Leniency Programs in Competition Law

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Competition is one of the key elements of the development in the economy. So the purpose of all markets is to provide healthy competition between competitors. However, some companies conclude horizontal agreements such as price-fixing, market allocation, bid rigging which are prohibited by law as preventing, restricting or distorting competition within the market. These agreements known as cartels pose the most serious threat to the competition since they artificially decrease or even eliminate the natural level of competition in the market and consequently, increase prices to final consumers as well as decrease the overall competitiveness of the industry.

The viability of cartels depends on a great extend on their ability to set up control and retribution mechanisms that discourage cheating by cartel members. Despite being inherently unstable, cartels are increasingly difficult to detect and prove. Therefore, competition authorities all around the world commenced to look for alternative solutions on how to discover and punish cartel members. As a result, various competition authorities have introduced special programs which encourage cartel members to betray their fellow conspirators in exchange for full or partial immunity from sanctions. The idea of so-called "whistle blowing" has been institutionalized in many parts of the world in the form of amnesty or immunity programs or alternatively referred to as Leniency programs. Despite to the increase of the amount or degree of the fine, this program is considered as more effective and accurate way to encourage the participants who don't want to be sacrifice or to feel danger between "companions".

A leniency program is a system, publicly announced, of, "partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition [law] enforcement agency". [4] Leniency program can be defined as reduced legal sanctions for wrongdoers who spontaneously self-report to law enforcers or, in more detail, as granting full immunity from possible sanctions (or at least their considerable reduction) to the cartel member who first provides the competition authority with information about the cartel agreement, its participants and at the same time actively cooperates during the following investigation with the competition authority. Although the main purpose of competition authorities still remains to reveal illegal cartel-type relationships in the markets through their own instruments and market surveillance, at the age of global economy, leniency programs form an alternative method of revealing the increasingly sophisticated and geographically expanded cartels which would not be feasible in their absence.

Numerous publications refer to last ten years of leniency programs expansion as "explosion" or "leniency revolution". That is partly because the leniency programs implemented in the USA and other countries have proven positive results but also because the scope of economic damage caused by cartels to final consumers has been widely acknowledged by the officials from the biggest economies in the world. [5]

Analyzing the effectiveness of those pro-

grams requires to define the objectives first. The primary objective of leniency programs, as of antitrust laws in general, is to deter cartels or harmful behavior. This primary objective can be separated into two parts: Ex ante or general deterrence and ex post deterrence or desistance. In other words, these two derived objectives imply prevention of cartels either before they occur or prosecution due to the detection of already existing cartels. [3, p.23]

Leniency programs have undergone significant development in their short time of existence. The first country which introduced them was the United States (U.S.) in 1978 when they started a new era of fight against frauds to the federal government in the antitrust law. Under the Corporate Leniency Policy (or "Amnesty Program") the amnesty was only available to applicants prior to the initiation of the Department of Justice's investigation and was not granted automatically to the reporting cartel member. As a consequence, this program was not too successful, it resulted in a few applications (approximately one per year) but no amnesty was granted during those proceedings.

In order to encourage the cartel members to self-report their illegal activities the Antitrust Division of the Department of Justice expanded its leniency program in 1993 into the Corporate Leniency Policy. The generosity and transparency of the program dramatically increased: The complete amnesty (100 % reduction of the fine) was automatic to the first cartel member who self-reports under the condition that no investigation had been underway before the applicant came forward (Type A Immunity). In addition, the lenient treatment was extended to two other areas: First, granting "ex post" immunity to the first reporting firm in cases when the Department of Justice does not already have evidence against the applicant that is likely to result "in a sustainable conviction" (Type B leniency). Second, granting amnesty from criminal prosecution to all individual officers, directors and employees if the confession was in a form of a "truly corporate act". [6]

In all three scenarios mentioned above, the leniency applicant had to cooperate continuously and completely with the Department of Justice, terminate promptly its involvement in the cartel and also must not have been the coercer, leader of originator of the illegal activity.

After the pioneering introduction of Leniency Programs in the US and the very effective reform in 1993, the European Commission has approved a regulation in 1996 and reformed it in 2002. Moreover, many other countries have adopted similar schemes. [8] Although there is currently no global leniency program merging the regional and local specificities, several key principles have proven to be applicable to all successful leniency programs. A successful leniency program must be have both deterring and detecting function, i.e. it prevents the formation of cartels as well as reveals the cartels by eliciting information from cartels members. The factor which plays a crucial role in weighing the interests of remaining in the cartel vs. reporting the cartel is the seriousness of possible penalties, ranging from administrative fines to criminal sanctions including imprisonment. [7] Some countries like the U.S. operate not only corporate liability for competition infringements but also individual liability which is generally regarded as a powerful motivator to encourage early cooperation with the competition authorities.

Spagnolo identifies three major effects of a successful leniency program: Firstly, it protects the applicant from fines, or alternatively reduces fines below the expected level if the applicant does not report first or prior to authority's reveal of the cartel. Secondly, the ideal leniency program brings the "protection from punishment" effect which follows the "carrot and stick" penalizing strategies as well as stricter punishment for repeated offenders. Thirdly, leniency should also feature the deterrence effect causing that the illegal agreement appears more risky, increasing the likelihood of "breakdown in trust" and considering the strategic risk if to abstain from collusion or to join a cartel together with a likely cheater. [3, p.148]

In addition to sanctions, there are three key features which make the leniency program successful: Certainty and transparency, attractiveness and competition authority with sufficient competencies and clear procedures.

Necessary conditions for an effective leniency program include:

(a) Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and pun-

ished if they do not apply for leniency;

(b) Penalties imposed on cartelists who do not apply for leniency are significant, and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants;

(c) The leniency program is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated;

(d) To attract international cartelists, the leniency program protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere. [4]

Different leniency programs operate on one of the following systems of sanctions: Administrative and dual combining administrative and criminal sanctions. Some countries penalize only undertakings, others include also individuals. The most common sanctions are fines, imprisonment and a ban of trade.

The most common sanctions for antitrust infringements are fines which can be of administrative or criminal nature. In various countries fines can be imposed against enterprises or against natural persons. The fixing of the fine must be substantially high to create the deterrence effect to lead a rational cartel member to defect from any collusive or illegal agreement. Generally, the fines for competition law infringers are augmenting, for example in France the fines doubled in 2001. Interestingly enough, the increases in fines tend to follow major legislation changes.

In order to make the leniency program successful, the criteria for setting fines must be clearly identified in public and legally binding documents and therefore, easily predictable by leniency applicants. However, determining the fixing of fine is a very complex process, taking into account many different criteria, for example length of participation in the cartel or the seriousness of the competition infringement. Countries differ in their regulation of the fixing of fines: They can be defined by percentage of last year's turnover of the undertaking, by a maximum amount or by combination of both.

As mentioned, the leniency program established in US and EC in the different times and of course, they have unique and different characteristics, so key differences between US and EC Leniency Programs:

- Privilege. In the US (unlike the EC) leniency applications to the Antitrust Division are privileged under the US law. Although the Commission has stated it would not disclose evidence to US courts, it may do so to a national court of any EC member state in connection with the application of Art. 81 of the EC treaty.
- Automatic immunity. Granting the US immunity from fines is automatic but in the Community it is dependent on the value of the submitted information.
- Fine reduction. The US, unlike the EC, has not adopted clearly set guidelines which would be transparent and provide affirmative fine reduction commitments.
- Individual leniency. Given the fact the individual liability for cartel infringements exists under the US law, the American system also includes individual leniency. In contrast to that, the EC recognizes only the corporate leniency granted by the Commission and therefore, no individual leniency for managers or other employees.
- Ringleader. Although the language differs in determining the exact involvement of the ringleader, the US leniency is open only to a ringleader who was not the sole instigator or the sole leader of the illegal activity.
- Perception of importance. The US society realizes more the importance of competition law for everyday life. 83 % of Americans perceive the antitrust policy as important compared to only 10 % in the UK. [1, p.27]
- Quantity. Partly because of higher awareness of competition law in the American market, leniency applicants in the US come forward at three times the rate of companies in Europe. [2, p.563]

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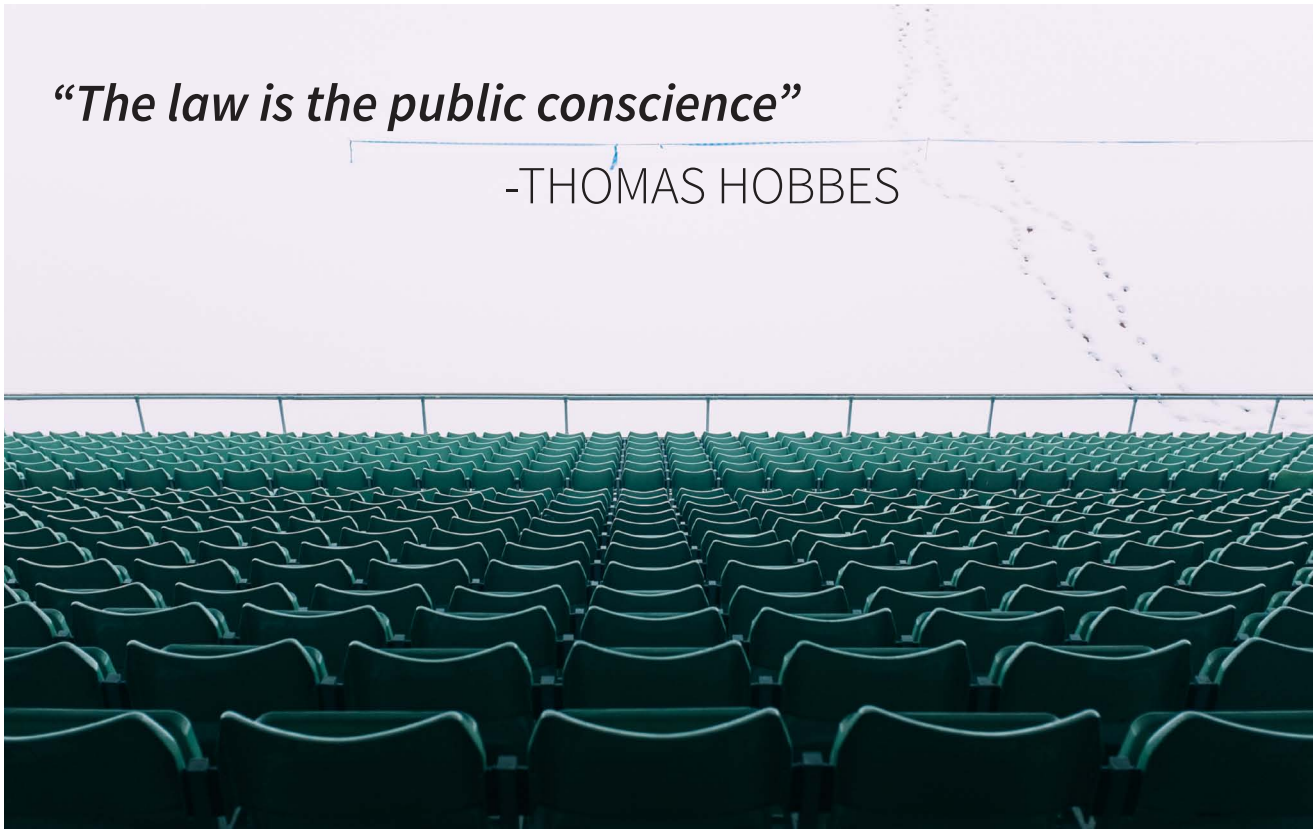

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Xülasə

Açar sözlər: rəqabət hüququ, kartel, leniency (güzəşt) proqramı, əsas şərtlər, sanksiya sistemi, vacib fərqlər.

İqtisadiyyatın inkişafına mane olan üfuqi sazişlərin və ya kartel sövdələşmələrinin aşkar edilməsi və araşdırılmasında inkişaf etmiş ölkələrdə geniş yayılmış “Leniency (Güzəşt)” Proqramı xüsusi əhəmiyyətə malikdir. Bu proqram gizli kartel sövdələşməsinin qarşısının alınması, açılması, nəticəsinin aradan qaldırılması məqsədi ilə vaxtında bu hüquq pozuntusu haqqında rəqabət orqanına lazımi məlumat vermiş həmin kartelin iştirakçısı olan şirkətlərə münasibətdə cəza tətbiq edilərkən güzəştlərin edilməsini nəzərdə tutur.

Резюме

Ключевые слова: антимонопольное право, картель, программа смягчения ответственности, необходимые условии, система санкций, основные отличия.

Широко распространенная в развитых странах программа “Leniency” (программа смягчения ответственности) имеет особое значение в обнаружение и расследование горизонтальных соглашений или картелных сделок, которые мешают развитию экономики. Программа предоставляет шанс смягчения ответственности участникам которые дают необходимые информации о тайных картелях.