NON-IMPOSING OR REDUCING A FINE IN SOME TYPES OF AGREEMENTS RESTRICTING COMPETITION PURSUANT TO THE ARTICLE 38 PAR. 11 AND 12 OF THE ACT

(Leniency program)
CONTENT

1. INTRODUCTION.................................................................................................................. 3

2. TYPES OF AGREEMENTS RESTRICTING COMPETITION TO WHICH NON-IMPOSING OR REDUCTION OF A FINE REFERS TO.............................................................. 4

3. NON-IMPOSING A FINE ................................................................................................... 5

4. REDUCTION OF A FINE .................................................................................................. 8

5. PROCEDURE OF FILING AN APPLICATION FOR ENFORCEMENT OF A LENIENCY PROGRAM PURSUANT TO THE ARTICLE 38, PAR. 11 AND 12 OF THE ACT .................................................................................................................... 9

   5.1. Applicant....................................................................................................................... 9

   5.2. In which phase it is possible to file an application....................................................... 9

   5.3. Form of application..................................................................................................... 10

     5.3.1 Marker.................................................................................................................... 10

     5.3.2 Hypothetical application ....................................................................................... 11

     5.3.3. Summary application ......................................................................................... 13

   5.4. Procedure of the Office, when an application has been filed.................................... 14

CONTACTS: .......................................................................................................................... 15

ENCLOSURES ..................................................................................................................... 16

APPLICATION FORM FOR PROCEDURE OF THE OFFICE PURSUANT TO THE ARTICLE 38, PAR. 11 OR 12 OF THE ACT ................................................................. 16

APPLICATION FOR GRANTING RESERVATION OF AN ORDER............... 18
1. **Introduction**

1. Some types of agreements restricting competition, mainly those concluded between the rivals and referring to price fixing, market division, and restriction of production or coordination of conduct in public procurement belong to the most serious violations of the Act on Protection of Competition\(^1\) with the significant negative impact on consumer and on sector as a whole, as well. Their aim is to increase the prices of goods and services provided by the participants to the agreement and thus also their profit, but the consumers benefit from no objective advantages.

2. Regarding the significant negative impacts of these types of agreements restricting competition each competition authority, thus also the Antimonopoly Office of the Slovak Republic (hereinafter only „Office“) has the priority to disclose these agreements and to sanction their participants.

3. However, the fine for participation in cartel agreement may be reduced or not imposed to those participants of cartel agreement, who would assist the Office to prove it, since its prompt disclosure and proving represent a higher asset than sanctioning each participant. Possibility to reduce or non-impose a fine\(^2\) is adjusted by the article 38, par. 11 or par. 12 of the Act No. 136/2001 Coll. on Protection of Competition and on amendments of the Act of Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other State Administration Bodies of the Slovak Republic as amended (hereinafter only „Act“).

4. The Office publishes this material in order to clarify the steps of the Office in applying the article 38, par. 11 and 12 of the Act, namely with the aim to explain, which conditions need to be fulfilled to reduce or not to impose a fine to a participant to the agreement restricting competition. The Office is aware of the fact that this material arouses legitimate expectations, on which undertakings may rely disclosing agreements restricting competition at the Office.

5. Material provides answers to essential questions connected with the possibility not to impose or reduce a fine. If an undertaking has any questions of matter-of-fact or procedural nature referring to enforcement of particular provisions of the Act, we recommend him/her to consult the case with the Office.

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\(^1\) These types of agreements are also called cartel agreements or cartels.

\(^2\) A term „leniency program“ is used for this procedure.
2. **Types of agreements restricting competition to which non-imposing or reduction of a fine refers to**

6. Non-imposing or reduction of fine (leniency program) for cartel agreement is adjusted in the article 38, par. 11 and par. 12 of the Act.

7. **Pursuant to the article 38, par. 11 of the Act,**

   The Office shall not impose a fine on an undertaking which was a party to an agreement restricting competition according to the article 4 (3) (a) to (c) or (f) of the Act, for the purpose of which the parties carry out business activities at the same level of a production chain or distribution chain, and which, at the same time:
   a) was the first to provide, on its own initiative, decisive evidence to prove a violation of the prohibition pursuant to the article 4 or special legislation, or was the first to provide, on its own initiative, information and evidence being decisive to perform inspection pursuant to article 22 par. 2, 3 or 4, by which decisive evidence allowing to prove violation of article 4 or special legislation should be obtained,
   b) terminated its participation in an agreement restricting competition at the time when it provided evidence according to (a) at the latest,
   c) did not force another undertaking to take part in an agreement restricting competition or was not the instigator of the conclusion of said agreement,
   a) provided the Office with all evidence available to it and cooperated with the Office throughout the entire investigation.

8. **Pursuant to the article 38, par. 12 of the Act,**

   the Office shall impose a fine reduced by up to 50% of the amount of the fine that the Office would otherwise impose on an undertaking that was a party to agreement restricting competition pursuant to the article 4 (3) (a) to (c) or (f) of the Act, for the purpose of which the parties to said agreement carry out business activities at the same level of a production chain or distribution chain, if the undertaking fails to comply with any of the following conditions
   a) to provide, on its own initiative, significant evidence, which, in combination with information and documents already available to the Office, enable the Office to

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3 Article 81 of the Treaty establishing the European Community (hereinafter only “Art. 81 of the Treaty”)
prove a violation of the prohibition pursuant to the article 4 of the Act or special legislation,

b) to terminate its participation in an agreement restricting competition at the time when it provided evidence according to (a) at the latest.

9. Conditions determined in the article 38, par. 11 or par. 12 of the Act need to be cumulatively fulfilled in order not to impose or to reduce a fine to an undertaking.

10. Possibility not to impose or reduce a fine refers only to agreements restricting competition for the purpose of which the parties carry out business activities at the same level of a production chain or distribution chain, it means to agreements restricting competition concluded between the rivals (so called horizontal agreements). The article 38, par. 11 or par. 12 of the Act does not refer to undertakings, which were participants to vertical agreement restricting competition.

11. At the same time, the possibility not to impose or reduce a fine refers only to certain types of agreements, namely to agreements restricting competition pursuant to the article 4, par. 3, letters a) to c) or f) of the Act, it means the agreements containing

a) direct or indirect fixing of prices or other trade conditions,

b) commitment to limit or control production, sales, technical development, or investments,

c) division of the market or sources of supply,

f) signs of collusive behavior as a result of which undertakings coordinate their bids, especially in the process of public procurement.

3. **Non-imposing a fine**

12. It is possible not to impose a fine only to one, namely the first undertaking, which has provided the Office with the decisive evidence to prove the agreement restricting competition or was the first to provide, on its own initiative, information and evidence being decisive to perform inspection, by which decisive evidence to prove agreement restricting competition (hereinafter only “targeted inspection”) should be obtained and which at the same time fulfill the other conditions pursuant to the article 38, par. 11 of the Act, it means it terminated its participation in an agreement restricting competition at the time when it provided evidence or information and evidence being decisive to perform a targeted inspection at the latest, did not force another undertaking to take part in an agreement restricting competition or was not the instigator of the conclusion of said agreement and at the same time it provided the Office with all evidence available to it and cooperated with the Office throughout the
entire investigation. Undertaking must formally ask for application of the article 38, par. 11 of the Act, namely for non-imposing a fine (for procedure see chapter 5 of this material).

13. Decisive evidence to prove an agreement restricting competition needs to be submitted on its own initiative, it means prior the undertaking was invited to submit an evidence and prior the Office has an evidence to prove an agreement restricting competition at its disposal. The fact, if an investigation or a proceedings have been initiated in time of submitted decisive evidence in the matter of agreement restricting competition, is not decisive (for more information see point 27).

14. Submitted decisive evidence needs to be sufficient to prove an agreement restricting competition. It needs to be concrete (direct evidence is preferred), and the undertaking should provide all information on agreement, which are available to it. Extent of information which needs to be submitted by an undertaking is given by the enclosure No. 1 to this material.

15. An undertaking has to be the first to submit information and evidence being decisive to perform a targeted inspection and has to submit them on its own incentive; it means prior an undertaking was invited to submit them. The Office realizes an examination of submitted information and evidence ex ante. The Office assesses submitted information only from the view whether they sufficiently convincingly justify performance of an inspection, during which decisive evidence should be found. Based on assumption that this condition is met the Office does not impose a fine either in case that an inspection is not realised or decisive evidence is not found. Extent of information which needs to be submitted by an undertaking is given by the enclosure No. 1 to this material. It is not decisive whether in the time of submission of information and evidence an investigation has been initiated or proceedings has been already initiated (for more information see point 28).

16. If whatever specific written documentation, confirming the submitted information available to the undertaking requesting for enforcement of the article 38, par. 11 of the Act exists, it needs to be submitted to the Office as well. This written documentation needs to be complemented by the written declarations of an undertaking, describing its participation to the agreement restricting competition.

17. Only one undertaking may benefit from non-imposing a fine, namely the first one requesting for non-imposing a fine, which at the same time fulfils the conditions determined by the article 38, par. 11 of the Act. If more undertakings request the Office for non-imposing a fine, the Office would assess the applications of undertakings in such an order as they have been delivered. If an undertaking finds
out, that it is not first in line, it still may request for fine reduction pursuant to the article 38, par. 12 of the Act.

18. Filing the application for enforcement of the article 38, par. 11 of the Act the undertaking should in its own interest provide the Office with all available evidence, since the Office assess the applications in such order they have been delivered. If, for example, the first undertaking requesting for enforcement of the article 38, par. 11 of the Act does not submit evidence sufficient to prove the violation of the Act and consequently the second undertaking would submit decisive evidences or information and evidence being decisive to perform a targeted inspection to prove the violation of the Act, the Office could grant an immunity only to the second undertaking (if it would fulfil the condition determined by the Act), even if a first undertaking would complete the submitted evidence later. The stated facts do not refer to cases, when an undertaking reserves order pursuant to the part 5.3.1 of this material or to cases of submission of hypothetical application pursuant to the point 5.3.2 of this material.

19. An undertaking must terminate its participation in an agreement restricting competition at the time when it provided evidence or information and evidence being decisive to perform a targeted inspection at the latest to be able to benefit from non-imposing a fine. Termination of participation in agreement means that a participant to an agreement must not participate to it any more (not to participate to the meeting, not to use agreement information etc.), apart from participation to the extent being necessary both in order not to endanger following investigative procedure of the Office and not to damage evidence. Such participation requires previous approval of the Office. If an applicant does not have concrete evidence proving termination of its participation to agreement restricting competition, its statutory declaration is sufficient, if this fact is not questioned during proceedings on a basis of the other evidence.

20. It is not possible not to impose a fine to an undertaking which forced another undertaking to take part in an agreement restricting competition or was the instigator of its conclusion. In this connection the undertaking needs to prove that it did not play a leading role in cartel agreement conclusion, it did not organize meetings, did not propose the ways of coordination of undertakings participated to the cartel agreement or it did not put an economic squeeze on undertakings refusing to participate to an agreement etc. If an applicant does not have evidence proving stated facts, its statutory declaration is sufficient, if this fact is not questioned during proceedings on a basis of the other evidence.

21. Last condition to fulfil in order to benefit from enforcement of the article 38, par. of the Act is that an undertaking should provide the Office with all evidence on
existence and application of agreement restricting competition available to it and cooperate with the Office throughout the entire investigation. In this connection the Office would regard if an undertaking without the request of an Office submits another evidence to the Office, immediately after receiving it, if it promptly gives explanations to the Office or if it responds to all calls of the Office, if it did not impede the procedure of the Office in proving cartel agreement (for example, by disclosing to a third party, that it requested an Office for non-imposing a fine for violation of the Act or by informing third parties on evidence which it submitted to the Office, what could result in compounding procedure of the Office).

4. **Reduction of a fine**

22. The Office should reduce fine to an undertaking, which provide the Office with significant evidence which is not sufficient to prove an agreement restricting competition by itself, but in connection with information already available to the Office, it could enable the Office to prove it. Evidence needs to be provided on its own incentive, it means before the Office asks the undertaking to do so. Provided evidence needs to have a significant added value to the evidence already available to the Office.

23. The undertaking must terminate its participation in an agreement restricting competition at the time when it provided significant evidence at the latest to be able to benefit from reduction of a fine. Termination of participation in agreement means that a participant to an agreement must not participate to it any more (not to participate to the meeting, not to use agreement information etc.), apart from participation to the extent being necessary both in order not to endanger following investigative procedure of the Office and not to damage evidence. Such participation requires previous approval of the Office. If an applicant does not have concrete evidence proving termination of its participation to agreement restricting competition, its statutory declaration is sufficient, if this fact is not questioned during proceedings on a basis of the other evidence.

24. Fine can be reduced to one or more undertakings. Assessing how the fine could be reduced, the Office regards the value or contribution of evidence in proving an agreement, as well as time when it was provided. The Office would assess the applications for reduction of a fine in such an order as they have been delivered.
5. **Procedure of filing an application for enforcement of a leniency program pursuant to the article 38, par. 11 and 12 of the Act**

5.1. **Applicant**

25. Only undertaking, it means a person entitled to act in the name of an undertaking, not individual employees of an undertaking, may file an application for enforcement of a leniency program pursuant to the article 38, par. 11 and 12 of the Act. The association of undertakings can not file an application. Also the common application of several undertakings is excluded.

26. Application may be filed also by legal representative, but he/she needs to prove his/her identity by valid authorization. If a party to the proceedings has a representative in the proceedings, the signatures of the authorized person and the authorizing person on a written power of attorney must be officially certified pursuant to the article 25, par. 4 of the Act.

5.2. **In which phase it is possible to file an application**

27. An undertaking may file an application for enforcement of a leniency program pursuant to the article 38, par. 11 or 12 of the Act whenever, it means prior the investigation in given area, during the investigation, as well as whenever during the administrative proceedings. In its own interest, the applicant should file an application and submit the connected evidence as soon as possible, since later during the investigation or during the administrative proceedings, the Office might have other evidence to prove a violation or information and evidence submitted by applicant may not be decisive or significant. Also applications for not imposing a fine in case of a targeted inspection will not be accepted, if in the time of submission of such application the Office has already had sufficient information and evidence to issue decision to perform inspection at its disposal or it has already performed an inspection. However, application for enforcement of a leniency program may be filed also during performance of inspection (in case of a targeted inspection only an application for reduction of a fine may be filed) pursuant to the article 22 par. 2 and 3 of the Act.
5.3. Form of application

28. Application for enforcement of a leniency program pursuant to the article 38, par. 11 or 12 of the Act may be filed in written or orally into minutes or by electronic means. It could be filed telegraphically or by fax, however, such applications need to be completed in written or orally into minutes within 3 days. Application form comprises Enclosure No. 1 to this material. Form is available at the web-site of the Office. Office’s contacts – see end of this material.

29. Applicant may ask the Office for reservation of an order (so-called marker) or to file an application in the form of so-called hypothetical application prior filing full application.

5.3.1 Marker

30. An undertaking, which plans to apply for non-imposing a fine pursuant to the article 38 par. 11 of the Act, may ask the Office first for reservation of an order (so-called marker), example see Enclosure No. 2 to this material. Reservation of an order provides an undertaking for a certain reasonable period with an order between the other potential applicants for non-imposing a fine. The purpose of the reservation is to keep the order to enforce leniency program for an undertaking despite the fact that it is not able to submit all evidence (information and documents) being necessary to enforce leniency program in the time of filing an application due to reasons, which it is obliged to clarify.

31. Filing application an undertaking applying for reservation of an order must provide the Office with following information at least:

   a) its name and address,  
   b) participants to notified agreement restricting competition (cartel),  
   c) goods or service to which notified agreement restricting competition relates,  
   d) area which is affected by notified agreement restricting competition,  
   e) estimate duration/effect of notified agreement restricting competition and  
   f) description of functioning of notified agreement restricting competition  
See Enclosure No. 2 to this material – application for granting reservation of order.

32. An undertaking applying for reservation of an order is obliged to provide the Office both with information pursuant to the point 31 and also information on applications for enforcement of leniency program relating to same agreement restricting
33. The Office may grant reservation of an order to an applicant, only if an undertaking justifies its application for reservation of an order and it suggests adequate time period in which it fills in its application.

34. The Office without undue delay confirms granting reservation of an order to an undertaking in written. In the letter to an undertaking the Office states its order and date or time, on which an undertaking has reservation of an order.

35. The Office also determines a period, in which is an undertaking obliged to fill in its application for enforcement of leniency program by information in the extent pursuant to the Enclosure No. 1 to this material being necessary to enforce leniency program pursuant to the article 38 par. 11 of the Act. An undertaking may not fill in its application in the form of hypothetical application pursuant to the part 5.3.2 of this material.

36. If an undertaking fills in its application within period determined by the Office in the extent necessary to enforce leniency program, its application for not imposing a fine is considered to be delivered on the day, when reservation of an order was granted to it. In case that an undertaking does not fill in its application for enforcement of leniency program in accordance with the point 35, it loses reservation of an order on the day following the last day of period determined by the Office pursuant to the point 35.

5.3.2 Hypothetical application

37. In its application for not imposing a fine the applicant to enforce leniency program pursuant to the article 38 par. 11 may state information and evidence, which it intends to provide the Office with to acquire advantages from non-imposing a fine, both in advance and also hypothetically, namely submitting describing list of evidence, which it suggests to provide lately („hypothetical application“).

38. Identity of an applicant not to impose a fine including identity of the other undertakings participating in an agreement restricting competition does not have to be announced to the Office till the evidence stated in describing list is provided. The Office communicates with determined contact person (for example legal
representative, determined employee of an undertaking or person chosen by an undertaking) till notification of an applicant’s identity.

39. In hypothetical application an applicant must state, to which product and geographic area an agreement restricting competition relates including determination of time period of agreement duration. In hypothetical application an applicant also states period after notification by the Office pursuant to the point 41, first sentence, within which it suggests to provide the Office with evidence stated in describing list.

40. At applicant’s request the Office confirms reception of hypothetical application for contacting person, in which it confirms date and time of reception of an application, if necessary.

41. The Office assesses whether information and evidence submitted in hypothetical form may constitute decisive evidence or constitute information and evidence being decisive to perform a targeted inspection in the meaning of the article 38 par. 11 letter a) of the Act and it informs contact person on this matter. Coming out from undertaking’s proposal pursuant to the point 39 the Office also determines the period, in which an undertaking must provide the Office with evidence, which it has at its disposal. If an applicant declassifies evidence pursuant to the describing list of evidence within determined period to the Office, the Office verifies whether declassified evidence answers the describing list and it grants to an applicant conditional exemption from a fine. In this case the hypothetical application guarantees for an applicant the first place in list of applicants to exempt from a fine, retrospectively from the moment of its filing.

42. If an applicant declassifies evidence to the Office later than in the period pursuant to point 41, the Office assesses such filing to be new application for exempting from a fine.

43. In case that an applicant received order (marker) pursuant to the part 5.3.1 of this material, for this purpose it may not fill in evidence by filing hypothetical application. Marker and hypothetical application may not be mutually combined considering different purpose, which they fulfil and also due to their different nature. Hypothetical application serves for undertakings as confirmation whether evidence, which they have at their disposal, may ensure exemption from fines before they reveal their identity. Marker guarantees place in order for an undertaking being decided to file an application, but, for now, it may not submit evidence, which have to be part of full application.
5.3.3. Summary application

44. As an application filed to one competition authority is not considered to be an application filed to another competition authority, to reduce administrative load by filing complete applications at more competition authorities an applicant may ensure itself the first position in the order by filing brief summary applications to more competition authorities.

45. If the Commission is pursuant to Article 14 of the Commission Notice on Cooperation the most suitable competition authority to assess case, an applicant which filed to the Commission an application for not imposing a fine in case of a targeted inspection or it intends to do so, may file a complete application to the Commission and simultaneously summary applications to all national competition authorities, which it considers to be suitable to assess the case, i.e. also to the Office.

46. Summary application must include at least:

1. Name and seat (address) of an applicant;
2. Name and seat (identity) of other participants to a cartel;
3. Data on goods and services in subject;
4. Determination of area to which a cartel agreement relates;
5. Time period during which a cartel agreement has lasted;
6. Character of a cartel agreement;
7. Member States, where evidences are likely to be present;
8. Information on the fact whether an applicant filed or intends to file an application for leniency relating to this cartel to other competition authorities in the future.

47. After receiving a summary application the Office confirms receiving it to an applicant and informs an applicant whether it is the first which filed such summary application. The Office does not act on a basis of a summary application itself, thus it does not guarantee or refuse conditional immunity. If the Office requires other information, an applicant must provide them immediately.

48. If the Office decides to act in given case, it determines for an applicant a time period within which an applicant must file a complete application (a form pursuant to Commission Notice on Cooperation within the Network of Competition Authorities (Text with EEA relevance), Official Journal C 101, 27/04/2004 P. 0043-0053
If an applicant supplements an application during determined time period, a complete application is considered to be filed on the day when a summary application has been filed.

5.4. Procedure of the Office, when an application has been filed

49. If an undertaking asks for non-imposing or reducing a fine due to the reasons mentioned in the article 38, par. 11 or 12 and the Office concludes that conditions not to impose or reduce a fine have been fulfilled, it informs an undertaking on this fact by a letter (not by a decision).

50. If an undertaking meets conditions stated in the article 38 par. 11 or article 38 par. 12 of the Act, obligation not to impose or reduce a fine on an undertaking arises for the Office.

51. If an undertaking formally asks for non-imposing or reducing a fine and examining applications the Office finds out that the conditions to non-impose or to reduce a fine are not fulfilled, it would communicate this fact to an undertaking by a letter.

52. If the Office informs an undertaking that its application for not imposing a fine does not meet conditions stated in the article 38 par. 11 of the Act, an undertaking may in this case withdraw evidence submitted in connection with an application for applying article 38 par. 11 of the Act or to ask the Office to assess them pursuant to the article 38 par. 12 of the Act.

53. If during the further conduct, after notifying, that the undertaking fulfils the conditions pursuant to the article 38 par. 11 or the article 38 par. 12 of the Act, the Office finds out, that some information were not truthful or were not complete, the Office would communicate this fact to an undertaking by another letter and it would also deal with this fact in decision.

54. The Office will not assess other applications for applying the article 38 par. 11 of the Act in connection with same alleged violation of the Act, while it does not assess filed application irrespective of the fact whether it was filed as full application, hypothetical application or on a basis of granting an order.
Contacts:
Antimonopoly Office of the Slovak Republic
Division of Agreements Restricting Competition
Drienova 24
826 03 Bratislava
tel.: +421 2 43334 045
fax: +421 2 48297 365
e-mail (to consult): leniency@antimon.gov.sk
Enclosures

ENCLOSURE No. 1

Application form for procedure of the Office pursuant to the article 38, par. 11 or 12 of the Act

1. Data on applicant

1.1 Trade name of an undertaking
1.2 Legal form
1.3 Address
1.4 Venue of business
1.5 Telephone number
1.6 Fax number
1.7 Contact person (name, position, telephone number, possibly e-mail contact)
1.8 Statutory representative of an undertaking (name, position, telephone number, possibly e-mail contact)
1.9 Legal representative (name, position, telephone number, possibly e-mail contact)

2. Type of anticompetitive conduct

2.1 Describe the type of anticompetitive conduct (agreement between rivals on prices, goods volumes, market or customers division, price, market division, concerted practice in public procurement etc.)
2.2 When and where did the agreement emerge?
2.3 Describe the precise functioning of an agreement, its internal rules and control mechanisms.
2.4 Describe the aims followed by an agreement.
2.5 Describe the participation of an undertaking – applicant in an agreement.

3. Data on other participants to an agreement restricting competition

3.1 Give names of other undertakings participating to agreement restricting competition (mainly name, legal form, address, venue of business).
3.2  Give names of natural persons acting in names of these undertakings or names of other persons who may be contacted by the Office.

4.  **Data on concerned markets**

4.1  Description of functioning of market covered by an agreement. Which goods/services are covered by an agreement?
4.2  Which geographical area is covered by an agreement (region, whole territory of SR, international impact)?
4.3  In what time period has been an agreement applied?

5.  **Evidence**

5.1  Give all evidence supporting your application (mainly contracts, e-mail communication, other written documents, names of witnesses, dates and other data on meetings, telephone calls and other contacts between the participants to an agreement). Enclose all available evidence to your application.
5.2  If it is possible, give other existing evidence you could not submit by yourself. Who is capable to submit them?
5.3  If you have information and evidence being decisive to perform *a targeted inspection* at your disposal (thus you do not have decisive evidence at your disposal), state them in your application.

Those are mainly *information and evidence* as follows:
- name and seat of an undertaking in which premises this evidence should be found,
- determination of premises (rooms, vehicles, etc.) or person, at who’s disposal they should be found,
- description of documents, which should be found in determined premises,
- other evidence relating to alleged cartel, which you have at your disposal or are accessible to you.

6.  **Other**

Give all other information you consider as relevant for the given case.

7.  **Date of filing an application and applicant’s signature**
ENCLOSURE No. 2

Application for granting reservation of an order

On a basis of the article 38 par. 11 of the Act I request not to impose a fine, which could be imposed on me as a participant to an agreement restricting competition.

I also require reservation of an order of my application for non-imposing a fine, since I am not able to submit all necessary evidence in the extent pursuant the Enclosure No. 1 to this material together with this application.

I am not able to submit evidence with this application due to these reasons:

description of reasons

All evidence will be submitted to the Office in the time period of xxxx days.

Basic data (minimum extent):

1. a) name and address of an applicant,
   b) participants to notified agreement restricting competition (cartel),
   c) goods or services, to which notified agreement restricting competition relates,
   d) area, which is affected by notified agreement restricting competition,
   e) estimate of duration/effect of notified agreement restricting competition and
   f) description of functioning of notified agreement restricting competition.

2. Information whether an applicant has filed application for enforcement of leniency program or intends to do so and where such application has been or will be filed (European Commission, national competition body stating Member State).

Date: ....................

In ........................

....................................

signature