

Leniency Policy in Competition Law

By: Dr. Márk Pándi and Dr. Zsolt Füsthy

Füsthy & Mányai Law Office

1036 Budapest, Lajos u. 74-76.

(36 1) 454 1766 phone

(36 1) 454 1777 fax

mpandu@fusthylawoffice.hu

zfusthy@fusthylawoffice.hu

www.fusthylawoffice.hu

1. Leniency Policy in the European Union: The 2002/C 45/03 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases

The leniency policy is based on the theory that some business organizations wish to exit from a cartel but do not want to go public because they are afraid of the high fines. This is the reason the European Commission gives these undertakings immunity in case they provide information about the members of the cartel. This might sound like a very simple information providing process but the Commission has two conjunctive criteria:

- The undertaking is the first to submit evidence which is in the Commission's view may enable the Commission to carry out an investigation in connection with an alleged cartel affecting the Community or
- The undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of former Article 81 EC (now Article 101 of TEC) in connection with an alleged cartel affecting the Community.

Upon fulfillment of the above conditions the undertaking shall work together with the Commission, and shall provide all evidences possible. The Commission has only applied the rule of greatest immunity in a few cases. For example in the Rhône-Poulenc case considering the involvement of the company in a vitamin cartel, in the Interbrew case where the company was a member of the Luxembourg beer cartel and in the Sappi case when the company provided useful information about the paper-cartels. In June 2006 the Commission revised its guidelines for imposing fines in competition cases, providing significantly higher fines than previously.

Those undertakings that do not meet the requirements laid down by the criteria listed above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement, which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.





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The level of reduction an undertaking will benefit from relative to the fine which would otherwise have been imposed as follows: For the first undertaking to meet the above requirements 30-50 percent, the second 20-30 percent and all the other undertakings shall receive a reduction up to 20 percent.

2. The Leniency Policy in Hungary

One year after the European Commission has published its leniency policy, the Economic Competition Authority (ECA) has introduced its Notice on the application of a leniency policy to promote the detection of cartels, mostly based on the notice of the Commission.

In the introduction the Notice outlines its own purposes in general terms. It highlights the main principles of the fining policy of the ECA, that is, to establish the criteria according to which undertakings participating in a cartel but actively assisting in its detection may be granted immunity from, or a reduction in the amount of, the fine which would otherwise have been imposed. The Notice may be applied to those secret cartel agreements or concerted practices between two or more competitors that are aimed directly or indirectly at fixing prices, sharing markets including bid-rigging or fixing production or sales quotas.

The legal background of the leniency policy is based on Section 78. (3) of the Hungarian Competition Act, which provides that, in setting the amount of the fine, the “effective co-operation” of the respondent “during the proceedings” is to be taken into consideration as a factor to reduce the fine. The amended version of the Act came into effect on June 1 2009 and enacted the guidelines previously published by the ECA under No. 3/2003. The rules of leniency are incorporated into the Competition Act by adopting a new Section 78/A.

The ECA only grants total immunity to the undertaking that provides first evidence about the cartels or is the first to submit new evidence and information which will enable the ECA to find an infringement, on the condition that the ECA did not have, at the time of the submission, sufficient evidence to find an infringement. If these conditions are

not fulfilled the only possibility is to reduce the amount of fines. The reduction corresponds to the Commission Notice, the first undertaking to fulfill the requirements receives a 30-50 percent reduction, the second 20-30 percent and all the others up to 20 percent. As a curiosity the ECA only decides at the end of the procedure if it grants the total immunity or not.

As an addition to the leniency policy from April 1 2010 an individual who has knowledge of a market-partitioning or price-fixing hardcore cartel and informs the Competition Office, supplying essential written evidence, will receive an informant’s fee. The fee is equal to 1 % of the fine imposed but not more than HUF 50 million (EUR 185,000,-).

3. The Leniency Policy in Practice

A Finnish company called Kemira Growhow and a Belgian one called Tessengerlo both animal feed producers decided to inform each other of the prices and quantities since the 80’s then jointly evaluated the needs of customers and shared the market. Kemira reported itself to the ECA which dismissed the fine. In case of fining the companies the fine could have been 10 percent of the relevant product market. Bearing in mind that the total income of the Finnish company was EUR 1,15 billion (of this amount LLC, the Hungarian subsidiary produced HUF 5,1 billion) we can imagine that the fine could have been incredible. During the procedure the Belgian company also helped the ECA and received “only” a HUF 131 million fine.

The example of Royal Bau Kft. is remarkable. Royal Bau and Construm applied separately for a tender. They agreed that in the last round of the tender Construm should have to make a better offer than Royal Bau. If Construm wins and Royal Bau is second then Construm steps back and then they build the project together. If Royal Bau does not achieve the second place Construm implements the project alone. Construm was imposed a HUF 16,5 million fine but Royal Bau escaped the punishment. ECA promised full discretion to the companies but after the procedure owing to a press release their reputation was perfectly ruined.

In 2010 ECA has closed its investigation into the railway construction sector, concluding that it has evidence



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to prove that five companies participated in a series of bid-rigging arrangements on railway construction projects in 2004 and 2005. The ECA has imposed fines totaling HUF 7.1 billion (EUR 25.5 million), the largest aggregate fine in a single case. No fine was imposed on one of the companies' subsidiaries for cooperating with the ECA during the investigation.

The ECA has first ever granted full anonymity to an undercover witness in exchange for his or her testimony in support of charges against the railway construction companies.

4. Summary

Inevitably cartels cause serious damage to the free competition and deteriorate the positions of fair market players. Therefore the efforts to reduce or filter the unwanted practices naturally stand in the focus of competition authorities both in the EU and Hungary. To this end leniency policy constitutes one of the most powerful means found out up to now. Nevertheless, only prophets could tell if it is efficient enough. We will see scrutinizing the future developments of the global market.