

NOTICE OF THE OFFICE FOR THE PROTECTION OF COMPETITION

OF 4 NOVEMBER 2013

ON APPLICATION OF ARTICLE 22ba (1) OF THE ACT ON THE PROTECTION OF COMPETITION

(LENIENCY PROGRAMME)

1. Through this Notice, pursuant to the Article 22ba (1) of the Act No. 143/2001 Coll., on the Protection of Competition and on Amendments to Certain Acts, as amended (hereinafter referred to as “the Act”) the Office for the Protection of Competition (hereinafter referred to as “the Office”) sets out the framework for granting immunity from a fine imposition or reduction of the fine imposed upon undertakings which are or have been party to secret cartel agreements and which decide to cooperate with the Office during the investigation of the alleged cartel. By cartel agreements it is meant secret horizontal agreements between two or more undertakings aimed at coordinating their competitive behavior in the market and/or influencing the competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid rigging and restrictions of imports or exports.

2. Such cartel agreements lead not only to increase in price and reduced goods¹ choice for the consumer but also have negative impacts on relevant economic sector through the restriction of competition, avoiding pressures that lead the companies to innovate, both in terms of product development and the introduction of more efficient production methods. Finally, such cartel agreements result in artificial prices and reduced choice for the consumer and in the long term, they lead to a loss of competitiveness and reduced employment opportunities.

3. Cartel agreements have serious negative impacts on competition and the Office considers the combat against such agreements as its priority. By their very nature, secret cartels are often difficult to be detected, investigated and prohibited without the cooperation of undertakings or individuals who are involved in them. Therefore, the Act provides the possibility of application of the Article 22ba (1) on those undertakings, which are willing to put an end to their participation in illegal practices and cooperate in the Office’s investigation under defined conditions, independently on other parties to an agreement.

4. The Office assumes that transparent setting and explanation of its procedures for applying the Article 22ba (1) of the Act in this Notice provide the undertakings with better understanding of the manner and conditions needed for submitting the application for granting the immunity from the fine imposition or reduction of the fine imposed pursuant to the Article 22ba (5) (hereinafter referred to as “the application”) and therefore increase the legal certainty of undertakings. Certainty and understanding is crucial for undertakings in order to use the legal possibility to apply for immunity or reduction of the fine imposed.

5. This Notice results from the Act and at the same time from the Model Leniency Programme of the European Competition Network (hereinafter referred to as “ECN”)² and Commission Leniency Programme³ and shall be interpreted in accordance with these documents. Leniency programme refers both to secret horizontal⁴ agreements forbidden under the Article 3 of the Act and Article 101 of the Treaty on Functioning of the European Union. Non-imposition of the fine on the basis of this

¹ In this Notice, goods mean products and services as described in the Article 1 (1) of the Act.

² Document is available on http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

³ Official Journal of the European Union C 298, 8/ 12/2006, page 17.

⁴ This does not exclude the application of leniency programme also on horizontal agreements that includes also vertical characteristics.

programme is possible (hereinafter referred to as “*Leniency type I*”) along with possibility to reduce the amount of the fine (hereinafter referred to as “*Leniency type II*”).

I. Immunity from a fine imposition (Leniency type I)

6. This part regulates conditions under which the Office will grant immunity from a fine to the undertaking who was a party to the cartel. Further distinction between Leniency type IA and Leniency type IB is set, according to character of information provided by the undertaking to the Office.

I.1. Leniency type IA

7. The Office will grant the immunity from the fine imposition to the undertaking if:

- a. The undertaking is the first to submit evidence which the Office does not possess and which, in the Office’s view, at the time it evaluates the application, will enable the Office to carry out targeted inspections⁵ in connection with an alleged cartel; relevancy of this information is evaluated by the Office.
- b. The undertaking admits its participation in cartel.
- c. The Office had not had sufficient evidence to adopt an inspections decision at the time of the application and had not carried out an inspection (dawn raid) in connection with the alleged cartel arrangement, and
- d. the common conditions attached to leniency application are met.⁶

8. In order to fulfil conditions set in the Article 7 of this Notice, the leniency applicant is obliged to provide the Office with the following information and evidence:

- a. In the extent known to the applicant at the time of submission:
 - i. A detailed description of the alleged cartel agreement, including its aims, activities and functioning etc.; information about products and services concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application;
 - ii. The name and address of the undertaking submitting the immunity application as well as the names and addresses of all other undertakings that participate/participated in the alleged cartel;
 - iii. The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant’s knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant’s behalf;
- b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

⁵ Article 21f or 21g of the Act.

⁶ See Article 15 of this Notice.

I.2. Leniency type IB

9. The Office will grant immunity from fine imposition to the undertaking if:

- a. The applicant is the first to submit information and evidence which, in the Office's view, prove an existence of an alleged cartel pursuant to the Act and which the Office has not gathered yet; the relevance of submitted documents is assessed by the Office.
- b. The undertaking admits the participation in cartel.
- c. The Office did not, at the time of the submission, have sufficient evidence to prove the alleged cartel.
- d. No undertaking has been granted conditional immunity⁷ from fines according to leniency IA in connection with the alleged cartel, and
- e. the common conditions attached to leniency application are met.⁸

II. Reduction of a fine (Leniency type II)

10. The Office will reduce a fine imposed on undertaking if:

- a. An undertaking provides the Office with evidence of the alleged cartel which, in the Office's view, represents significant added value relative to the evidence already in the Office's possession at the time of the application.
- b. The undertaking admits the participation in cartel.
- c. The common conditions attached to leniency application are met.⁹

11. The concept of "significant added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Office's capability to prove the alleged cartel. During the assessment the Office usually evaluates written evidence originating from the time referred, rather than evidence elaborated later on, for example in the form of a statement. In general, it is considered that the evidence related directly to the concerned questions shall be deemed more valuable than evidence related indirectly. The evidence's value is determined also by the level of acknowledgement received from other sources necessary to ensure reliability of the evidence offered. Evidence with significant added value represents information that enables the Office to prove higher level of infringement or longer duration of alleged cartel.

12. If the conditions attached to Leniency type II application have been fulfilled, firstly the Office takes into account the order of undertakings in which they applied for the leniency and reduces a fine:

- a. To the first applicant providing the Office with information and evidence representing significant added value, by 30–50 %;
- b. To the second applicant providing the Office with information and evidence representing significant added value, by 20–30 %;
- c. To the other applicants providing the Office with information and evidence representing significant added value, up to 20 %.

⁷ See Article 32 of this Notice.

⁸ See Article 15 of this Notice.

⁹ See Article 15 of this Notice.

13. During the determination of the appropriate level of reduction of the fine in all of these cases, the Office will take into account the time at which undertakings submitted information and evidence fulfilling the conditions set in Article 10 of this Notice and the extent to which the evidence, by its nature or details, strengthens the possibility of the Office to prove the cartel.

14. If the applicant is the first to submit additional evidence and information in terms of Article 10 of this Notice, which the Office uses to establish additional facts which have a direct bearing on the amount of the fine, such as gravity or duration of the infringement, this will be taken into account and considered as non-aggravating for the undertaking which submitted the evidence.

III. Common conditions for granting immunity from imposing and reduction of a fine (hereinafter referred to as “common conditions for leniency application”)

15. The applicant must satisfy the following conditions:

a. The applicant must actively assist the Office in the course of the administrative proceeding. This includes especially:

i. Without the Office’s consent, the applicant shall not disclose any information about its leniency application or its content until the Statement of Objections is issued by the Office;

ii. At the time when contemplating the submission of leniency application, the applicant must not have destroyed, falsified or concealed evidence relevant to alleged cartel or disclosed its intention to submit application or a part of intended application, except having done so at other competition authorities;

iii. Providing the Office promptly with all relevant information and evidence related to alleged cartel that comes into the applicant’s possession or under its control;

iv. Providing the Office only with true, complete and exact, not misleading information;

v. Being available to the Office to reply promptly to any requests that may contribute to the establishment of relevant facts on this subject;

vi. Making current and, if possible, former employees, directors and members of statutory bodies available for the interviews with the Office;

vii. Not destroying, falsifying or concealing relevant information or evidence which falls within the scope of alleged cartel agreement.

b. Should the applicant have not terminated its involvement in the alleged cartel agreement already; the applicant would do so at the time of its leniency application; by its conduct the applicant must not affect the conduct of dawn raids.

c. The applicant has not taken steps to coerce other undertakings to participate in the cartel.

IV. Not imposing the ban to execute public contracts or concessions

16. If the Office does not impose the fine pursuant to the part I. of this Notice or if the Office reduces the fine pursuant to the part II. of this Notice, it is not possible to impose a ban to execute public contracts or concessions to the same undertaking.¹⁰

¹⁰ Article 22a (4) and (5) of the Act in relation with Article 22ba (3) of the Act.

V. Procedural rules

17. An undertaking, party to alleged cartel agreement, wishing to ask for immunity from a fine or for reduction of a fine, should apply to the Office for the Protection of Competition. Formal application can be made only by individuals entitled to represent or act on behalf of the undertaking.

18. Granting immunity from a fine imposition pursuant to the part I of this Notice or reduction of the fine pursuant to the part II of this Notice is possible only on the basis of an application submitted by an undertaking. The application for the immunity from a fine imposition has to be submitted no later than a day when the undertaking received the Statement of Objections. The application for the fine reduction has to be submitted within 15 days at the latest from the date when the undertaking received the Statement of Objections. Mentioned applications may be withdrawn within 15 days from the deadline for their submission. The application which has been withdrawn and information and evidence attached to the application are not taken into account during the administrative proceedings when determining the responsibility for administrative offenses.¹¹ The application which has been submitted after the set deadline will be assessed by the Office only in cases worth of special considering.¹²

19. The submission including application for immunity from fine or for the fine reduction is a voluntary Notice made by an undertaking or on its behalf regarding undertaking's awareness of the cartel agreement and its role in the alleged cartel prepared specifically for purposes of the submission pursuant to this Notice.

20. The application and any information and evidence addressed to the Office or by the Office in connection with the application are exempted from the administrative file till the Statement of Objections is issued.¹³ After the issuing of Statement of Objections, the access to parts of the file that include the application and any information or evidence addressed to the Office or by the Office in connection with the application is restricted. The access to such parts of the file is provided only to parties to the administrative proceedings or their representative when making copies or extracts is forbidden.¹⁴

21. The application can be submitted in writing¹⁵, orally into the protocol or in electronic form undersigned with certified electronic signature.¹⁶ Under the condition that the submission is confirmed within 5 days or eventually supplemented as listed in previous sentence, it is possible to make the submission through the other technical instruments or media such as teletype, telefax or public data network without certified electronic signature in particular.

22. Applicant for Leniency type I is obliged to inform the Office about the foregone applications for leniency programme submitted to other competition authorities or about the applicant's intention to submit application in future.

23. Upon request the Office issues acknowledgement of receipt of an application and acknowledgement of receipt of all subsequent submissions. The acknowledgement will include date and time of receipt of each submission.

24. The Office will disregard other leniency applications for granting the immunity from fines till the assessment of already submitted application related to the same alleged infringement is concluded.

¹¹ Article 22ba (5) of the Act.

¹² Article 22ba (7) of the Act.

¹³ Article 21c (3) of the Act.

¹⁴ Article 22ba (4) of the Act.

¹⁵ The submission is possible also through the data box of the Office (ID of data box: fs2aa2t).

¹⁶ Act No. 227/2000 Coll., on Electronic Signature, as amended.

At the same time the Office will disregard any application for reduction of the fine till the assessment of all already submitted application for immunity from fines related to the same alleged infringement is concluded.

25. Final decision on immunity from a fine or reduction of a fine will be announced in the decision at the end of the administrative proceeding.

V.1 Procedural rules for application for immunity from fine imposition (Leniency type I)

26. The complete application must be submitted to the Office, containing all requested information (see below). However, any undertaking may confer on the Office with information and evidence in hypothetical terms, or may ask for protection of applicant's place in the fine non-imposition queue, allowing it to gather the necessary information and evidence (hereinafter referred to as "**marker**").

27. An undertaking making an **application for immunity from fine** must provide the Office with all relevant information and evidence concerning the alleged cartel that comes into the applicant's possession or under its control as stated in conditions for Leniency IA and IB.

28. An undertaking may initially present this information and evidence in **hypothetical terms**. Provision of information and evidence in hypothetical terms represents qualified form of preliminary consultation with the Office; in such case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of applying undertaking and of other undertakings involved in the alleged cartel need not to be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified. The scope of detailed information and evidence submitted in hypothetical terms may be consulted with the Office.

29. Once the Office has received the information and evidence in hypothetical terms submitted by the undertaking and has verified that it meets the conditions set out for real Leniency type IA or type IB, it will inform the undertaking accordingly. Provision of information and evidence in hypothetical terms neither represent an application for immunity from fine pursuant to this Notice nor provides the undertaking with the reservation of place in the fine non-imposition queue allowing it to gather the necessary information and evidence in future (marker).

30. An undertaking wishing to make an application for immunity may initially apply for a "**marker**" which protects an applicant's place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity as agreed with the Office. To be eligible to secure a marker, the applicant must provide the Office with its name and address as well as information concerning the parties to the alleged cartel, the affected product and territory, the duration of alleged cartel and the nature of the alleged cartel conduct. An undertaking applying for immunity from fine should justify an application for a marker.

31. Where a marker is granted, the Office determines the period within which the applicant has to complete the marker by submitting the information required to meet the relevant evidential threshold for immunity. If the applicant perfects the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when marker was granted.

32. Once the Office has verified that the evidence submitted is sufficient to meet the relevant evidential threshold for Leniency type I application, it will grant, without undue delay, the undertakings conditional immunity from fines in writing.

33. If the Office receiving the application finds that the applicant has not met the conditions set out for Leniency programme application IA or IB, it will inform the applicant of this promptly. In that case the applicant may ask the Office to consider its submission as Leniency application type II for reduction of the fine. The Office assesses such application as application for the fine reduction submitted at the time when the first application for immunity from fine was submitted.

34. If the Office having granted conditional immunity finds that the applicant has fulfilled all of the conditions attached to leniency programme application, the Office will not impose a fine upon the applicant.

35. If the applicant has not fulfilled the conditions attached to leniency programme during the proceeding, the Office will inform the applicant about such matter of fact; a sanction can be imposed on such applicant in the final decision.

V.2. Procedural rules for application for reduction of the fine (Leniency type II)

36. An undertaking **applying for the fine reduction** to the Office must provide the Office with all information and evidence relating to the alleged cartel available to it as specified in Leniency type II conditions. The evidence and information submitted as substantiating the application must be clearly and explicitly marked.

37. If the Office comes to the conclusion that the information and evidence submitted by an undertaking constitutes “added value” and the applicant fulfilled the conditions attached to leniency programme, it will inform the applicant in writing of conditional fulfilment of the conditions and of the framework within which the fine could be reduced. If the Office comes to the conclusion that information and evidence submitted by the undertaking do not constitute “added value” and/or the undertaking did not fulfilled the conditions for the fine reduction, the Office will inform the undertaking.

38. If the Office conditionally granted the undertaking the reduction of a fine and the undertaking has fulfilled the general conditions for leniency programme during the whole proceedings, the Office will grant the undertaking the reduction of a fine in its final decision.

39. If the undertaking did not fulfil conditions for leniency programme application during the proceedings, the Office will inform such undertaking and in the final decision the fine will not be reduced pursuant to the Article 22ba (1b) of the Act.

V.3. Summary applications

40. In cases where the Commission is the most suitable authority to deal with the case in accordance with Article 14 of the Commission’s Notice on Cooperation¹⁷, the undertaking that has applied or is applying for Leniency type IA, IB or II to the Commission may file “summary applications”. In that case the applicant may submit the general (complete) application to the Commission, whilst submitting the summary application to the Office. Summary applications must include at least:

- a. The name and address of the applicant submitting the summary application;
- b. Information about the alleged cartel (the other parties to the alleged cartel identity, the affected products and services, the affected territory, the location of evidence, brief description of conduct, duration of alleged cartel, other necessary information);

¹⁷ Notice of the Commission on Cooperation within the European Competition Network, OJ C 101, 27 April 2004, page. 43.

- c. Information about the application submitted to the Commission (date of submission, particular contact details of DG Competition, the explanation why the Commission is assessed by the undertaking as the most suitable authority for such case);
- d. Information about other leniency applications (name of the competition authority to which the application was or will be submitted and contact details), and
- e. any additional information.

41. Having received a summary application, the Office will confirm the receipt to the undertaking and issue a marker for summary application stating the date and time of its receipt. The Office will inform the undertaking submitting the summary application, if the undertaking is the first to submit the summary application related to alleged cartel agreement to the Office.

42. Should the Office having received a summary application decide to request specific further information and evidence, the applicant should provide such information promptly. Should the Office decide to act upon the case, it will determine a period of time within which the applicant must make a full submission of all relevant evidence and information included in the summary application so the application could fulfil the above mentioned conditions for granting the immunity from fine or for the fine reduction. If the applicant submits such information within the set period, the information provided will be deemed to have been submitted on the date when the marker for summary application was granted.

43. The Office examines the submitted information and evidence in the order in which the markers for summary applications were granted to each of the undertakings. The Office examines if submitted documentation fulfil conditions for granting the immunity from fine or for the fine reduction.

44. Summary applications are also applications pursuant to Articles 19, 20 and 21 of this Notice and are handled in the same manner.

45. The summary application can be submitted also using a template prescribed by ECN¹⁸. Such template is fully in accordance with the requirements of the summary application described in Article 40. Summary application using the template can also be submitted to the Office in English only.¹⁹

VI. Final provisions

46. If the Office discovers that application relates to illegal conduct under the provision of Article 22b (3) of the Act about termination of responsibility for an administrative offense, the leniency programme applications shall not be taken into consideration.

47. Matter of fact that either protection from fines was granted or the amount of the fine was reduced cannot safeguard the competitor against private legal consequences of its participation in cartel agreement.

48. Responsibility for criminal offense in the form of breaching the competition rules pursuant to the Article 248 (2) alinea 1 of the Act No. 40/2009 Coll., Criminal Code, as amended (criminal offense of conclusion the cartel agreement) is terminated if the offender fulfils conditions for granting the immunity from fine or the fine reduction pursuant to the Act. Therefore, it is necessary for the particular offender, a natural person, to be actively involved in the undertaking's fulfilment of leniency conditions.

¹⁸ The template is available on http://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf.

¹⁹ In case the Office further investigates the case, summary application with all related documentation must be submitted in Czech or Slovak.

49. This Notice became effective on 4 November 2013 and is applicable on all applications submitted after this date.