



ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION
SUBMISSION TO THE HUNGARIAN COMPETITION AUTHORITY REGARDING ITS DRAFT
FINING NOTICE

1 Introduction and Purpose of Submission

1.1 Introduction

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at <http://ibanet.org>.

1.2 Purpose of Submission

The Cartels Working Group of the Antitrust Committee of the IBA (*the "Working Group" or "WG"*) is pleased to make this submission on the draft notice on the setting of the amount of fines in cases of breaches of Hungarian and European antitrust rules (the **Draft Notice**) issued by the Hungarian Competition Authority (in Hungarian: Gazdasági Versenyhivatal, **GVH**) at its website on 1 September 2017.¹ The Draft Notice is proposed to replace the current notice No. 1/2012 of the President of the GVH and the President of the Competition Council on the same subject (the **Present Notice**).

The WG wishes to address only specific issues based on the WG's international, European and Hungarian experience in a manner that the Hungarian Competition Authority will hopefully find constructive and helpful.

The WG commends the Hungarian Competition Authority for undertaking an update of the Present Notice, especially with regard to the proposed amendments which relate to taking into account compliance programs as a relevant factor for the reduction of fines. It has some misgivings, in particular as concerning the use of compliance programs as aggravating factors, which are set out below.

¹ The draft is available at:
http://www.gvh.hu/gvh/elemzesek/vitaanyagok/nyilv_konz_antitroszt_fogyasztos/nyilv_konzult_antitroszt_fogyasztos.html (in Hungarian)

2 Methodology and Steps to Calculate Fines

The Draft Notice introduces a five-step method for the calculation of the fine (1. initial amount, 2. basic amount, 3. corrections, 4. cooperation and 5. payment difficulties).

While the WG considers this method to be a relatively clear and transparent way for the fine calculation, it could be useful to further streamline it: one may either combine the first two steps (to clear up the difference between an “initial amount” and a “basic amount”) or, to the contrary, apply a more direct differentiation between the respective denominations. Such further clarity would be beneficial to both the parties and also the GVH as it would avoid unnecessary dispute on unclear provisions.

3 Relevant Turnover

In the Draft Notice, it is stated “*The illegally achieved turnover includes income from the sales of directly and indirectly affected products. In case of vertically integrated businesses (groups), internal sales shall also be taken into account.*”²

In case of indirectly affected products, the WG consider it is important to further clarify the scope and extent to which such products may be taken into account, especially in light of relevant judgments of the European Courts. More specifically, as the European Court held most recently in its judgment C-588/15 P and C-622/15 P (LG/Philips) “*the concept of the ‘value of sales’ referred to in point 13 of the [European Commission’s] Guidelines on the method of setting fines cannot extend to encompass sales made by the undertaking in question that in no way come within the scope of the alleged cartel*”³ It would be useful to include this conclusion in the explanation in the relevant section where the Draft Notice discusses the value of sales.

In addition, once again based on the European Court’s jurisprudence (when applied together with the relevant provisions of the Hungarian Competition Act on the jurisdiction of the GVH), the Draft Notice could make it clear that in the case of products exported outside of Hungary, indirect sales can only be included to the extent such sales have a repercussion (or at least a tangible effect) over competition dynamics within the Hungarian territory⁴

Furthermore, the Draft Notice states that with regard to anticompetitive conduct affecting tender procedures (e.g. bid-rigging), “*the relevant turnover is equivalent to the tender’s value (which is typically equivalent to the value of the winning tender).*” The WG considers it important to add that only the net amount of the tender’s value should be taken into account (ie without any applicable taxes, like VAT); this would conform to the provisions of para 16 and the past decision-making practice of the GVH.⁵

² para 16 of the Draft Notice.

³ para 69 of the judgment.

⁴ See C-231/14 P InnoLux, para 57.

⁵ See e.g. from the recent case-law the GVH’s decision in Vj/79/2013 (medical sutures)

4 Compliance Programs – as an Aggravating Circumstance

The Draft Notice envisages three specific situations where an existing competition compliance program (or, to be precise: a breach of an existing competition compliance program, which, at the same time, entails a breach of competition law) may serve as an aggravating circumstance for the calculation of fines:

- a voluntary compliance program was used in an abusive manner, in order to mislead the authority and to cover an infringement,
- the company undertook the introduction of an ex post compliance program vis-à-vis the GVH as a result of a previous GVH investigation (ie if the compliance program was expressly undertaken as part of a prior GVH infringement decision),
- the company voluntarily introduced a competition compliance program.⁶

The text of the Draft Notice states that in the first case, the situation entails an “abusive” use of the compliance program, while in the latter cases, the mere existence of the breach appears to be sufficient to be considered as an aggravating circumstance. Furthermore, the text of the Draft Notice appears to create a mandatory, non-discretionary type of penalty: the occurrence of these situations automatically triggers an increase to the fine due to aggravating circumstances.

The WG has the following comments to the above new rules.

The Committee considers that promotion of competition compliance programs is a positive factor that can help instill and promote a competition culture in Hungary.

Nonetheless, the newly proposed rules appear to have several important drawbacks.

First, it would be unfair in principle if those parties who commit significant energy and resources to implement an effective compliance program are treated in a more burdensome way as compared to companies that have no such programs in place. Companies that have actively contributed to the spread of compliance culture cannot be in a worse position than those who have not made the commitment to include competition concerns to their governance principles. This would be an untenable position.

Second, in practice such provisions introduce a disincentive for companies to adopt competition compliance programs. Although such tools tend to reduce the possibility of a violation of the competition rules taking place within the company, compliance programs are built in a “best-efforts” base and cannot peremptorily avoid misconduct. In this sense, one could come to the conclusion that not adopting a compliance program is preferable if it fails, even to a small extent, the sanction would be even more severe. This clearly creates undue incentives.

Third, competition compliance programs – as all systems operated by humans – are naturally subject to honest mistakes. As a result, it is possible that a compliance program, no matter how well designed and maintained, fails to detect a breach of competition law. In a number of cases, the breach may be either minor or without any anticompetitive intention by the company concerned, in particular in situations where the law or facts are not clear and a breach takes place unintentionally. In such situations, increasing a fine simply on the basis that a compliance program was in place but

⁶ See paras 32-33 of the Draft Notice.

failed to detect a possible competition issue, would be undue and create unwanted incentive of not intending to have a program in the first place.

Fourth, the proposed rules lack flexibility in their formulation. They do not provide any margin for the GVH to exercise discretion and to make nuanced decisions over degrees of breaches of the compliance program (and thus: degrees of breaches of competition law). This could also lead to undesirable results as disproportionate sanctions.

Finally, the WG notes that situations where compliance programs are expressly, maliciously and on purpose used to circumvent and / or abuse competition law rules will be extremely rare and wholly exceptional.

In light of the above, the WG suggests that the GVH remove effective compliance programs from the aggravating circumstances list.

Also, the WG considers that if the GVH finds it necessary to mention “abusive” compliance programs, this should be limited to determining that a finding that a compliance program is “abusive” would be considered an aggravating circumstance when imposing a sanction. Furthermore, the Draft Notice should contain the express and clear caveat that a “simple” error or errors in the compliance program (ie the fact that the program did not detect each and every infringement) cannot in themselves trigger this aggravating circumstance.

5 Extended Scope of Recidivism

In accordance with the Draft Notice, a repeated infringement would be taken into account (i) in relation to the entire group of undertakings in question (ie the conduct of any other undertaking in the group becomes relevant), (ii) in case of infringements of EU law, any other EU competition authority's decision would be relevant and (iii) the relevant period for previous infringements would be increased to 15 years before the adoption of the (new) decision. A repeated infringement could result in a 100% increase of the basic fine amount as per each repeated infringement.

Before turning to each of these proposed changes in the Draft Notice, the WG wishes to comment on the definition of recidivism in the Draft Notice, which states that a “*repeated infringement occurs, if the undertaking commits an equivalent or similar infringement continuously or repeatedly*” and then goes on to state that the criterion of “*equivalent or similar*” infringement means that the first and the repeated infringement both entail either a breach of Article 101 TFEU (or its Hungarian equivalent) or a breach of Article 102 TFEU (or its Hungarian equivalent)⁷. This is an unreasonably vague formulation and is contrary to the practice of the European courts in this respect. Namely, under the EU rules, “*infringement of Article 101 (eg vertical restrictions) would not lead to a finding of recidivism in a cartel decision and vice versa*”.⁸ It is therefore suggested that the GVH follows a similar more tailored approach in respect of the subject of repeated infringements.

Second, the WG takes the view that making any NCA or European Commission decision relevant from the perspective of recidivism by the GVH can also be regarded as excessive. It is true that the same rule is contained in the European Commission's own fining guidelines: however, it is to be noted that the European Commission's EU-wide jurisdiction and its role as the pan-European enforcer of European competition rules makes it very different from the GVH. Specifically, under the Hungarian Competition Act, the GVH only has jurisdiction over foreign conduct, if such conduct may have an effect over the territory of Hungary.⁹ In a number of cases, the European NCAs bring decisions, which have nothing to do with Hungary, even if the decision concerns a local member of a multinational group of undertakings, which also happen to have another subsidiary in Hungary.¹⁰ As a result, the WG would propose a more nuanced approach in such a case, generally leaving out any past conduct that is not related to Hungary and allowing the consideration of foreign conduct only in exceptional cases (e.g. where there is a direct link between the two infringements or where the prior infringement had a Hungarian impact¹¹).

⁷ Para 44 of the Draft Notice, last sentence.

⁸ See Faull&Nikpay: The EU Law of Competition, OUP, 2014, p. 1294, referring to T-57/01 *Solvay v Commission* and T-66/01 *ICI v Commission*.

⁹ See the second sentence of Article 1(1) of the Hungarian Competition Act.

¹⁰ Arguably, if the Portugal or Swedish NCA made a decision about a local infringement relating to a large multinational group, such local conduct – even if an effect on trade between Member States was established – can hardly have any effect on the territory of Hungary and should be irrelevant when that multinational group's other subsidiary becomes involved in a matter before the GVH.

¹¹ For example, the latter solution is used (and is planned to be continued to be used) by the UK competition authority: see footnote 35 of the CMA [OFT]'s guidance as to the appropriate amount of a penalty (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/634987/marked-up-draft-guidance-ca98-penalty-calculation.pdf)

Third, the WG also considers the increase of the relevant period for recidivism to 15 years as disproportionate. Such period is significantly beyond the 5 years limitation period typical in competition law regimes (such as under the EU regime¹² or the Hungarian regime¹³). In fact, under the EU jurisdictional practice, there is no obligation to employ such a specific period and it is up to the Commission (and then the reviewing courts) to verify if the given period “*demonstrated a tendency towards infringing the competition rules*”.¹⁴ As a result, the WG suggests either not to employ such a specific period (similarly to the European Commission’s fining guidelines) and thus to take a case-by-case flexible approach or to employ a significantly shorter, e.g. 5 year period for this purpose.

6 Compliance Programs – as a Mitigating Circumstance

The WG welcomes the incorporation and recognition of compliance programs as effective tools into Hungarian fining policy / guidelines. Previously, compliance programs had no role in sanctioning in Hungary, so it is a welcome change that the Draft Notice introduces it for the first time as a part of this assessment.

As referred above, considering the existence of a compliance program to be an aggravating circumstance, the Draft Notice neglects the policy benefits arising from companies’ efforts to respect competition laws and to promote a pro-competition culture in Hungary.

As an entire novelty compared to the Present Notice, the Draft Notice wishes to take note of compliance programs as a mitigating circumstance in two ways:

- *ex ante* compliance programs (implemented before the initiation of the GVH proceedings) in itself would not entail a reduction; however, if the given party can prove that the compliance program contributed to the provision of relevant evidence within the framework of a leniency application, then this could entail a maximum 10% reduction.
- *ex post* compliance programs (implemented after the initiation of the GVH proceedings) may achieve a smaller rate of reduction (up to 5%), only if (i) the program is undertaken to be implemented in conjunction with a leniency application, a participation in a settlement procedure or active measures to rectify the harm caused by the infringement and (ii) if they comply with relevant international standards.

As to *ex ante* compliance programs, the WG notes that the requirement to submit a full-fledged leniency application in order to benefit from this reduction appears to be rather strict. On the one hand, leniency under Hungarian law is only available for (horizontal) cartels and vertical price-fixing, which excludes a wide range of possible infringements – most prominently: abuses of a dominant position or vertical restraints – from the scope of this reduction. On the other hand, the requirement that “*the compliance program contributes to the provision of evidence, which was previously unknown to the Authority, in the framework of a leniency application*”¹⁵ also entails an even more significant burden, since in case of an “ordinary” leniency application under the HCA it could be sufficient if the applicant provides “*significant added value*” to the case at hand.¹⁶

¹² See Article 25 (1) (b) of Regulation 1/2003/EC.

¹³ See Article 67 (3) of the Hungarian Competition Act.

¹⁴ T-53/03. BPB v. Commission, para 388

¹⁵ para 69 of the Draft Notice, second sentence.

¹⁶ Article 78/A (3) of the Hungarian Competition Act.

As to *ex post* compliance programs, it is noted that the requirements here are less strict as in the case of an *ex ante* program, since it is possible to fulfill these by participating in a settlement procedure or by undertaking active compensation measures. This could allow sufficient flexibility for the undertakings wishing to make use of this new possibility. As to the specific requirements for an “acceptable” compliance program¹⁷, the WG considers such requirements as appropriate for the given purposes. Nevertheless, the WG notes that they could be further refined (e.g. to clarify the scope of a public commitment by “*all of [the] officers*” of the company to the compliance program¹⁸ or the precise meaning of a “*feedback, continuous improvement of the program*”¹⁹).

7 Conclusion

The WG welcomes GVH’s willingness to offer guidance on the application and enforcement of Hungarian competition law.

We believe that the Draft Notice would greatly benefit from amendments to ensure that it is in line with international experience and ensure that the regulatory burden on firms is not unreasonably and unnecessarily increased beyond what is required to achieve compliance with competition laws.

By introducing the amendments we outline above, the Draft Notice could be improved to be more in line with legal requirements in other mainstream jurisdictions, as well as the findings of international organisations, including those of the OECD.

¹⁷ Points a)-e) of para 71 of the Draft Notice.

¹⁸ point a)

¹⁹ point e)