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ALTERNATIVES TO LENIENCY PROGRAMMES – Contribution from Latvia

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More documentation related to this discussion can be found at: oe.cd/atlp.

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Alternatives to Leniency Programmes

- Contribution from Latvia -

1. Introduction

1. In this written contribution the Competition Council of Latvia (hereinafter - the CC) discusses its experience of using different alternatives to leniency as tools to detect cartels and other prohibited agreements.

2. Recent trends

2. As explained in more detail in the CC's 10 May 2023 written contribution for OECD's WP3 Roundtable on *The Future of Effective Leniency Programmes: Advancing Detection and Deterrence*, the leniency programme has been in force in Latvia for approximately 20 years. However, the CC has received very few leniency applications for full immunity during this time. For example, between 2012 and 2023, the CC received a total of 20 leniency applications, but only five were applications for full immunity.

3. As regards reasons for the lack of full immunity applications, surveys conducted by the CC indicate that a major problem in Latvia is the small size of the market. Competitors often know each other personally and can sometimes be unavoidable trading partners. As a result, there is significant reluctance to report on each other. Additionally, there is general mistrust of government institutions by businesses. Finally, awareness of the leniency programme amongst undertakings is still quite low, although the CC has been working hard to address this (see section 4 below).

4. Given the above, the CC has had to rely on other sources of intelligence for initiating cases. These alternatives to leniency are discussed in more detail below.

3. Alternatives to leniency

5. As an introductory remark, the CC has found that tools other than leniency can be very effective in detecting cartels and other prohibited agreements, and they have in fact been the source of most of the CC's cases over the years. In addition, having these tools significantly raises the threat of detection, therefore also increasing undertakings' incentive to apply for leniency.

6. In the below table we have indicated the different sources of information that have resulted in the CC opening a case in the past 10 years. As can be seen, the two alternatives to leniency that have generated the most cases for the CC are:

- Notifications from public authorities – public procurement organisers. These notifications are a consequence of the CC's educational and outreach activities described in section 4 below. Using education as an alternative to leniency allows the CC to reach out to the widest possible audience while also optimising its resources. By using this tool the CC can both prevent infringements (because there is a better understanding by undertakings of what is prohibited) as well as detect them (because procuring authorities know what to look out for).

- Cooperation with other government agencies, such as the Corruption Prevention and Combating Bureau (the CPCB) and the Central Financing and Contacting Agency (the CFCA). The CC has ensured that these agencies are vell versed in competition law and identifying potential infringements, meaning that information received from them will usually be relevant and likely to warrant at least an initial investigation by the CC. The CC's cooperation with other government agencies is described in more detail in section 5.

Table 1. Case sources 2013-2023

Source	Number of cases	%
Leniency	5	10.4%
Information received from other law enforcement agencies	4	8.3%
Information received from other (non-law enforcement) government agencies	8	16.7%
Information received from public authorities – public procurement organisers	19	39.6%
Information received from undertakings outside of leniency	5	10.4%
Information received as a result of another administrative process within the CC (*ex officio*)	6	12.5%
Tip-off + screening	1	2.1%
Total cases opened during this period	**48**	**100%**

7. Importantly, no matter how detailed the information received, the CC will always conduct its own investigation, including doing an initial analysis and, if the results of that analysis confirm a possible infringement, conducting dawn raids.

4. Education and outreach

8. Measures to raise awareness of fair competition, prohibited agreements and the possibility to apply for leniency form an important part of the CC's work. The CC frequently organizes seminars and other events for public administrative bodies (including procurement organisers), undertakings and their associations, and other interest groups. Approximately 10 – 20 such events are organised by the CC each year. The events are often tailored to the audience, in particular when discussing examples of prohibited behaviour. By way of an example, on one occasion, a public administrative body contacted the CC because it was unclear to them why information they had shared with the CC had not resulted in any cases. The CC decided that the most effective way to address this was to organise a seminar for employees of the public administrative body, explaining why in the specific circumstances there had not been enough evidence for the CC to open an investigation. This did not only improve the public administrative body's understanding of competition law and reassure them that the CC had not simply dismissed their concerns, but will also help ensure the CC receives more relevant information in the future. Currently the CC is also doing a series of seminars on prohibited vertical agreements, as it wants to develop more strongly its practice in this area. As well as general talks that are open to all undertakings, the CC has done several events for specific audiences to whom it thinks these issues may be most relevant, e.g. grocery retailers and suppliers. This allows the CC to prepare more specific examples of prohibited behaviour, as well as fostering productive discussions at the event itself about how the specific market works.

9. The above-mentioned educational events are led by employees of the CC (approximately 70% of them are organised by the department of prohibited agreements). Occasionally they may also be held in cooperation with other government institutions, for

example, the CPCB or the Procurement Monitoring Bureau (the PMB). By way of some examples:

- In 2017/2018 the CC delivered a series of seminars on responsible and fair business practices in cooperation with the CPCB and the PMB.
- In 2023 the CC delivered a series of seminars in cooperation with the PMB regarding some newly introduced changes to public procurement laws (see paragraph 14 below). In a series of six talks, a mix of online and in-person, the CC and the PMB educated more than 1000 interested persons.

10. The CC also organises and takes part in knowledge sharing meetings with other institutions (the CPCB, the PMB, the Administration for Combating Economic Crimes (the ACEC), the European Public Prosecutor's Office (the EPPO), etc.), discussing latest practices and developments. The CC uses these meetings to inform and educate other government agencies about the CC's work, including what types of behaviour are prohibited, how to detect signs of possible infringements and when to get in touch with the CC. These meetings are also an opportunity for the agencies to discuss any new tools for identifying possible infringements that may have a more general application/usefulness. Such knowledge sharing meetings can be done on a one-on-one basis or involve several institutions, for example, as part of the Anti-Fraud Coordination Service (AFCOS) Council. Members of the AFCOS Council include the Ministry of Finance, the Ministry of Justice, the CPCB, the PMB, the Prosecution Office, the EPPO, the State Audit Office, state police, the Ministry of Agriculture and the Ministry of Environmental Protection and Regional Development. The Council's meetings are also attended by experts from other government institutions, including the CC.

11. In addition to events, the CC has prepared various written materials for different target audiences about various competition law issues, such as a 'red flags' list for organisers of public procurement tenders, guidelines for associations of undertakings, short briefings on no-poach agreements and collective agreements between representatives of employers and employees. There are also materials and guidelines on the application of the leniency programme.[1] All these materials are available on the CC's website and at the time of publication are also advertised on the CC's social media. Recognising shifts in information consumption habits, in particular amongst younger audiences, the CC regularly uses social media to publish important information, which nowadays also takes different forms, including short videos and podcasts.

12. Finally, there are media publications and appearances by the CC. For example, a press conference is held on the conclusion of an important cartel case, which is usually broadcast online and subsequently reported on in various other media channels, including national television.

13. The aim of the above activities is to enable the public to identify possible breaches of competition law and report them to the CC. The CC regularly receives notifications regarding possible breaches from public authorities –contracting agencies, as well as undertakings and individuals. Importantly - even if the CC decides that the information provided does not indicate an infringement, the opportunity is used to undertake further education by sending a response letter which explains in detail what are the criteria for finding a prohibited agreement and why the information provided was not sufficient for the CC to open an investigation. This, again, ensures that the CC will receive more relevant information in the future. The CC also practices soft enforcement, meaning that, if there

[1] https://www.kp.gov.lv/en/leniency-programme.

are signs of a possible infringement, but the case is seen as one of minor importance (for example, because of the small size of the undertakings involved and/or the low value of contracts in question) and therefore not a priority for the CC, the CC will issue a warning rather than open formal proceedings. Where this is deemed the most appropriate course of action the CC will also send a letter to the authority or undertaking that originally notified the CC of the conduct, explaining why this option was chosen and how it works. This reassures the authority/undertaking that they were correct to contact the CC and hopefully motivates them to report again in the future.

14. It is worth noting that from January 2023 amendments to public procurement laws provide that if a procuring authority has suspicions of a prohibited agreement between participants, it may exclude them from that particular tender without waiting for the CC to initiate a case and issue a decision. However, before doing so, the authority must seek the CC's opinion of whether the signs identified by it are indeed indicative of a possible cartel. If approached by a public authority in such circumstances, the CC must provide its opinion within 10 working days from receiving the request. This new procedure is expected to result in the CC receiving more intelligence about possible breaches, as well as acting as an educational tool for the authorities.

5. Cooperation with other government agencies

5.1. The CPCB

15. One of the main sources of intelligence for the CC has been the CPCB. The CC and the CPCB have a close working relationship whereby the CPCB shares information obtained in its investigations that may also indicate possible breaches of competition law with the CC (and vice versa). This, for example, was how the CC became aware of a cartel in the construction sector, which ended up being one of the most significant cases in the CC's history, with fines of over 16.5 million euros being imposed on 10 undertakings.[2] Similarly, this year, the CC imposed fines of over 4 million euros on three undertakings that had engaged in a cartel in the road construction sector.[3] The information that led to the discovery of this cartel also came from the CPCB.

16. The cooperation with the CPCB is important to ensure fairness and equality in public tenders where the aims and tasks of the CPCB and the CC are similar. Past practice shows that corruption offences by officials responsible for public tenders often also involve breaches of competition law by the participating undertakings and therefore evidence gathered by one authority can include signs of an infringement within the responsibility of the other. The CPCB also has much wider investigative powers than the CC, for example, it can employ surveillance and wiretapping. It is important to stress, however, that while the CPCB may share evidence from its criminal law proceedings with the CC, this is information from existing investigations that have been opened independently by the CPCB. Similarly, an authority may withhold information from another if sharing it might not be appropriate at the particular stage of the investigation. Finally, as explained above, the CC will always conduct its own investigation, including checking and analysing the

[2] https://www.kp.gov.lv/en/article/competition-council-fines-10-construction-companies-participating-cartel.

[3] https://www.kp.gov.lv/en/article/competition-council-discovers-road-construction-cartel.

information received and, if the results of that analysis confirm a possible infringement, conducting dawn raids.

5.2. The PMB

17. The CC's cooperation with the PMB largely stems from the fact that the most common competition law infringement in Latvia is bid rigging. The PMB maintains a database of public tender documentation and, accordingly, the PMB can be a valuable source of information for the CC regarding these infringements.

18. Additionally, pursuant to the Latvian Public Procurement Law, one of the consequences of being found guilty of a competition law infringement, is that the undertakings involved are excluded from participation in public tenders for a period of three years.[4] Given the importance of public procurement tenders for many businesses, focusing on this aspect (for example, by organising joint events with the PMB as described above) can be an effective way of attracting undertakings' attention to the importance of competition law. The PMB also publishes on its website various materials prepared by the CC, for example, the above-mentioned 'red flags' list for organisers of public procurement tenders.

5.3. Other

19. In addition to the CPCB and the PMB, the CC has also initiated cases or issued warnings (soft enforcement) on the basis of information received from institutions such as the ACEC, the CFCA, the Prosecution Office and the Audit Department of the Ministry of Finance. The CFCA and the Audit Department of the Ministry of Finance, for example, are responsible for the administration of EU funds, which involves them reviewing tender documents. The CC has received many notifications from the CFCA and the Audit Department of the Ministry of Finance about possible infringements they have identified as a result of this process. The CC has also passed on relevant information to other agencies itself, for example, the EPPO.

6. 6. Screening

20. The CC has used manual screening[5] both to initiate a case and as supporting evidence in an ongoing case. For example, as regards initiating a case, the CC received an anonymous tip-off, following which it conducted manual screening of public tender data in the sector. The results of that screening indicated a possible market sharing between undertakings and, as a result, a case was opened. As regards using manual screening as supporting evidence in an ongoing case, the CC used variation screening, which shows differences in submitted tender prices in a market over time, to support conclusions from other evidence that there was a cartel between tender participants in the road construction sector. However, the process of manually inputting large quantities of data to perform screening activities is very time consuming and has motivated the CC to look at developing an automated screening tool, which would pull data from public databases. However, the problem with developing such a tool is that it relies on the accuracy of public databases and experience shows there are issues with this, for example, the same information being

[4] Section 42 of the Public Procurement Law.

[5] Manual screening in this context refers to manually pulling information from public and private databases. This information is then analysed, for example using the tools available in Microsoft Excel. In a recent case, the CC also used Tableu - a data visualisation tool.

entered in different fields, in a different form or missing altogether. For example, important tender documents, including the offers submitted by undertakings, are often not stored (or are not stored in a structured way) in the public procurement database maintained by the PMB. These issues need to be solved before a truly effective automated screening tool can be developed.

7. Notifications/complaints

21. As mentioned above, as a result of its educational and outreach activities, the CC regularly receives notifications regarding possible breaches from public authorities – public tender organisers, as well as undertakings and individuals. These can be submitted to the CC directly (e.g. in the form of an official letter signed by the public authority/undertaking reporting it) or anonymously by completing a form on the CC's website. Nearly 40% of the CC's cases over the past 10 years have been initiated on the basis of information received from public authorities (public procurement organisers), and a further 10% from complaints by undertakings (see above).

22. There is also a whistleblowing tool available, which allows natural persons to report anticompetitive conduct that they have become aware of as part of their employment. When using the whistleblowing tool, the identity of the whistleblower is disguised to protect him or her from any negative consequences of reporting (e.g. retaliation by the employer). In addition to the usual ways of contacting the CC (phone, post, general e-mail address), a whistleblower may also submit information to the CC by sending it to a dedicated whistleblowing e-mail address or using an electronic form available on the government's whistleblowing website. While the CC has received a handful of whistleblower reports regarding possible anticompetitive conduct, to date there have not been any cases initiated as a result of this tool. The whistleblowing tool does not currently provide for a financial reward for reporting.

8. Conclusion

23. The CC has used alternative tools to leniency as a means of initiating cases for some time now and found them to be very effective. The two alternatives to leniency that have generated the most cases for the CC over the years have been: (i) notifications received from public authorities – public procurement organisers; and (ii) cooperation with other government agencies. Both of these sources are largely the result of the CC's educational and outreach activities. The CC has found that focusing on education and outreach allows it to capture the widest range of possible infringements while also optimising its resources.