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.

4. While in Western Europe the number of leniency applications declined 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 recently, which is due in particular to the high degree of ex officio case initiating and detecting by the GVH, since the authority has a wide range of tools at its disposal to detect cartels.

5. 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.

6. In 2022 80% of the overall fines (HUF 2.9 billion, approx. EUR 7.5 million) was issued because of restrictive agreements, the vast majority of which (around HUF 2.5 billion, approx. EUR 6.5 million) were cartel-type infringements. The crackdown on cartels therefore continued in 2022 and in 2023 as well, since this year the GVH has already adopted two cartel decisions imposing fines amounting to approximately HUF 300 million (EUR 800.000).

7. In the last 5 years, undertakings have submitted an average of 1 or 2 applications before launching a case, and 2-3 fine reduction applications per year.

8. The majority of the applications are reduction for fines applications, which means that applicants approach the GVH once the case has been launched.

9. 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.

10. It has to be noted, that although the number of applications is not decreasing, but the same cannot be said in connection with the applications' *quality*.

11. Undertakings frequently submit applications which are not elaborated to the extent expected but rather are general acknowledgements of a cartel conduct. In some cases, the applicants even say that they are not sure if they committed a competition law infringement, but if the GVH establishes the infringement, then they are willing to acknowledge it. Applicants sometimes lack active cooperation, but would rely on the fact findings of the GVH, and would only acknowledge that evidence found by the authority as the evidence of their cartel.

3. Tools used by the GVH for detecting and fighting cartels beside Leniency

12. The GVH has a wide range of tools for detecting cartels, namely:
1. launching an investigation on the basis of information obtained from another separate case,
 2. evidence provided by an informant ('informant reward scheme'),
 3. information received via Cartel Chat.
 4. information provided by a formal or informal complainant,
 5. cooperation with other agencies, authorities:
 - a. a possible infringement indicated by the contracting authority,
 - b. indication of the body responsible for the control of public procurement or the public procurement authority,
 - c. infringement reported by law enforcement,
 6. detection of market signals, detection of market conditions (this includes monitoring of public procurement data, economic analysis as well)
 7. accelerated or common sector inquire.

3.1. Launching an investigation based on information obtained during dawn raid carried out in the course of another separate case

13. Under the Hungarian Competition Act (hereinafter: HCA), the GVH has the right to make copies of, and/or seize any means of evidence suggesting any infringement of anticompetitive agreement or abuse of dominance either under Hungarian competition law and/or infringement of Article 101 or 102 of the TFEU, even if such evidence is not directly related to the subject of the investigation and if not covered by the court warrant. In the case of such evidence a separate court warrant shall be obtained within 60 days. In the absence of a subsequent court warrant the means of evidence discovered shall be inadmissible.

14. Accordingly, HCA enables the GVH to use evidence obtained during the dawn raid of another separate, non-related investigations provided it is related to an anticompetitive agreement or abuse of dominance and the GVH was granted a court warrant within 60 days. It should be noted that it is an important and effective tool in fighting cartels particularly because in the last 5 years approximately ¼ of the cartel cases of the GVH have been launched based on evidence obtained during dawn raids carried out in the course of another separate case, proving that it is one of the most successful alternative method besides leniency.

15. There is no conflict with leniency since under the Leniency Notice of the GVH if an undertaking submits a leniency application in the course of a dawn raid, the GVH estimates the significant added value relative to the evidence acquired as a result of the dawn raid. Therefore, once the GVH obtains the evidence during the dawn raid it is considered as evidence in the possession of the GVH provided the separate court warrant was granted. If the GVH receives the court warrant for the evidence which is related to another separate case, the leniency applicant cannot apply for leniency based on this evidence, the leniency applicant shall supply other evidence.

3.2. Informant Reward Scheme

16. Under the HCA, the GVH pays a reward for a natural person if she/he provides written evidence to the GVH which qualifies as indispensable, i.e. i. enables the authority to establish a hard-core infringement or ii. the information makes it possible for the GVH to get a court warrant to conduct a dawn raid and the GVH gathers evidence during the dawn raid proving the infringement. Accordingly, only a natural person might apply for it and might get the reward if this person provides written evidence which either enables the establishment or makes it possible to get a court warrant and the GVH finds decisive evidence thanks to it.

17. It should be highlighted that the GHV receives 6-8 times more informant applications than leniency applications, however, the vast majority of them do not qualify as an indispensable evidence and the information provided does not enable the GVH to get a court warrant to carry out a dawn raid. We shall mention, however, that the GVH has launched a couple of cases based on information received by informants and has already established infringements based on it, but this number is significantly lower than the investigations based on leniency. To sum it up, the information provided by informants is not as reliable for the GVH compared as leniency applications.

18. In the light of the above, informant reward scheme and leniency cannot go together, because if the undertaking taking part in the cartel has submitted a leniency application to the HCA, then the legal representative of the undertaking is not entitled for reward for a written evidence or information provided in connection with the same cartel. Since leniency applications are deemed to be more useful (more structured, relevant, more complex) than information received from an informant, the GVH incentivises undertakings to adopt well-functioning compliance programmes to increase competition law awareness within the undertaking which might increase the possibility to identify infringements and to come to the HCA and become a leniency applicant. Under the Fining Guideline the GVH requires the informant to report an infringement internally first because it might result in leniency applications.

19. The informant is required to prove either

1. he/she was not under any compliance programme at the moment of obtaining or providing the evidence to the HCA;

2. he/she was under a compliance programme and he/she had reported the infringement within the company, however, the company did not answer it and thus infringed its compliance programme or;
3. if he/she had reported the infringement within the company, he/she would have been exposed to serious harm.

3.3. Cartel Chat

20. Cartel Chat is an anonymous information channel, a closed platform which enables anyone to ask questions and to share information and upload documents to the GVH anonymously regarding anti-competitive agreements that potentially or actually constitute a competition law infringement. Cartel Chat essentially acts as a source of information for the GVH. However, the information and documents uploaded to Cartel Chat do not oblige the Authority to launch an investigation.

21. The Cartel Chat was introduced in 2015 and it enables the GVH to receive relevant information on potential cartel conducts and it enables potential informants or leniency applicants to get in contact with the authority in an anonymous way. Thus, it is a useful tool for the GVH and the informants or potential leniency applicants which might incentivise leniency applications or informant applications resulting in cartel investigations.

3.4. Cooperation with other agencies, authorities

22. The GVH has good professional cooperation and connection with numerous other agencies, and ministries responsible for areas and activities where public procurement cartels might be present or can be detected. Two examples are the cooperation with the Prime Minister's Office and the Public Procurement Authority.

23. The aim of the cooperation between the GVH and the Prime Minister's Office is to facilitate effective professional cooperation between the two organisations in order to ensure the fairness of public procurement procedures. Within the framework of this cooperation, the Prime Minister's Office regularly informs the GVH whenever it detects signs of restrictive market practices while investigating public procurement procedures and the GVH will, in turn, investigate the signals received. The Prime Minister's Office ensures that upon request, the GVH has access to the data necessary for investigating suspected cartels stored in the Electronic Public Procurement System. It should be underlined based on our experience so far, however, that the signals received are not direct evidence for cartels but rather hints that together with other direct evidence obtained by the Cartel Detection Unit, might result in launching an investigation.

24. Under the Public Procurement Act, where the contracting authority considers that a clear cartel infringement has been committed during a contract award procedure, or if there is reasonable suspicion of such infringement, it must notify the GVH. In the experience of the GVH, these notifications have already resulted in cartel cases, therefore it can be said that is an effective source for detecting cartels.

25. Based on the above cooperations, the GVH regularly receives information, red flags sent by these third parties, and can investigate, whether there is ground to launch a cartel case.

3.5. Detection of market signals, detection of market conditions

26. The separate Cartel Detection Unit screens publicly available data in connection with individual markets and public procurements.

3.6. Accelerated sector inquiry

27. 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. The GVH has already launched an RPM investigation based on the information collected in dawn raids carried out in the course of an accelerated sector inquiry.

4. Conclusion

28. It can be seen from the above that the GVH has a wide range of tools for detecting and fighting cartels. Due to the early years’ low success in connection with leniency, the GVH had to find other sources of information regarding cartels. Fortunately, leniency became successful over time, and still remains the most effective and reliable instrument to establish cartel infringements, however, the others are also crucial since they complement, supplement and incentivize leniency. All these tools together constitute a complex eco-system and each has its role in it, strengthening each other. We do believe that every competition authority has to diversify its toolkit and use all the tools available. Competition authorities must not rely solely on leniency since there is no effective leniency policy without effective ex-officio cartel detection and significant fines once a cartel infringement is established.

29. The GVH focuses highly on the fight against cartels, and is willing to fine tune its existing tools and introduce new ones to deter and detect cartelists.