IMMUNITY AND LENIENCY POLICY IN COMPETITION CASES

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Abstract

It is fully known that the premises for market economics resides on free competition. In other words, market player must make all the necessary efforts in order to obtain the desired results on their own, through business innovation and increased efficiency. In order to protect this, the competition primary and secondary legislation is carefully tailored to such needs, supporting and protecting the internal market from the companies' tendency to distort competition.
As such, competition law offers the companies' involved in anticompetitive agreements methods to either waive the entire fine or to diminish it considerably. The aim is to encourage companies to bring upfront anticompetitive agreements that aim to distort competition and free market, thus protecting the internal market. The competition law itself does not pursue to sanction players that acted in an anticompetitive manner, but to prevent such behavior, because prevention is more important than reducing the effects afterwards.
In the present paper we aim to make a radiography of the methods of eliminating or reducing a fine that a company have in our national law when it comes to anticompetitive agreements.

Keywords: *immunity, sanctions, leniency, anticompetitive agreements, recognition*

1. Introduction

In Romania, the Immunity and Leniency Policy in the competition are is still at beginning, as very few cases have seen the light. Even though the fines applied by the Competition Council are very high, are they are settled as a percentage of the company's turnover (between 0.5 and 10), the undertakings that engage themselves in anticompetitive practice still tend to walk past by this opportunity and let the faith (or other undertakings) decide whether getting fined or not.

The present study aims to bring a shed of light in the little-known procedure of Immunity and Leniency. By doing this, we hope that we can make aware undertakings, lawyers and counsels of the advantage this procedure brings so that they can take into account this possibility when discovering that they are part of an alleged anticompetitive agreement. The purpose of the competition regulation is not to "hunt" the undertaking that breach the law, but to ensure that there is a normal competitive environment that will benefit the final consumer. The competition authority acts on two directions: (a) prevention and (b) sanctioning, the latter being activated only when the harm done cannot be reverted. By allowing undertakings to disclose possible anticompetitive agreements for an immunity deal, the competition frame aims to drop a signal with respect to competition enforcement: if more and more companies will apply for immunity deals, more and more undertakings will be fined and fewer anticompetitive agreements or practices will take place. We are still talking about the principle of prevention, but in a long term.

Until now, the subject of Immunity and Leniency Policy in competition law cases remains in shadow, as very few papers have been published on this subject. If such, this institution raised a little bit of awareness if round tables or conference where specialist from the Romanian Competition Council were invited.

In order to do this exhaustive overview of the Immunity and Leniency Policy, we decided to start with a mere introduction of this institution of our national legislation, followed by a step-by-step explanation of the procedure that needs to be followed. Afterwards, we answered some questions that arose in the practice of other competition authorities and are related to our frame regulation that we think it might clarify a few of the potential discussions. Last but not least, we focused on the very fragile case-law we identified in Romania and detailed few comparative elements with other countries of the European Union that have a more developed Immunity and Leniency Policy than we do, with the hope that their practice can shape our future actions.

A. Immunity

1. Introduction & short historic

The immunity policy was developed with the purpose of discovering the secret agreements between economic operators, as well as to eliminate them, these coordinates being subsumed to immediate scope (*causa proxima*) of the competition legislation, that is the guarantee of a proper functioning of the markets and,

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subsequently, protecting the consumer through price reduction and quality improvement.

The purpose of the immunity policy is to encourage the acknowledgment of this anticompetitive agreements by the involved companies and inform the competition authorities. On this occasion, the companies will have a greater benefit than the one resulted after the effective sanctioning, *post factum*, once the "evil" has already produced.

In essence, the immunity policy is a favorable treatment offered by the Competition Council to the economic operators involved in anticompetitive agreements who decide to cooperate with the competition authority by providing them information and evidence, in order to discover the anticompetitive practice.

A very important instrument at European level, the immunity policy was first introduced in Romanian legislation in 2004[1]. In 2009, after Romania became part of the European Union, important amendments were brought to this secondary legislation in order to align it with the European legislation and therefore a new set of instructions were adopted ("**Immunity Guidelines**")[2]. In 2015, these Guidelines faced few amendments[3] so that they were updated to the latest European tendencies and case-law.

2. General conditions

In Romania, immunity is offered for both horizontal (*cartels*) as well as vertical agreements[4], such as price fixing, bid rigging, market allocation. Before the 2015 amendment, the parties that were involved in vertical agreements regarding territorial and/or client limitation, which offered absolute protection were also able to apply for immunity, but at the present such provisions have been eliminated.

Even though it is not expressly stated, by means of interpretation we get to the conclusion that the rewarding for economic operators which cooperate with the Competition Council, will only be granted only for the hardcore agreements from art. 5(1) of the Law no. 21/1996 ("**Competition Act**")[5] and/or art. 101(1) TFEU[6]. As we can clearly observe, the immunity benefit applies to anticompetitive agreements, which means that at least two parties need to be involved in order to have a valid scenario. Thus, an abuse of dominant position cannot be taken into consideration as it is a one-side manifestation from an economic operator and does not imply and agreement[7]. However, it is to be discussed whether when talking about collective dominance we can also take into consideration an immunity deal. Collective dominance, even though is not as common as single dominance, implies that two or more companies linked by economic purposes (*which implies an agreement*)[8], abuse their dominant position upon the market.

Of course, we also need to take into consideration pct. 3 of the Immunity Guidelines that refers to art. 5(2-3) of the Competition Act and art. 101(3) TFEU, situation where, with respect to this specific type of agreements, the immunity procedure is not applicable. *In concreto*, we are talking about those agreement that

[1] Guidelines of April 22, 2004 Regarding the Conditions and Applicability Criteria for the Immunity Policy According to Art. 56(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 93 of April 22, 2004 for the Approval of the Guidelines Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 56(2) of the Competition Act No. 21/1996, (13.05.2004).

[2] Guidelines of August 21, 2009 Regarding the Conditions and Applicability Criteria for the Immunity Policy, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Guidelines Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, (07.09.2009).

[3] Guidelines of May 6, 2015 for the Amendment of the Guidelines Regarding the Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Instructions Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 238 of May 6, 2015 for the Approval of the Guidelines of May 6, 2015 for the Amendment of the Guidelines Regarding the Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Instructions Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, (09.06.2015).

[4] Art. 2 of Guidelines of August 21, 2009 Regarding the Conditions and Applicability Criteria for the Immunity Policy, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Guidelines Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996.

In this case, point 2 let. a)-b) from the Immunity Guidelines detail the notion of „hardcore restrictions", distinguishing between two categories:

- horizontal agreements and/or concerted practices, between 2 or more competitors, aimed to or having as an effect the coordination of the competition behavior on the market and/or influencing the relevant criteria of the competition frame by adopting practices like price fixing (buy-sell) or some commercial conditions, allocation of the productions and selling market shares, customer or market allocation, bid rigging, import/export restrictions or other anticompetitive acts against competitions; these are called generically cartels;
- vertical agreements and/or concerted practices, regarding the conditions in which the parties can buy, sell or resell certain products or services, that have as object the restraining of consumer's freedom to set it's sell/resell price.

[5] Competition Act No. 21 as of April 10, 1996 (*as Further Republished and Amended), (29.02.2016).

[6] Treaty on the Functioning of the European Union (*Consolidated Version), (26.10.2012).

[7] For further reference please see the following decision in which the Competition Council and the national court decided that in a case of dominance abuse an immunity deal cannot be applied: Case 5802/11.10.2011, Bucharest Court of Appeal, Section 7.

[8] For more details on the subject of collective dominance see Richard Whish and David Bailey, *Competition Law*, 7 ed. (New York: Oxford University Press, 2012).

are governed by the Block Exemption Regulation[9], where these agreements create sufficient advantages in order to compensate for the anticompetitive effects and therefore will not being considered as illegal.

Our national law provides 2 types of immunity that can be offered to companies involved in anticompetitive practices: (1) type A immunity and (2) type B immunity.

As a separated notice, we must outline that our national competition provision only sanction companies and not private individuals and therefore the immunity can only be granted to companies.

Immunity Guidelines provide a series of criteria that need to be fulfilled: (a) general ones, that are applicable for both fine immunity as well as fine reduction and (b) special ones, applicable for each procedure.

General criteria

With respect to general criteria that needs to be checked when applying either for immunity or for reduction, these are provided in pct. 19-20 of the Immunity Guidelines and are as follows:

a) real, continuous and prompt cooperation with the Competition Council throughout the entire investigation procedure, respective:

- providing the Competition Council all the necessary and relevant information and evidence the company has or may have regarding the infringement;
- remaining at the Competition Council's disposal to answer any kind of solicitation which might contribute to establishing the deeds;
- the prohibition to destroy, falsify or hide relevant information or evidence regarding the alleged infringement;
- the prohibition to disclose the existence of the immunity request or its content before the competition authority will transmit the investigation report to the parties, if the Competition Council did not state otherwise;

b) stopping the implication in the alleged infringement at the Competition Council's request;

c) not disclosing the company's intention to apply for a immunity deal or any elements of the request, with the exception of other competition authorities.

Immunity

As defined by law (*lato sensu*), immunity from fine represents the exemption to pay the fine for the companies that are part of an illegal agreement according to art. 5(1) of the Competition Act and/or art. 101 TFEU and decide to disclose their participation to the competition authority. Thus, the immunity deal will be applied to those agreements which have as their object or effect the prevention, restriction or distortion of competition within the national market or on a part of it[10]. This national infringements, as well the European ones, are "*by object infringements"*, which means that the effect of market competition distortion does not need to be demonstrated, as the mere agreement upon this kind of practices is sanctioned.

Art. 5(1) of the Competition Act exemplifies a series of anticompetitive practices and agreements which are the most common in practice:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development, or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Persons excepted from immunity deal

Concerning the economic operators excluded from immunity deal, the Immunity Guidelines[11] state that the initiator is eligible to qualify for immunity while for the undertaking that encouraged others to join or stay in the cartel immunity is '*off limits*'.

However, the ringleader may qualify for a fine reduction if it meets the relevant requirements set out in the Immunity Guidelines. Aside from compliance with the usual requirements set out above, in order to benefit from the immunity another important condition is that the ringleader must provide evidence that brings '*significant added value*' to the evidence the Competition Council already has.

It should be mentioned that this is a significant progress towards encouraging immunity deals, as before June 2015, neither the initiator of the anti-competitive conduct nor an undertaking that actively encouraged other undertakings to join or remain in the cartel would qualify for immunity.

3. Types of immunity

Our national law regulates, as already mentioned, two types of immunity: (1) type A immunity and (2) type B immunity. This classification is made up according to the moment of time the undertaking asks for immunity: before or after an investigation on behalf of the Competition Council was opened.

[9] *Commission Regulation (Eu) No 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices*, (01.06.2010).

[10] Art. 5(1) *Competition Act No. 21 as of April 10, 1996 (*as Further Republished and Amended)*.

[11] Pct. 13.

Type A immunity

Regarding type A immunity (*i.e.* before an investigation is opened), asides the general criteria mentioned above, there are also special requirements that need to be taken into consideration by the undertaking in order to have an eligible application.

These conditions are set out in pct. 9 of the Immunity Guidelines and are, cumulatively, the following:

a) the undertaking is the first one to deliver information and provide evidence that, according to the Competition Council, can be used to open up an investigation and set up mock dawn raids;
b) at the moment the evidence is provided, the Competition Council did not have enough evidence to open un an investigation or to set up dawn raids;

Per a contrario, the undertaking cannot claim type A immunity if the Competition Council has already opened up an investigation or has sufficient evidence to open it up at the moment the request is made. This means that we must always remember that type A immunity takes into consideration the previous situation (*ex ante*) before opening up an investigation by the competition authority.

However, we consider that these conditions are arbitrary and rely only upon the Competition Council's will to grant the type A immunity as the meaning of "*significant information and evidence'* relies solely upon the competition authority's interpretation.

Type B immunity

With respect to type B immunity, pct. 11 from the Immunity Guidelines also provides us with the necessary conditions that the undertaking needs to comply with (and which are also cumulative):

a) the undertaking is the *first one* to provide information and evidence that will allow the Competition Council to identify the infringement in accordance to art. 5(1) of the Competition Act and/or art. 101 TFEU;
b) at the moment the evidence was provided, the Competition Council did not have sufficient elements to establish the infringement according to art. 5(1) of the Competition Act and/or art. 101 TFEU;
c) no other undertaking was granted conditional immunity (type A) related to the alleged infringement;
d) immunity's general requirements are met.

Type B immunity takes place after the investigation procedure was opened by the Competition Council (*ex post*), situation in which the competition authority is fully aware of the infringement but lacks sufficient evidence in order to sustain it. Thus, the undertaking needs to actively provide information and evidence that can accurately establish the infringement.

Both type A and type B immunity mean that the undertaking that qualifies for them is exempted from paying the fine. Therefore, it is very important to always keep in mind that this kind of full immunity is provided only to one undertaking. In other word, a type A or B immunity for the first claimant exclude the possibility of the subsequent undertaking to benefit from full immunity, but does not affect its chances of obtaining a fine reduction of between 30% and 50%12, as it will be presented in section B.

Procedure

For both kinds of immunity, the applicant must submit a statement in which it should describe as detailed as possible aspects like:

- a detailed description of the alleged infringement, including:
  - the purposes, activities and functioning mechanisms:
  - the products or services involved, geographic area, the duration of the infringement and estimated market volumes affected by the alleged anti-competitive practice;
  - meeting dates and places, the content and the participants at the discussions during the alleged infringement;
  - all relevant explanations regarding the evidence provided for supporting the request;
- name and address of the applicant and of all other undertakings participating or which have participated in the alleged anti-competitive conduct;
- names, positions, locations of the offices, and if necessary, the home addresses of the individuals who, to the applicant's knowledge, are or have been involved in the alleged infringement, including the individuals who have been involved in the name of the applicant;
- a specification that the undertaking has not done anything to constrain other undertakings to join or stay in the alleged anti-competitive arrangement;
- information on the competition authorities from or outside the European Union that have been contacted or that the applicant intends to contact in relation to the alleged anti-competitive practice.

Besides this, according to pct. 21 of the Immunity Guidelines, the applicant must provide the Competition Council, besides statements, all the information and evidence that are in its possession and are connected to the alleged infringement *or* to hypothetically first present the information it has and subsequently present a descriptive and detailed list of the evidence that are proposed to be revealed. If the information the application provided are meet the conditions set above, then the applicant will be granted conditional fine immunity.

Immunity marker

When seeking immunity, the undertaking has the possibility to contact the designated person of the

[12] According to pct. 17 of the Immunity Guidelines.

Leniency Module within the Competition Council (which we will detail below) either directly or via a legal representative by telephone, e-mail, post etc. It is advisable to have such preliminary contact in order for the applicant to know if immunity is still available or not (*for example if somebody else already applied for it*). If immunity is still available, the undertaking must submit (either by fax or mail) a formal or hypothetical application. On the other hand, if the immunity is not available, the applicant should request a fine reduction.

In this case, the normal question arises: but what happens when the undertaking knows about the infringements, does not have all the necessary information and evidence but can gather them?

As described before, there are two main procedures in which an undertaking can apply for a immunity deal:

a) when it has all the necessary information, the applicant can submit to the Leniency Module or directly the competition authority a statement with all the documents or
b) it can address the Leniency Module its intention, asking for a priority number.

Similar to the "*marker"* used by the European Commission[13], in Romania, starting with 2010, the Leniency Module has been implemented[14]. The main scope of the Leniency Module is to secure an interface between Competition Council and the undertaking that lodge immunity requests according to Immunity Guidelines. Thus, this module allows an undertaking to collaborate with the competition authority in order to identify and stop alleged infringements until all the necessary information for a completed application are gathered.

The Competition Council, after meeting with the applicant, may decide to grand the *marker* for a variable case by case period of time (depending on how much it considers that it will take the applicant to gather all the necessary information and evidence in that particular situation)[15]. From practice, the amount of time given is quite short, usually a couple of weeks. Of course, there are no deadlines for the marker application, which means that the competition authority has a sole discretion regarding the amount of time granted to the applicant and can therefore extend the first deadline. However, if the competition council authority decides not to extend the time and the application is not supplemented with the requested information, the application will be rejected. In this case, if the applicant will subsequently decide to submit a new request, it cannot apply for a marker or to submit a hypothetical request, but it must apply for the formal request where it will provide the competition authority all the necessary information and evidence it possesses.

In order to obtain a *marker*, the applicant must provide the competition authority the following information:

- its name and address;
- the parties involved to the alleged anticompetitive agreement;
- the affected product/s and geographic area;
- the type of the infringement;
- the estimated duration of the alleged anticompetitive conduct;
- the member states where evidence can be found;
- information regarding the existence of other immunity applications (or potential ones) regarding the same alleged anticompetitive practice.

In both cases, the competition authority grand the conditional immunity by a written decision addressed to the applicant and which is not made public until the end of the investigation. After the authority has assessed all the immunity conditions and found out that the applicant fulfill them, it will validate its initial decision. Afterwards, once the competition councils finalize the investigation, the sanctioning decision will be transmitted to the parties and published on the website.

Simplified procedure

The Immunity Guidelines also provide a simplified procedure for those undertakings that apply for immunity in more than one member state[16]. Afterwards, after it is established what competition authority will instrument the immunity case, the undertaking will supplement and submit to this authority the request with all the necessary documentation.

Practical questions

- Does the applicant need to formally admit the infringement?

According to the immunity guidelines, there are no specific provisions regarding the admittance of the infringement by the applicant. It is true that the applicant need to submit a statement containing a detailed description of the deed as well as the participants to it, but at no time does the law require to formally admit the infringement. We may say that the applicant informally recognizes it implications or that its participation is evident.

- Does the applicant need to stop the infringement?

The Immunity Guidelines only state that the applicant will cease its participation in the alleged anticompetitive deeds at the Competition Council's request. This means that, given the fact that the applicant acts like an informant, it may be possible to take part in the alleged agreement, in order to gather further information about the illegal deed until the

[13] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, (08.12.2006).
[14] http://www.clementa.ro
[15] Pct. 27 of the Immunity Guidelines.
[16] Pct. 33-36 of the Immunity Guidelines.

competition authority considers it has sufficient evidence to start an investigation.

- Does the applicant need to compensate the victims?

As a general rule in our national legislation, there is not an express provision regarding the victim compensation by the parties of an anticompetitive deed. On the contrary, the Competition Act specifically provides that, when there are more participants in an anticompetitive practice, those that applied and where granted immunity will not be jointly liable with the rest of them. The victims need to open a separate claim in court where they can request a compensation as a result of the anticompetitive behavior, provided that they can prove their prejudice according to common provisions.

Domestic provisions are poor with respect to compensation, but further amendment will take place with the transposal of the Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for the infringement of the competition law provisions of the Member States and of the European Union[17]. The Directive should have been transposed by the end of 2016, but no actions have been taken into this direction, with the exception of some public consultation which took place of the draft project and were published on the Competition Council's website.

The main novelty of the above mentioned Directive in the immunity policy is the limitation of liability of the immunity recipient. Accordingly, the immunity recipient will be jointly and severally liable towards direct and indirect purchasers or providers. By exception, when the victim cannot obtain full compensation from the other infringers, the immunity recipient will also be held liable towards other injured parties.

- Can a whistle-blower be considered as an immunity applicant?

According to Competition Act, whistle-blower as those "individuals that provide the Competition Council, on their own initiative, information regarding possible breaches of Competition Law"[18].

As we mentioned in the preamble of this article, only companies are eligible for immunity deals in Romania and not individuals. Therefore, if the undertaking's employee decides to inform the Competition Council upon possible anticompetitive deeds of the company he works with, the undertaking that employs the whistle-blower will not benefit from it.

In this case, in the competition authority finds that he has sufficient evidence from the whistle-blower and decides to open up an investigation or carry out dawn raids, type A immunity is no longer available for the interested parties. However, in certain conditions, type B immunity can also be granted to applicants.

- Does the competition authority provide confidentiality assurance to the immunity applicants?

According to the Immunity Guidelines[19], any statement made by an undertaking to the Competition Council with respect to the immunity procedure is part of the case-file and cannot be used or made public for any other reasons than applying art. 5(1) of the Competition Act and/or art. 101(1) TFEU.

Access to statements is only granted to the involved parties, under the condition that they will make copies (either physical or through electronically methods) of these statements[20]. Furthermore, the Competition Council is obliged to assure, at the undertaking's request, the confidentiality upon its identity until the investigation report is transmitted to the involved parties.

Also, an undertaking that requests immunity but is denied due to prior application of another party will not receive any details from the Competition Council on the identity of the first applicant.

A problem that raised several debates in practice is the potential disclosure of leniency documents in court actions for damages initiated by individuals or companies harmed by the anti-competitive practice. This issue is now settled by the Directive on damages that expressly forbids national courts from requesting a party or a third party to disclose leniency statements in courts. The scope of such procedure is to encourage the undertakings to approach the competition authorities with immunity applications.

- What happens when the competition authority discovers additional anticompetitive practice than the ones submitted by the applicant (either through formal procedure or marker)?

The marker or the acceptance granted by the Competition Council only refers to the participants, anticompetitive deeds and duration indicated by the applicant. If, for example, the first participant applied for an infringement regarding price fixing, a second applicant may as well benefit from immunity if he brings evidence regarding territorial or client allocation, even if its related to the same parties. In this case, the first participant may apply for a fine reduction for the other discovered deeds.

- What happens if a second applicant comes with better information?

The marker or the immunity deal is not revoked if a second participant comes with better information that the first one which already secured an immunity deal.

- Will the applicant be forced to submit client attorney documents?

[17] Directive 2014/104/Eu of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for the Infringement of the Competition Law Provisions of the Member States and of the European Union., (05.12.2014).
[18] Art. 35 par. (1) of the Competition Act.
[19] Pct. 44.
[20] Pct. 45 of the Immunity Guidelines.

Competition Act expressly recognizes the confidentiality between lawyer and client, mentioning that the following types of documents cannot be used as evidence during the investigation carried out by the Competition Council: the communications between undertaking/association and their lawyers (only lawyers, not in-house counsel), made exclusively with the purpose of exercising the right of defense (before or after the investigation started).

Furthermore, according to the national provisions with govern the activity carried out by lawyers, any communication between the lawyer and the client, irrespective of its support, is confidential.

The Immunity Guidelines only require the applicant to submit the competition authority with the relevant information and evidence for establishing an anticompetitive practice. Moreover, the entire procedure is voluntarily and seen as a benefit for the participants. In the light of these aspects, it is up to the participant whether he will decide to provide the Competition Council with confidential documents that are protected by the client – attorney privilege.

- Can the immunity be revoked?

Although not a common practice, the Competition Council may decide to revoke the conditional immunity at any time until it decides to close the investigation. Some of the reasons for such actions is that the immunity was no longer available or the applicant failed to comply with one or more of the requirements for being granted the immunity deal.

In case this happens, the competition authority will inform the applicant in writing about its decision. Formally, the immunity will be granted of refuse by the Competition Council through the sanction decision issued at the end of the investigation.

If the immunity application was reject, the applicant can challenge the decision in court at the Bucharest Court of Appeal in 30 days from the date it received the sanctioning decision.

B. Leniency

In case the undertaking does not qualify for the immunity deal, it can apply for the leniency program where it can benefit from a considerable reduction of fine.

Undertakings eligible for such reductions are those that can provide evidence of a '*significant added value*' in addition to those already available to the competition authority. In additions, the undertaking must comply with the general conditions for the immunity applicants. It is very important that, when submitting a request to the competition authority, the undertaking specifically mentions that the information and evidence provided are for fine reduction and not for immunity. As a general rule, it does not mean than an applicant that was rejected for an immunity deal will be automatically granted a fine reduction. For this, a specifically separated request must be made.

In this case, the reduction in sanctions is at the Competition Council's discretion, the Immunity Guidelines offering only variable limits between under 20% and maximum 50% percent of the fine that would normally be applied. Applicants that comply with the conditions will benefit from the following reductions (*taking into consideration the moment of time the undertaking provided the competition authority information that brought `significant added value`*): between 30% and 50% for the first undertaking[21], between 20% and 30% for the second undertaking that applies and maxim 20% for all the other undertakings.

In order to determine the reduction level in accordance to the limits previously set out, the Competition Council will take into consideration the time moment the evidence and information were submitted as well the added value they brought[22]. Furthermore, the evidence that allow the establishing of additional facts that increase the gravity or duration of the infringement will be rewarded in the future through their elimination from the fine amount for the undertaking that provided that information.

In case the Competition Council reaches the preliminary conclusions that the evidence and information provided by the undertaking really do bring the significant added value, it will inform the undertaking in writing, no later than the date on which the investigation report is transmitted to the parties.

C. Competition Council's practice

Until the present time, even though at the European level the Immunity Policy is widely used, in Romania is does not the embrace the same success. Up so far, only two cases took advantage of the immunity policy, gaining full immunity:

1. during the investigation of the taxi transport services in Timisoara County[23] *and*

[21] By the definition of "*significant supplementary contribution*", the law means, according to pct. 16 of the Immunity Guidelines, the way of measure in which the probative elements, unknown until that moment, that are offered by an undertaking, consolidates, through their own, the Competition Council's ability to demonstrate the existence of the alleged agreement. In this evaluation, the Competition Council considers that, in general, the written probative elements from the period the alleged facts took place have a higher contribution than the ones from a subsequent period. Probative elements that are directly linked to the facts will be considered to be more important than the ones indirectly linked to the facts. Similarly, there will be taken into consideration the implementation to corroborate the elements brought with other sources, so that the respective elements can be successfully administrated during the investigation. Thus, the conclusive elements will be considered as having a significant supplementary contribution than the probative elements such as statements, which require the verification and corroboration with other sources if they are contested.

[22] Pct. 17 of the Immunity Guidelines.

[23] Competition Council's decision no. 61/2010, which can be accessed at http://www.consiliulconcurentei.ro/uploads/docs /items/id7082/decizie_taxi_timis-publicare.pdf.

2. where companies where fined for a bid rigging in the bid organized by S.N.G.N. ROMGAZ S.A[24].

In the first case, the first company who brought significant evidence and disclosed the anticompetitive agreement to the Competition Council, Radio Taxi, received full immunity. The second company that brought significant evidence received a fine reduction of 50%.

In the second case, the fines were of 2.9 mil EUR. It was the first investigation opened as a result of an immunity request. The company obtained full immunity for cooperation with the Competition Council.

D. Elements of comparative law

It is well known that, in what concerns competition rules, they are similar to most member states of the European Union, as according to art. 3 of the Treaty on the Functioning of the European Union, the establishing of the competition rules necessary for the functioning of the internal market is the exclusive competence of European Union. This means that EU provides the framework for competitive activity in order to ensure that there is no distortion or restriction of competition in the market by applying the same rules to all companies operating on the internal market. Obviously, it follows that, in subsidiary, each state aligns its regulations with the requirements of the European level. For these reasons, we believe that a brief overview focused on the main points of difference between Romanian legislation and other states rules should be made, which is why we relate to France, Germany and Great Britain, countries with a consistent practice in competition law.

In line with our laws is also German and French legislation where the first applicant to qualify for leniency will be granted full immunity from fines provided they comply with the obligation to fully and continuously cooperate with the authority. Since 2006, the French Competition Authority has granted full immunity in nine of the ten decisions in which it applied its leniency program.

In what concerns the UK, rules are slightly different. First of all, it should be mentioned that there are several authorities with responsibilities in competition law. The first and most important is the Competition and Markets Authority (CMA). In parallel with the CMA, separate regulatory bodies hold concurrent powers to enforce UK law prohibitions against anti-competitive agreements. These regulatory bodies include the Financial Conduct Authority (FCA), the UK financial services regulator, as well as agencies with oversight of the energy markets (Ofgem) and water and sewerage providers (Ofwat). Unlike the other two jurisdictions mentioned above, in the UK there are two immunity regimes operated by the CMA: (i) a civil regime for undertakings under the Competition Act 1998 and (ii) a criminal regime for individuals under the Enterprise Act 2002. Both regimes operate side by side in circumstances where an undertaking seeks complete immunity from civil fines and criminal immunity for its current and former personnel. We also find here type A and type B immunity, according to the moment of time the undertaking asks for immunity: before or after an investigation on behalf of the CMA was opened.

An interesting fact regarding granting immunity after an investigation begins we found in France, where the competition authority will publish a press release after each dawn-raid it carries out in order to allow undertakings that were not visited to be informed that an investigation is underway in their sector and to apply for leniency. This way, the precautionary principle that characterizes competition law is emphasized, giving operators the opportunity to report certain forbidden behaviors before being subjects of inspections carried out by the authority. Such a mechanism is rightful if we consider that, in other countries, there is a general practice for companies to apply for leniency.

In Germany on the other side, the leniency program sets out different eligibility requirements for leniency depending on whether the application is made before or after the competent authority (FCO) has gathered sufficient evidence to obtain a search warrant. In practice, the relevant point in time for the distinction is often the beginning of the dawn raid. The first applicant who submits information that enables the FCO to obtain a search warrant will automatically be granted immunity provided that he complies with the obligation to cooperate going forward.

Moreover, while in Romania, France and Germany an explicitly admission of a violation of law is not required to qualify for leniency, as it results when the undertaking provides a corporate statement which includes a detailed description of the organization of the alleged arrangement. Therefore, in fact, the applicant acknowledges a violation of law. In the UK recognition is part of the admission requirement. Also, in the context of criminal offence, we are dealing with an individual applicant who must admit participation in the criminal offence. So, in this case, law incriminates individuals, rather than companies who enter into certain anticompetitive agreements.

The primary intention was to create a deterrent to cartel activity by threatening imprisonment (for a maximum of five years) for executives whose unlawful activities had previously carried only the threat of civil action against their company.

Related to the question whether an applicant can qualify or not for leniency if one of its employees reports the conduct to the authority first, the situation appears to be resolved by the fact that this procedure applies to undertakings. So, among the conditions that have to be fulfilled to successfully apply for immunity,

[24] Competition Council's decision no. 7/2015, which can be accessed at http://www.consiliulconcurentei.ro/uploads/docs /items/id10044/decizie_7_din_2015_foraj_vers_publicare_site.pdf.

the employee must be mandated by the undertaking to be considered as its representative and to qualify the undertaking.

However, an application made by an individual explicitly only in his own name or without authorization to represent a company will not cover the company. In this scenario, type A immunity will no longer be available for the company if the competition authority finds the information provided by the whistle-blower to be sufficient in order to open an investigation or carry out dawn raids. Type B immunity will still be available provided that the undertaking meets the requirements for accessing it. In the UK the CMA wishes to increase the pressure on undertakings to report collusive conduct by offering an individual who comes forward with information about cartels a £100,000 reward.

Last but not least, under the Romanian Competition Law the leniency program covers only companies or business associations, while in German or French legal system the authority can fine not only companies, but also individuals who have represented or supervised the company, for their respective participation in a cartel. If a person authorized to represent an undertaking files an application for leniency, the authority rates this also made on behalf of the individuals participating in the cartel as current or former employees of the company.

Another difference noticed is that, unlike the competition rules in Romania, in France, England and Germany is regulated a settlement process that allows early settlement of civil liability for companies in cartel cases, vertical agreements or other fine proceedings. This settlement process is distinct from the aforementioned leniency policy.

Conclusions

As we can see from the present papers, the Immunity and Leniency Policy has a very complex procedure, doubled by strong confidentiality principles. Moreover, not all the evidence can be considered in an Immunity or Leniency case, as they need to be significant and to bring the so-called added value for the competition authority.

The fact that there are only two cases of Immunity deals in Romanian until now might raise a big concern towards the applicability, understanding and nevertheless awareness of such procedure. At the very first glance, the conclusions we came up with is that undertakings prefer to take the risk and face a possible fine, considering that the chance to be sanctioned is lower than the one for getting away. This brings a serious damage to the normal competition environment as the undertaking still do not find the Immunity and Leniency as a "deal" to disclose possible anticompetitive agreement and bring balance in the competition market.

As further research, we bare the hope that more and more cases are to come in the near future and thus see how this policy will evolve at national level.

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