

LENIENCY POLICY AND ITS IMPLICATIONS ON THE INSTITUTION OF ADMINISTRATIVE RESPONSIBILITY

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Abstract

According to the Order of the Competition Council. 300/2009, individual denunciation of participation in anticompetitive agreements eliminate the contravention liability imposed by the provisions of Law no. 21/1996, or reduce the fine imposed, if the conditions to qualify for leniency, contained in the Guidelines on conditions and criteria for application of the leniency policy, part in the order mentioned above, are fulfilled. The amendments to competition legislation establish a case of removing anti-competitive acts liability for rewarding companies that cooperate with the authorities to denounce anti-competitive practices and a case for reducing the penalty for contravention, for those who, although not qualified for immunity from fine, actually have an important and actually role in uncovering anticompetitive practices.

This paper presents interest to the current developments of the institution of administrative responsibility resulting from the takeover in the national legislation of the elements of Community law, transposing the general principles also comes into the right to good administration.

Keywords: leniency, responsibility, competition, law, cartel

Introduction

The usefulness of finding the contraventions and applying the sanctions by the concurrence authorities as a remedial tool to restore a normal competitive environment is undeniable.

First, the imposition of fines by the competition authorities generates a deterrent effect among undertakings. It creates such a real threat of being pursued and punished, and this is likely to outweigh the possible intentions of the companies to engage in anti-competitive behavior.

Second, applying of differentiated fines, according to the role of each participant in the case of collective violations such as cartels, aims to increase the costs to organize and maintain such an anti-competitive agreement .

In addition, differentiated fines correlated with an effective leniency policy increases the risk that some cartel members do not respect anti-competitive agreements and intend to denounce others participants.

Third, applying fines against those who violate the competition law has a cautionary effect, reinforcing the belief to comply with these rules for those people who follow these prescriptions.

At EU's level, The Commission's action is the most important tool in the fight against the crimes covered by the competition law and therefore a fine is the most effective way to punish and deter the commission of such crimes .

The main objective of leniency programs is to provide an incentive to an undertaking participating in an unlawful cartel to come forward and to expose the cartel by offering immunity from, or a reduction of the fines that would have been applicable to that undertaking had the cartel been discovered by the relevant competition enforcement authorities without the undertaking's assistance.

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Leniency in antitrust enforcement can be defined as granting of immunity or reduction on penalties for antitrust violations in exchange for cooperation with the public authorities mainly in the form of provisions of intelligence and evidence of competition infringements.

Lenient treatment is particularly convenient for discovery of hidden cartels because of the mere character of the violation and the fundamental features of collusion being continuative, collective and hard to detect¹.

The origin of this policy as part of public enforcement mechanism can be traced back to 1978 when the US adopted its first Corporate Leniency Notice. In the US, the encouragement of whistle-blowing has proven to be highly successful, which inspired the European Commission to follow the example and to adopt in 1996 its first Leniency Notice.

The Commission subsequently amended it twice in 2002 and 2006 to make leniency more efficient and to take into account the lessons learned from its operation. The main changes were that immunity became automatic, that fine reductions became more strictly aligned to the timing of the cooperation and also improved the transparency and certainty of the conditions on which the immunity and the reduction of fines is granted.

European Union's leniency policy

In order to obtain immunity the undertaking has to provide sufficient evidence for the Commission to commence an investigation, or must be the first to enable the Commission to establish an infringement of Article 81 EC.

The 2006 Notice on Immunity from Fines and Reduction of Fines in Cartels Cases states that an undertaking that has coerced any other undertaking into participating in the infringement or remains in it does not qualify for immunity, although it may qualify for a reduction of fines, between 20 and 50 per cent, depending on the importance of the provided information:

The Notice, II.A, §8: "The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

- (a) carry out a targeted inspection in connection with the alleged cartel; or
- (b) find an infringement of Article 81 EC in connection with the alleged cartel".

The Programme does not protect an undertaking from civil litigation whose purpose is the coverage of the damages resulting from the cartel actions.

There was concern that leniency programmes should operate by the rule of total immunity, to include all applicable penalties: fines, civil damages and / or criminal sanctions, considering the U.S. experience, where it was only after they waived the triple sanction system, the leniency program has made notable results, encouraging individual interest of cartel participants to abandon such an anticompetitive agreement².

It is important to note that leniency as operated by the Commission does not mean absence of prosecution in all cases. The Commission might adopt a decision finding an infringement of the competition rules which might constitute a reason to treat the whistle-blower as a recidivist if any involvement in other cartels is subsequently discovered.³

As the Commission has currently no powers to impose penalties on individuals other than undertakings, the grant of immunity to a company does not concern its directors or employees and

¹ N. Zingales – "European and American Leniency Programme: Two Models towards Convergence?", 2007, Competition Law Review 1, p.5, available at <http://papers.ssrn.com>.

² F. Leveque - „L'efficacité multiforme des programmes de clemence" in „Concurrences. Revue des droits de la concurrence" no. 4/2006, p. 34

³ European Commission 2006 Leniency Notice [Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17.]

there is no separate immunity policy for individuals.⁴ This is another major difference with the US model which operates a Leniency Policy for Individuals.

It is interesting to note, however, that managers of undertakings can be still punished for their role in the cartel, if the Member State's antitrust legislation provides for individual sanctions. Member States retain their competence to adopt sanctions for breach of antitrust rules and to provide or not for any lenient treatment of whistle-blowers.⁵

That point leads to another important feature of leniency in the EU context: the existence in parallel of the Commission's policy of distinct leniency programmes of the Member States which concern infringements of both EU and national competition rules.

The Commission has the jurisdiction to decide on the existence of a competition law's violation, even if the term of extinctive prescription of the fine was fulfilled, because the fulfilling of this term does not prevent establishing the existence of an anti-competitive act.

The Commission retains the power to adopt a decision on the existence of prescribed anti-competitive acts, but only if there is a legitimate interest in this, such as clarifying an issue of principle or facilitate the introduction of "actions for damages" by individuals to the national courts in civil law.

The Commission still retained an important role in the enforcement mechanism, as the co-ordinating force in the newly created European Competition Network (ECN). This Network, made up of the national bodies plus the Commission, manages the flow of information between NCAs and maintains the coherence and integrity of the system.

This policy has been of great success as it has increased cartel detection to such an extent that nowadays most cartel investigations are started according to the leniency policy. The purpose of a sliding scale in fine reductions is to encourage a "race to confess" among cartel members. In cross border or international investigations, cartel members are often at pains to inform not only the EU Commission, but also National Competition Authorities.

Romanian leniency policy

Leniency did not exist in the Member States before the Commission adopts its first Notice. Although mostly similar to the Commission's model, a number of significant differences do exist between the EU and national programmes due to the freedom of the Member States with regard to the substantive provisions of leniency which has resulted in a variety of leniency procedures and lastly in a lack of harmonisation.⁶

In our legislation, the participation of firms in anti-competitive practices is prohibited by the imperative provisions of art. 5. 1 of the Competition Law no. 21/1996, republished: "Are prohibited any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and concerted practices which have as their object or effect the restriction, preventing or distorting competition in the Romanian market or on a part of it, especially those aimed at:

- a) Concerted fixing, directly or indirectly, of the sale or purchase prices, tariffs, rebates, markups, and any other trading conditions;
- b) limiting or controlling the production, distribution, technological development or investments;

⁴ W. Wils, Is Criminalization of EU Competition Law the Answer?, (2005) 28 Competition Law Review 2, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=684921

⁵ Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1-25

⁶ See 2009 Report on assessment of state the convergence, ECN Model Leniency Programme available at: http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf

c) sharing markets or sources of supply, on a territorial basis, the volume of sales and acquisitions criterion or other criteria;

d) application to trading partners of dissimilar conditions to equivalent transactions, thereby creating, for some of them, a competitive disadvantage;

e) conditioning the contracts of partners' acceptance of clauses stipulating supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

f) participation in a concerted manner, with fake offers in auctions or other forms of competitive tendering;

g) elimination of other competitors in the market, limiting or preventing access to the market and the free exercise of competition by other companies, as well as agreements as not to buy from or sell to certain parties without reasonable justification. "

In the current legislation, the Competition Council may impose a fine of up to 10% of the total turnover of the previous financial year for the most serious violations, punishable as contraventions, of art. 5 para.1 of Law no. 21/1996.

The agreements between two or more competing undertakings⁷ resulting distortion of competition are generally called cartels, the main types of cartel being those aimed at pricing and / or market sharing.

Leniency in antitrust enforcement can be defined as granting of immunity or reduction in penalties for antitrust violations in exchange for cooperation with the public authorities mainly in the form of provision of intelligence and evidence of competition infringements⁸.

The discovery and dismantling of cartels prevail over sanctioning economic agents participating in a cartel. By their cooperation with the Competition Council they are able to help at the detection and punishment of such behavior.

In this context, in order to encourage the cooperation of the competition authorities with those undertakings that have resorted on practices forbidden by law, the Competition Council established, by Instructions⁹, the conditions and the criteria for application of the clemency policy. According to the Order of the Competition Council 300/2009, the individual termination and exposure of participation in a contravention anticompetitive agreement eliminate the liability or reduce the fine imposed by the provisions of Law no. 21/1996. This is the case if the conditions to qualify for clemency are fully met, these conditions being mentioned in the guidelines and criteria for the application of the leniency policy, contained in the Order mentioned above.

The amendments to the competition legislation establish a case of removing liability for anti-competitive acts, by rewarding those operators who are cooperating with authorities to denounce anti-competitive practices and a case for reducing the contraventional penalty, for those which have actually an important role in the disclosure of anti-competitive practices, although not fulfilling the conditions of immunity from fines.

However, the facts referred to are subject to the clemency program only if they have a high degree of seriousness and gravity. This means that it refers to horizontal agreements or concerted practices cartel-type oriented, through which actions such as those prohibited by art. 5(1) of Law no. 21/1996 are deployed, influencing decisively the market or other vertical agreements and concerted practices, aimed at restricting the territory or customers and giving absolute territorial protection.

The two main elements of the leniency policy are: immunity from fines and reduction of fine. Immunity from fines represents exoneration from the fines provided for violations of art. 51 (1a) of the Competition Law. 21/1996, republished, and is granted for the following situations:

⁷ A.Fuerea – „Drept comunitar al afacerilor”, (Ed. Universul Juridic, Bucharest, 2006), p. 215

⁸ W. Wils, Leniency in Antitrust Enforcement: Theory and Practice, (2007) 30 Competition Law Review 1, p. 4 available at <http://ssrn.com/abstract=939399>

⁹ The Competition Council's Order no. 300/2009, M.Of. no.. 610/7.09.2009

- the economic agent as a whistle blower, is the first to provide evidence that will allow the initiation of an investigation and will authorize and conduct to unannounced inspections, when the Competition Authority had no such evidence (A-type immunity)

- the economic agent is the first to provide evidence which, according to the Competition Council, will prove a breach of art. 5(1) of the Competition Act no. 21/1996, republished, given that the Competition Authority had failed to gather sufficient evidence to show violation of art. 5(1) of Law no. 21/1996 or art. 81 of the Treaty (B -type immunity).

The immunity of the type A and type B is granted only if the general conditions for granting clemency are met, namely:

- the whistle-blower cooperates effectively and continuously with the Competition Council;
- it provides the Competition Council with all the evidence it has, without destroying or falsifying information;
- it is not disclosing the existence of the application for leniency;
- effectively terminates its involvement in the alleged anticompetitive agreement.

With regard to the second measure - reduction of the fine - may be applied also to those businesses which, although not the first to denounce anticompetitive agreements, provide information and evidence, revealing their participation in the cartel.

However, the information provided must make a significant additional contribution to the evidence already held by the Competition Authority, that is to allow proving the existence of a certain organized anticompetitive cartel, through the evidence provided by the applicant economic agent.

One criticism of the leniency programs, not only at the national but also at European level, is concerning insufficient protection of information provided by applicants. Within the European Competition Network (ECN) and the national networks organized by this model, all network members are informed about the existence of an applications for clemency. It has been contended that the security of these networks is weak, with the possibility of leaking information to those affected.

National leniency program is criticized from the same point of view but more then this it is considered not providing effective protection of the identity of the trader alleging anticompetitive agreements.

The specific legislation is requiring written request for prior immunity and it contains no such provisions to ensure confidentiality of the identity of the applicant for immunity, while the European legislation has added protection of the applicant, imposing just oral forms for prior immunity.

The threat of disclosure of these confessions could have a negative influence on the quality of the whistle-blower's submission or even dissuade him from applying for leniency at all¹⁰. Therefore, adequate protection against disclosure in private actions must be ensured for corporate statements submitted by all leniency applicants and not only the successful one in order to avoid placing the applicants in a less favourable situation than the non-cooperating co-infringers.

To avoid these risks, the White Paper proposes uniform rules for evidentiary disclosure and special provision of non-disclosure at any point in time of the corporate statements of both successful and unsuccessful leniency applicants.

Another major deficiency¹¹ can be found in the whistle-blowers' insufficient protection from discovery rules in cases covering multiple jurisdictions. The decentralization of EU competition enforcement can often lead to investigations being simultaneously carried out in several Member

¹⁰ White paper, Section 2.9., p. 10 [Commission White Paper on Damages Actions for Breach of the EC antitrust rules COM (2008) 165.]

¹¹ A. Kaczorowska – „European Union Law”, Routledge-Cavendish , London, UK, 2008, p. 903

States¹². The frequent involvement of different jurisdictions and thus different legal systems might deter some cartel members from confession, because they would fear not to receive the same treatment under other States' national standards.

Conclusions

The legislative changes are absolutely necessary, as the main instrument of European integration is legal integration through the establishment of community law, based on the principle of the primacy of Community law to the national law¹³. Unlike other international organizations, The European Union is an organization of integration that primarily involves the building of a supranational legal system and the harmonization of national laws with it.

Building a stable legal framework compatible with EU recommendations, in line with the new economic realities, can equate with changing the competitive and create new competitive advantages, such as that resulting from the adoption of the leniency policy in the national competition law.

Promoting leniency policy and severely sanctioning cartels must become an essential objective in the activity of any competition authority, in order to induce positive effects in maintaining a normal competitive environment and to guarantee a proper functioning of the market economy.

Finally, adapting national legislation, especially in the field of administrative responsibility to the requirements of the European Union helps us to define mechanisms to protect the rights and interests of citizens of Member States from the government actions in general, the ultimate purpose aiming of ensuring equity in relationships between citizens and public power.

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¹² Network Notice, para. 6 provides that investigation will be conducted by whichever authority is „well placed when the infringement has effects or implementation in that State.

¹³ C. Bîrzea – „*Politicile și instituțiile Uniunii Europene*”, (Ed. Corint, București, 2001), p.37