

Hungary

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BACKGROUND

1. What is the relevant legislation containing the leniency policy and what is the enforcing body?

Competition law in Hungary, including rules on illegal cartel activity, is regulated by Act LVII of 1996 on the Prohibition of Unfair Trade Practices and Restriction of Competition (as amended) (the Competition Act).

The Competition Act grants the Office of Economic Competition (the Competition Office) permission to act as the administrative authority in Hungary on all issues which fall under the scope of the Competition Act. The independent decision-making body of the Competition Office is the Competition Council.

Leniency regulations in Hungary were first introduced in 2003, when the Competition Office issued leniency guidelines about the application of the leniency policy. At that time, the Competition Act itself did not contain regulations about the leniency policy. The entire leniency policy was based on section 78(3) of the Act, according to which the cooperation of an undertaking under investigation which helps the proceedings has to be taken into account when establishing its fine. Nevertheless, there was a need to establish actual guidelines regulating in which cases, under what conditions, and to what extent the Competition Office is authorised to reduce the fine of a cartel participant who promotes the investigation of the authority and provides underlying evidence about the activity of a cartel.

According to section 36(6) of the Competition Act, the president of the Competition Office and the president of the Competition Council together are authorised to issue guidelines with respect to the law enforcement policies followed by the Competition Office. Such guidelines do not create an obligation on the Competition Office or on the Competition Council, their function is merely to provide information to the public on the interpretation and implementation of law as well as the practice followed in the past and to be followed in the future in connection with different key issues of the Competition Act. The leniency guidelines were modified in 2006, but the basic legal character of the leniency regime – namely that leniency is not regulated on a statutory level - did not change.

In this respect, the modification of the Competition Act (Act No. XIV of 2009 on the modification of Act No. LVII of 1996) effective from 1 June 2009 is a significant step towards establishing a much higher standard in the rule of law, while the modification implemented the most important rules of leniency into the Competition Act. The enactment, in addition to elevating

leniency to a statutory level, introduced modifications to the previous policy taking into account the Model Leniency Programme issued by the European Competition Network in September 2006 and the Commission notice on immunity from fines and reduction of fines in cartel cases (the Commission Notice).

In addition to the statutory enactment, the president of the Competition Office issued explanatory notes (Explanatory Notes) to the practical implementation and application of the revised rules of the leniency policy.

2. What are the basic tenets of a leniency/immunity programme? Is leniency available also for other types of competition law violations than cartels?

Maintaining secrecy and destroying evidence are basic characteristics of cartel activities. Under these circumstances it is extremely difficult to fight them using just the regular tools of law enforcement. Key to successful actions against cartels is to break such secrecy and establish a different method of collecting evidence. The leniency policy makes cartel members interested in revealing the cartel activity to the authority in exchange for more favourable treatment in the proceedings if they collect and hand over evidence. The assumption behind the leniency policy is that there are cartel members who would like to quit their illegal activity and would be willing to provide information to the authorities about the activity of the cartel so they could rely with certainty on being exempted from the legal consequences of their previous participation or, at least, could expect a reduction of their individual sanctions.

According to the new section 78/A of the Competition Act, the Competition Council exempts the applicant from the entire amount of the fine (or provides for a reduction of the fine) if the applicant reveals satisfactory information on activity constituting a violation of section 11 of the Competition Act (or Article 81 of the EC Treaty) through an agreement or concerted practice resulting in direct or indirect price fixing, market division (including bid rigging) or establishing quotas in the field of manufacturing or sales.

The regulations provide for two possibilities: complete exemption from the fine or a reduction of the fine. A complete exemption from the fine is possible for the cartel member who arrives first to the authority and provides evidence sufficient so that the Competition Office can obtain a court order for an on-site dawn raid, and/or the establishment of the illegal activity, provided that it also meets other conditions detailed in the Competition Act. Reduction of the fine is possible for cartel members whose assistance significantly contributed to the revelation of the cartel and establishment of the illegal activity, but who were not the first to report it. This latter category covers different levels of fine reduction, ranging between 50-20 per cent, depending on the actual circumstances, timing and content of the information and the efficiency of assisting the authority.

3. How many cartels have been unveiled and punished since the adoption of the leniency policy?

There are no public statistics available which state definitively how many

cartels have been unveiled since 2003 – the original introduction of the leniency policy. We learned informally that there have been nine different cases in which the leniency policy rules have been applied to a cartel member who provided information before an investigation was begun.

4. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient?

There are no specific requirements in the leniency guidelines with respect to the actual types of evidence required. Evidence deemed acceptable for full immunity or a reduction of fines is assessed with respect to its novelty and is valued more on the basis of how much it contributed to the discovery of the case and the establishment of the illegality of the acts under investigation.

Accordingly, the evidence supplied by a ‘first in’ applicant has to be substantial enough to enable the Competition Office to obtain a court order for a dawn raid, or, for ongoing proceedings, must be new to the Competition Office and sufficient to establish the illegality of the acts under investigation. For second and subsequent applicants the evidence provided has to represent ‘substantial added value’ with respect to the evidence already in possession of the Competition Office. The filing of additional evidence needs to be made prior to the handing out of the preliminary findings of the Competition Office or the first day of opening the file for review for any of the undertakings under proceedings (whichever occurs earlier).

The overall circumstances of the case and the information and evidence already available to the Competition Office will determine whether an applicant is eligible for a fine reduction. The Competition Office places greater weight on direct and contemporaneous evidence over evidence which is indirect or has been compiled or organised later on. The value of the evidence is also influenced by the necessity of finding supporting evidence from outside sources.

The rate of reduction of the fine is 30-50 per cent for the first applicant meeting the above requirements, 20-30 per cent for the second applicant and a maximum of 20 per cent for any further applicant meeting the requirements, provided in each case that the applicant satisfies further conditions discussed below.

The applicant must also furnish all the evidence it has in its possession in connection with the case. Partial disclosure will not make the candidate eligible for immunity or the fine reduction.

In addition to providing evidence at the time and of the value required above, the Competition Act sets forth further requirements and conditions which have to be met by each applicant in order to be eligible for the immunity from or reduction of the fine.

Immunity or reduction will be granted by the Competition Office only to an undertaking which, in addition to those set out above, meets the following conditions:

- The applicant must cease its cartel activity immediately following the filing of its application, except in those cases and to the extent

where the Competition Office considers the continuation of certain activities necessary to the success of the proceeding. This request by the Competition Office is limited to the successful execution of dawn raids at other undertakings involved in the case. The Competition Office may not compel the undertaking to continue its activity in order to collect more evidence.

- The applicant has to fully and continuously cooperate in good faith with the Competition Office. According to the Explanatory Notes, within the frame of the cooperation obligation, the Competition Office primarily expects the applicant:
 - (i) to provide all information in its possession in a timely manner;
 - (ii) to be available and react immediately to any further information request of the Competition Office;
 - (iii) to do its best, to the extent possible, to make their current and past employees and officers available for testimony;
 - (iv) not to destroy, falsify or hide any information or evidence;
 - (v) not to announce or publish the fact or content of the leniency request prior to the Competition Office handing out its preliminary opinion or allowing review of the files to any of the undertakings;
 - (vi) to act in good faith even prior to filing the application. According to the Explanatory Notes this means, among other things, that the applicant may not destroy evidence immediately prior to the application, may not notify the other undertakings about the fact or content of the leniency application, and may not organise a ‘cartel for leniency’, for example by sharing evidence with other participants.

As a general rule, those applicants who took steps to coerce another undertaking to participate in the cartel are not eligible for immunity.

TIMING

5. What are the benefits of being ‘first in’ to cooperate?

There are different benefits attached to the ‘first in’ status of a leniency applicant. Most importantly, only the leniency applicant who qualifies as ‘first in’ is eligible to be exempted from the entirety of the fine, provided that it meets all the other requirements discussed above. Furthermore, only the first leniency applicant is eligible to be exempted from criminal sanctions, both as an undertaking, and under certain circumstances, as an individual, provided again, that it meets the preconditions of release from criminal liability, as discussed in detail under question 13 below.

The Competition Office will grant immunity to the undertaking from the entirety of the fine if:

- the undertaking is the first to submit information and evidence previously unknown to the Competition Office about a cartel which enables the Competition Office to obtain a court order for a dawn raid; or
- in proceedings already commenced by the Competition Office, the undertaking is the first to submit new evidence and information which

enables the Competition Office to find an infringement illegal, on the condition that the Competition Office did not have, at the time of the submission, sufficient evidence to find an infringement.

Even a first applicant is eligible to be exempted from the fine only if it meets all the additional conditions discussed in question 4 above.

6. What are the consequences of being ‘second’? Is there an ‘immunity plus’ or ‘amnesty plus’ option?

An applicant who cooperates with the authority but is not eligible for immunity may be entitled to a reduction of the fine if the evidence provided to the Competition Office constitutes significant added value in the proceedings compared to the evidence in the possession of the Competition Office at the time of filing the application. The filing of additional evidence needs to be made prior to the handing out of the preliminary findings of the Competition Office or the first day of opening the file for review for any of the undertakings under proceedings (whichever occurs earlier).

The overall circumstances of the case and the information and evidence already available to the Competition Office will determine whether an applicant is eligible for the reduction of the fine. The Competition Office places greater weight on direct and contemporaneous evidence over evidence which is indirect or has been compiled or organised later on. The value of the evidence is also influenced by the necessity of finding supporting evidence from outside sources.

The rate of reduction of the fine is 30-50 per cent for the first applicant meeting the above requirements, 20-30 per cent for the second applicant and a maximum of 20 per cent for any further applicant meeting the requirements, provided in each case that the applicant satisfies all the other necessary conditions.

There are no immunity plus or amnesty plus programmes provided by the law.

7. Are subsequent firms given any beneficial treatment if they make a useful contribution? How are ‘useful contributions’ defined?

An undertaking that provides evidence to the Competition Office as a third applicant may receive a reduction in the amount of the fine of between 20-30 per cent, if the evidence it provided has ‘substantial added value’ in the proceedings, and the undertaking meets the requirements described in question 4 above. Any subsequent applicant providing evidence of substantial added value for the proceedings and meeting the requirements described in question 4 above may be granted with a fine reduction of up to 20 per cent compared to the fine set in accordance with the general rules.

In the event that the undertaking provides compelling evidence to the Competition Office of facts that are not known to the authority and which have significance in connection with the considerations which need to be taken into account when establishing the amount of the fine, then the Competition Office will disregard such facts when establishing the amount of the fine of the undertaking providing the evidence.

SCOPE/FULL LENIENCY

8. Is it possible to receive full leniency? If so, what are the conditions required to receive full leniency? Can ringleaders/coercers receive full leniency? If there is a requirement to ‘cooperate fully and on an ongoing basis’ what does it entail? Does the regulatory authority require the applicant to cease participation in the cartel conduct after its application?

In order to receive full leniency the applicant has to meet all of the following requirements:

- it has to be first to report to the Competition Office the existence of the cartel, and provide evidence substantial enough to enable the Competition Office to obtain a court order for a dawn raid; or in the case of already pending proceedings it has to be first to provide new evidence substantial enough to establish the illegality of the acts under investigation;
- it has to provide the Competition Office with all information and evidence it has in its possession without altering its content;
- it has to fully cooperate, in good faith, on a continuous basis throughout the entire procedure with the Competition Office (the actual content of such requirement is discussed in question 4 above);
- it has to discontinue its involvement in the cartel following the submission of evidence, no later than the time agreed upon with the Competition Office; and
- it must not have taken steps to coerce other undertakings into participating in the infringement and operating the cartel agreement.

9. How many companies have received full immunity from fines to date?

To our knowledge, so far all companies relying on the leniency rules have received full immunity or a fine reduction.

PROCEDURE

10. What are the practical steps required to apply for leniency?

Technically there are three different ways to file a leniency application: the preferred format is to file an application in full, in which case all required information is included in the file in accordance with the application form put together for this purpose by the Competition Office. If the applicant cannot provide all the information at the time of the filing, it may file an incomplete form (marker application), in which case the Competition Office will set a deadline for the completion of the information. The third possible filing relates to international cartels, where parallel to the local application, the applicant also files a leniency application at the European Commission.

The application must include the name of the applicant and the description of the cartel and must be accompanied by the required attachments including all available evidence.

Anonymous applications are not accepted. The application may be filed in writing, or may be presented orally by the representative of the applicant,

in both cases to the cartel department of the Competition Office. Foreign language documents need to be translated into Hungarian.

Full application for immunity

A full application for immunity includes all information required on the application form prepared by the Competition Office. When designing the application form the Competition Office took into account the Model Leniency Programme of the ECN and the Commission Notice.

A full application has to include information sufficient to justify the court order for an on-site dawn raid, or if filed at a later stage of the proceedings, enough evidence to establish the illegal cartel. Applications for a dawn raid have to be filed prior to a dawn raid and typically has to include the name and address of all undertakings involved in the cartel activity; name, position and address of all private persons who participated in the cartel activity; and a detailed description of the cartel, including its goal, its activity, the affected products and the geographical scope, the timeframe and the estimated market volume affected, the dates and places where meetings were held, their length and participants. All available supporting evidence must be filed along with sufficient explanation.

Applications containing evidence sufficient to establish the cartel may be filed at any time during the proceedings, provided that no one has filed an application for the justification of a dawn raid. The filed documents together with the explanation and the description of the cartel in their entirety have to be sufficient to prove the existence of the cartel.

Incomplete summary application for immunity: ‘marker’ application

If the applicant is not able to provide all the required information and evidence at the same time, it may file an incomplete application. A marker application protects the place of the applicant in the potential queue of leniency applicants, while providing additional time for the applicant to prepare a completed application in order to meet the requirements for immunity. At a minimum, it has to include the name of the applicant, the known facts on the cartel and information on the evidence known to the applicant, including its form and content. The Competition Office sets a deadline for the completion of the full application.

Application for a reduction of the fine

In order to be eligible for the reduction of a fine the applicant has to file evidence with the Competition Office that in its character or detail contributes significant added value relative to the evidence already in the possession of the Competition Office, thereby enhancing the possibility of proving the illegal cartel activity. Application for the reduction of the fine may be filed at the latest prior to the date of handing out the preliminary opinion of the Competition Office, or the day when the file is made available for review to the participants, whichever occurs earlier.

Companies may not file a joint application except where they are members of the same group. According to the Explanatory Notes the most

practical way to do this is if the controlling company files the application, naming all group companies involved in the cartel activity, accompanied by a power of attorney from each company involved. An application at one competition authority will not provide leniency at other competition authorities.

11. Is there an optimal time to approach the regulatory authority?

There is no recipe for how to time a leniency application. Obviously full immunity is only possible for the undertaking which qualifies as ‘first in’. If an undertaking receives information about an ongoing investigation, it is worth thinking about whether it could apply for leniency and provide substantial added value to the evidence already held by the Competition Office. It requires a very quick evaluation of the situation and fast decision-making in order to secure a good position in the queue.

12. What guarantees of leniency exist if a party cooperates?

According to the recent modification of the Competition Act, if the applicant meets all the conditions of the Competition Act, the Competition Council must provide the applicant with immunity or a fine reduction, whichever the case may be, provided that the applicant: acts in all respects in accordance with the requirements of the law; fully cooperates throughout the entire proceedings with the Competition Office; provides all evidence it has in its possession; and stops its cartel activity at the time as agreed upon with the Competition Office. In accordance with the process described under question 10 above, the Competition Office deals with each application individually, in the order in which they were received and issues a resolution granting conditional immunity or conditional fine reduction to the applicant whether its application is accepted as ‘first in’, or second, or as a subsequent application. The granting of immunity, a fine reduction or any other benefit is awarded by the Competition Office only at the end of the proceedings, in the final decision on the merits, when the competition council can already evaluate the actual level of cooperation and fulfilment of all conditions required by law.

CONSEQUENCES

13. What effects does leniency granted to a corporate defendant have on the defendant’s employees? Does it protect them from criminal and/or civil liability?

A request for the application of the leniency policy shall be accepted by the Competition Office only from the official representatives of an undertaking. In the event that officers or employees of the undertaking participated in the cartel and want to gain immunity from criminal sanctions, they have to participate in the reporting personally. Reporting made by the management of an undertaking does not shield the employees or other officers of the company from criminal sanctions. Furthermore, employees and officers of an undertaking receive immunity from criminal sanctions only if the reporting occurs at a time when none of the authorities (Competition Office,

financial authorities, public procurement authorities, etc) has knowledge of the criminal act. Consequently, exemption from criminal sanctions will only happen when the reporter was not only 'first in' at the authority, but also, no authority yet had knowledge about the act.

With respect to criminal sanctions, the situation is more complex. Section 296/B of the Criminal Code states that:

- '(1) Any person who enters into an agreement aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or an activity that is subject to a concession contract by fixing the prices (charges) or any other term of the contract, or for the division of the market, or takes part in any other concerted practices resulting in the restraint of trade is guilty of felony punishable by imprisonment for up to five years.*
- (2) Any person who partakes in the decision-making process of an association of companies, public body, a society or similar organisation, and adopting any decision that has the capacity for restraining competition aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or an activity that is subject to a concession contract shall also be punishable as set forth in subsection (1).*
- (3) [...]*
- (4) The perpetrator of a criminal act defined in subsections (1)-(3) shall be exonerated from punishment if it confesses the act to the authorities first hand and reveals the circumstances of the criminal act. Authorities shall also mean the bodies supervising competition and financial operations and the body which reviews procedures in connection with public procurement contracts.'*

It is important to point out that only cartels which relate to public procurement tenders and concession contracts are subject to criminal punishment. For cartels in these areas the persons acting on behalf of the undertaking in the cartel, or being involved in the decision-making process, whether an officer or an employee, are punishable. Any person who participates in the decision-making process (directors, members of the board, managing directors, heads of divisions, etc) making the undertaking involved in a cartel is punishable. In order to gain immunity from criminal punishment the person who is punishable has to report the criminal act, individually or together with the management of the company, as 'first in', at a stage when none of the authorities yet has knowledge about the criminal act. Only the first-comer (not only to the Competition Office, but to any authority mentioned in the Criminal Code) may rely on immunity. Reporting by the management of the undertaking does not create immunity from criminal sanctions for the employees and officers involved in the acts. The Competition Office accepts leniency applications only from the official representative of an undertaking. Therefore, it is possible that reporting by an employee may create immunity from criminal sanctions for that employee, but may not exempt the undertaking from either the competition law fine or the criminal sanctions. Undertakings are also subject to criminal sanctions under Hungarian law (the sanctions may be a fine, termination of the company or limitation of its activities for a certain period).

14. Does leniency bar further private enforcement?

The effect of granting immunity is limited to administrative proceedings, it does not provide immunity from civil law liability. Nevertheless, in order to make the leniency regime more attractive, the Competition Act provides that the applicant who received immunity may deny payment of a civil law claim as long as the damages can be collected from other participants in the cartel. The lawsuit for damages against the undertaking enjoying immunity must be suspended until the decision of the Competition Office in the antitrust matter becomes final and binding.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

15. Is confidentiality afforded to the leniency applicant and other cooperating parties? If so, to what extent? Is the identity of the leniency applicant/other cooperating parties disclosed during the investigation or in the final decision? Is information provided by the leniency applicant/other cooperating parties passed on to other undertakings under investigation? Can a leniency applicant/other cooperating party request anonymity or confidentiality of information provided?

Under the Competition Act anonymous leniency applications are not possible. According to the Competition Act (Article 55(1)), the party under investigation and its representative may have access to the documents relating to the proceedings only after the completion of the investigation, or following the date set by the Competition Council and they may make copies and take notes of them. Specifying the documents concerned, the competition council may give its consent to the party or its representative having access to the documents before the completion of the investigation where this does not jeopardise the effectiveness of the proceedings. This means that, typically, the identity of the leniency applicant and the statements and other evidence made by it are held confidential by the Competition Office until the end of the investigation phase of the proceedings.

In addition to the above rule the leniency applicant may request that certain reports, evidence, statements, etc be handled confidentially during the proceedings. According to Article 55(3) of the Competition Act the party under investigation may request, based on protection of business secrets, the confidential treatment of some documents by establishing why the given document qualifies as a business secret. Leniency applicants may use this opportunity to limit the possibility of other parties to the proceedings reviewing the filed documents and other evidence. In practice confidentiality is granted only to the extent that it does not jeopardise other participants' right of defence. If the request for confidential treatment of certain business secrets is granted by the Competition Office, the applicant typically must file a confidential and a non-confidential version of the same brief.

16. Is the evidence submitted by the leniency applicant protected from transmission to other competition authorities with whom the authority in question cooperates?

In accordance with the Competition Act, the Competition Office may not use the information and evidence provided by the applicant for immunity for any purposes other than the leniency proceedings until the issuance of the decision granting conditional immunity. If the application is rejected, or the applicant withdraws its application prior to such decision, the Competition Office has to give back all documents and evidence to the applicant. Nevertheless, the Competition Act does not provide any other protection to the applicant, nor does it bar the Competition Office from providing information to other authorities. It is a highly controversial issue and will require further legislation in order to clarify its uncertainty and provide a higher level of protection to applicants.

With respect to competition authorities in the European Union, Regulation 1/2003 EC is binding on the Competition Office. In accordance with Article 12, the Competition Office is entitled to share any information or evidence, including confidential information, with other EU authorities.

17. To what extent can evidence submitted by the leniency applicant (transcripts of oral statements or written evidence) become discovered in subsequent private enforcement claims? Can leniency information be subjected to discovery orders in domestic or foreign courts? Can leniency information submitted in a foreign jurisdiction be subjected to discovery orders in the domestic courts?

Discovery, as known and regulated in common law jurisdictions, is not available under the Hungarian legal system. In a private enforcement claim based on cartel activity, the court must notify the Competition Office. The Competition Office may send its comments to the court, or may commence investigation proceedings. The final decision of the Competition Office on the merits of the competition law infringement is binding on the court deciding the civil law matter. Other than that, the law does not regulate how, under what conditions or whether the evidence filed with the Competition Office can be revealed in civil law proceedings.

18. Are there any precedents in which evidence from a leniency application has been discovered in a private enforcement claim?

See answer to question 17.

RELATIONSHIP WITH THE EUROPEAN COMMISSION'S LENIENCY NOTICE AND LENIENCY POLICY IN OTHER EU MEMBER STATES

19. Does the policy address the interaction with applications under the Commission Leniency Notice? If so, how?

If there is the possibility of parallel applications within the European Union, and it seems that the European Commission is the most suitable to carry the case forward, the applicant may file a preliminary application with the

Hungarian Competition Office.

A preliminary application may be filed only as an application for immunity by providing enough information to justify a court order for a dawn raid. The application must include the name and address of the applicant, the name of the other participants in the cartel, the products, the geographical area, the timeframe and the nature of the cartel. With respect to the Hungarian market the application has to provide information on the cartel affecting Hungary, the market effect of the cartel on the Hungarian market and the estimated market share of the participants in the Hungarian market.

The applicant also has to inform the Competition Office whether it has filed or plans to file other leniency applications with other competition authorities.

Filing a preliminary application ensures that if the European Commission decides not to pursue the case, but the local authority proceeds with it, the applicant secures its position for leniency with the Hungarian authority at the time of submitting the preliminary filing. Provision of the immunity is subject to the applicant providing all supplementary information and evidence that is requested by the Competition Office when launching its proceedings.

20. Does the policy address the interaction with applications for leniency in other EU member states? If so, how?

The law does not address the interaction with applications made in other EU member states. It states clearly that application of the leniency policy in competition proceedings does not provide the applicant with immunity from any fines that may be imposed by other (foreign) competition authorities.

RELATIONSHIP WITH SETTLEMENT PROCEDURES

21. What is the relationship between leniency and applicable settlement procedures? Are they mutually exclusive?

There are no specific regulations with respect to settlement procedures. Voluntary undertaking of different obligations is known in Hungarian law only in proceedings commenced by the Competition Office *ex officio*. Parallel application of the voluntary undertaking with the leniency filing would be impossible, since the precondition of eligibility for immunity or fine reduction is that the applicant immediately ceases the illegal activity, ie, it is a statutory requirement and not an option or voluntary undertaking.

REFORM/LATEST DEVELOPMENTS

22. Is there a reform underway to revisit the leniency policy? What are the latest developments?

We are unaware of any plans to reform the new regime in the near future.

