

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Hungary****5 June 2018**

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm

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Hungary

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

1. The leniency policy in Hungary was introduced in 2003 with the aim of providing an effective tool for detecting and thus fighting cartels. The 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 of the GVH (Notice No 3/2003 on Leniency) which was not legally binding but defined the guiding principles and the extent to which the active cooperation of a company suspected of engaging in cartel activity should be taken into account.
2. The HCA was slightly amended in 2006 and more substantially in 2009, with the latter amendment taking into account the European Competition Network's Model Leniency Programme. The leniency policy was incorporated into the HCA (i.e. by raising the legal status of these provisions to the level of the HCA). The HCA stipulates the basic rules, while the Notice on Leniency Policy (which had been amended two times by 2009) contains the detailed rules on leniency. Also, the marker system was introduced in Hungary by this amendment.
3. The next amendment took place in 2013. The aim of this amendment – which entered into force in 2014 – was to align the leniency rules with the other parts of the HCA amended by this amendment and to harmonise the Hungarian leniency policy with the new ECN Model Leniency Programme revised in 2012. Due to the amendment of the HCA, the possibility to apply for markers in ongoing cases was abolished.
4. With the amendment of 2016, 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.
5. It should be noted that, in general, the Hungarian leniency policy is harmonised with the ECN Model Leniency Programme. Moreover, whenever other enforcement policies, such as criminal sanctions in the Criminal Code, have been introduced into the Hungarian legal system, these new instruments have always been aligned to the leniency rules of the HCA and not vice versa.
6. Despite the fact that the Hungarian leniency programme is fully harmonised with the ECN Model Leniency Programme and the new developments of the European Commission's practice are always incorporated in it, the leniency policy does not work with great success in Hungary. We have noticed that when in Western Europe the parent undertaking submits a leniency application, its subsidiary in Hungary does not do so in the same case. It should be noted, however, that besides its leniency programme the GVH has a number of other tools and powers for ex officio cartel detection, such as the informant reward scheme, power to pursue forensic IT investigations, data surveillance, dawn raids, etc. Irrespective of the relatively low number of leniency applications, the GVH has dealt with a number of cartel cases thanks to its well-performing ex officio cartel detection activities. The low number of leniency applications motivates the GVH to be more active in ex officio cartel enforcement. The GVH is of the opinion that ex officio cartel detection and leniency complement and reinforce each other in a very effective manner.

7. As regards the reasons for the relatively low number of leniency applications, the cultural aspect is deemed to be one of the most relevant: i/ cultural background, as an effect of the former planned economy system of Hungary (not to be seen as a traitor) and ii/ low level of competition law awareness (especially in the case of SMEs). In order to improve this situation the GVH launched a communications campaign to raise awareness, educate, and incentivise.

8. Additionally, with the aim of facilitating the detection of cartels the GVH introduced an informant reward scheme, which rewards natural persons for disclosing written evidence qualifying as indispensable either because it enables the GVH to establish a hard core infringement or because the information makes it possible for the GVH to obtain a judicial warrant to conduct a dawn-raid, provided that in the latter case the GVH is able to find evidence proving the infringement during the inspection. Besides the informant reward scheme, the GVH launched its CartelChat. The CartelChat is an important and useful internet-based tool developed by the GVH in order to allow informants to contact the GVH in an anonymous way and to share information and documents with the GVH, or to request information in full anonymity. In our experience, these two tools increase the effectiveness of the GVH in detecting cartels; however, well-prepared, detailed leniency applications with high quality hard-core evidence have been a lot more useful for the GVH.

2. Challenges

2.1. The challenges of the marker

2.1.1. Introduction of a marker system

9. The institution of non-final application for immunity (hereinafter: “marker”) was introduced by the 2009 amendment of the HCA. The marker was used for all types of leniency applications (1/A immunity before the case is initiated, 1/B immunity in ongoing cases, 2-type applications for the reduction of fines). The marker for all types of leniency applications proved to be a useful tool because it improved companies' willingness to cooperate. Consequently, a large number of 1/B-type and 2-type applications were submitted in ongoing cases.

2.1.2. Amendment of the marker system

10. With the 2013 amendment of the HCA – which entered into force on January 1, 2014 – the institution was abolished for leniency applications in ongoing cases (1/B-type and 2-type applications). According to the explanation of the HCA, the amendment was made for the following reasons. First of all the evaluation of information provided by the leniency applications in ongoing cases (1/B-type and 2-type applications) requires more time and energy than the evaluation of 1/A applications, therefore allowing the possibility of a marker for 1/B-type and 2-type applications would cause a problem in determining the order of the applications. Secondly, according to the explanation of the amendment, it was expected that the abolition of marker-applications in ongoing cases would encourage market players to submit 1/A applications to facilitate the detection of secret cartels.

2.1.3. Consequences

11. The abolishment of markers for 1/B-type and 2-type applications did not increase the number of 1/A applications. According to the feedback received from competition lawyers, the number of applications in ongoing cases (1/B-type and 2-type applications) would increase if markers were to be made available again for each type of application. In the absence of markers for 1/B type and 2-type applications, applicants must immediately provide finalised applications. Due to the strict rules relating to the ranking of applicants, market players want to secure their positions as quickly as possible and therefore often do not have the opportunity to thoroughly investigate the infringement and summarise it in the final application. With the reintroduction of markers for all types of applications, the GVH on the one hand could incentivise undertakings to submit 1/B-type, and 2-type applications in order to help it to establish cartel infringements, and on the other hand the GVH could receive applications and evidence of a higher quality thanks to the extended time limit provided.

12. On the basis of the abovementioned, the GVH is considering to change its position and to extend the marker for each type of application.

2.2. The challenges of cooperation

2.2.1. Obligation to cooperate

13. According to the provisions of the HCA, an obligation of mutual cooperation exists between the GVH and the applicant on the basis of the leniency/immunity application.

14. According to the current regulations the applicant must terminate its involvement in the infringement immediately following the submission of its application. Moreover, the applicant must cooperate with the GVH in good faith, fully and continuously throughout the competition supervision proceeding. Consequently, the applicant must disclose the infringement and its role in it to its best knowledge; therefore, it has to take every measure that can be reasonably expected from it.

2.2.2. Atypical cases

15. However, situations may arise where the applicant does not intentionally violate the duty of cooperation, but for various reasons it is simply unable to assess and judge the infringement and its role in the cartel.

16. It has occurred in the GVH's practice that the applicant had a different perception of the infringement and therefore assessed the infringement in a different manner to the GVH. Accordingly, it had not terminated its involvement in the infringement – which had been identified as the infringement by the GVH, not the one wrongly identified by the applicant – at the time that it submitted the application and it continued to participate in the infringement until the case was closed.

17. In another case it turned out that only three bid riggings had been disclosed by the applicant, when in fact the investigation revealed that a lot more tenders had been affected by the same practice.

2.3. Members of an association of undertakings as leniency applicants

18. Under the current legal framework, neither an association of undertakings, nor any of its members can apply for leniency, since they fall outside the scope of the leniency policy. A leniency application can only be submitted in the event that there is a cartel, and the decision of an association of undertakings is not a cartel pursuant to Hungarian legislation.

19. Consequently, both the association of undertakings and its members are excluded from submitting leniency applications. While the GVH is of the view that an association of undertakings should not be eligible for leniency when it is the restrictive decision of the association itself that constitutes the breach of competition law, it is of the opinion that any of its members should be able to come forward and report an anti-competitive act of the association and should be able to qualify for leniency.

20. When the competition law infringement is in the form of a decision of an association of undertakings, then the members – who took part in the decision making – are only jointly and severally liable for the fine imposed on the association if the latter refuses to pay the fine that was imposed, and if it cannot be enforced otherwise.

21. Based on the above, it should be noted that the members of the association do not possess primary responsibility, and therefore the concept of leniency should be broadened in a manner that enables a member that comes forward and applies for leniency in connection with the wrongdoing of the association to be exempted from possible joint and several liability.

22. This approach could convince members of associations to come forward and disclose the decisions made by the associations, which might be unknown and unlikely to be detected by the GVH.

2.4. Co-ordination of investigations triggered by multi-jurisdictional amnesty/leniency applications

23. In the GVH's view it would be worth considering giving the implementation of the related OECD Recommendations and ICN work products (e.g. Leniency Checklist and Anti-Cartel Enforcement Manual Chapter on Leniency) much greater importance (e.g. by volunteering to regularly adjust the national leniency programme to these recommendations and good practices). This could result in the (at least partial) approximation of national leniency systems, which may as a result reduce businesses' hesitation to apply for leniency in multi-jurisdictional cases.