

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by
Poland****5 June 2018**

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm

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Poland

1. Leniency programme in Poland

1. The Polish leniency programme, has been in force since 2004. From the date it was introduced the programme has been changed twice in order to increase its efficiency and approximate it to some aspects of the ECN Model Leniency¹. The first amendment was introduced in 2009, when a marker system and summary applications were adopted. The second significant change entered into force in 2015. With these legal changes the Office of Competition and Consumer Protection (UOKIK) aimed to move a few steps forward, not only rendering the existing leniency programme more transparent for undertakings, but also enriching the enforcement framework with new solutions such as the leniency for individuals and leniency plus institution.

2. In accordance with leniency plus, the undertaking which does not fulfil all the requirements to be granted full immunity is now able to receive an additional fine reduction if it provides UOKIK with information and evidence on another, still undetected agreement. The additional fine reduction could amount up to 30%, while for uncovering that second agreement, the undertaking would receive full immunity. Moreover, the amendment envisaged the introduction of pecuniary sanctions on individuals who perform managerial functions or who are members of the company's management bodies for participating in anti-competitive arrangements². In consequence, the scope of the leniency programme has been broadened and it is available for undertakings as well as individuals. Since it was difficult for the enforcer to establish who the initiator of an agreement actually was, the change also provided that an undertaking filing for leniency is not obliged to show that it did not initiate the illegal agreement. However, the applicant for immunity still needs to prove that it did not coerce other undertakings to participate in the agreement. The liability of individuals is conditional on the liability of undertaking, i.e. the person may only be fined if the company is held liable.

3. The main legal basis for leniency is the Competition Act³ as well as Council of Ministers' Leniency Regulation dated 23 December 2014. In 2017, the UOKIK updated its guidelines on the leniency policy in view to increase the transparency of a/m provisions and provide undertakings with practical instructions of how to apply for leniency, including examples and leniency application templates.

4. There are a number of criteria that the applicant for immunity must fulfil. However, the most important one is to be the first who reports to the UOKIK competition infringement unknown to the enforcer.

5. The applicant must submit evidence sufficient for the Office to open an antimonopoly proceedings or information allowing the UOKIK to obtain such evidence.

¹ http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

² Except for leniency

³ Act of 16 February 2007 on competition and consumer protection <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20070500331/U/D20070331Lj.pdf>

If the authority has commenced the proceedings, the applicant must submit sufficient evidence for the Office to issue a decision finding infringement or information enabling the UOKIK to obtain such evidence. As mentioned above, the applicant cannot coerce others to participate in the agreement and may not disclose the information about filing the leniency application to the authority. The applicant that has not ceased its anticompetitive behaviour prior to submitting the leniency application shall do so immediately following the submission.

6. Undertakings that do not fulfil the above mentioned conditions for immunity may benefit from a reduction of fine. The second applicant can receive a reduction of up to 50 per cent, the third up to 30 per cent, and the remaining applicants up to 20 per cent of the fine.

7. It is very important for each applicant, no matter what place they hold in the leniency queue to fully cooperate with the authority, in particular to provide on its own initiative or at the request of the UOKIK all information and evidence regarding the illegal arrangement that is or may be at its disposal, not make it difficult for its employees or managers to provide explanations to the competition authority, not destroying, falsifying or concealing relevant information or evidence and not to inform anyone about the filing of the leniency application without the consent of the authority.

8. If the UOKIK finds that an applicant meets the requirements a preliminary notification informing the applicant that it meets the requirements will be submitted. The competition authority also informs the applicant that the evidence and information provided will be verified during the investigation. The notification is preliminary and does not serve as a guarantee to the applicant leniency. A full immunity or a reduction of a fine can only be granted in final decision concluding the proceedings.

2. Challenges

9. Despite all of the changes that have been done to make the leniency policy more attractive to undertakings, the number of the applications filed to the UOKIK is below the expectations. Since the introduction of the programme in 2004 there were only 75 applications, the majority of which regarded vertical agreements. Although we find it very important to catch also infringements in vertical relation, as they may generate horizontal cartel behaviour, still leniency applications reporting pure cartels would be most welcome.

10. Another problem is that the leniency itself does not lead to discovery of illegal agreements. Most of the applications were submitted after the first procedural steps undertaken by UOKIK, e.g. during dawn raid. It can be said that the leniency does not constitute a sufficient threat that the cartel will be detected. It seems also that the potential leniency applicants are not eager to come forward and report an infringement due to fines being constantly lowered by courts. This trend of imposing lenient fines by courts effectively de-motivates companies to apply for leniency and cooperate with the authority.

11. Due to disappointing number of leniency applications, UOKIK in April 2017 launched a whistle-blower program hoping for a positive response from the market and receipt of useful information from informants. The introduction of this system is a complementary tool to leniency and improves the effectiveness of detecting restrictive agreements.

12. The next challenge is the clash between leniency and private enforcement. The Polish Private Enforcement Act which entered into force on June 27, 2017 provides for protection of leniency statements. Under the new regulations, the statements made by the undertaking which has decided to cooperate within leniency cannot be disclosed. Furthermore, damage claims may only be enforced by those aggrieved parties which formed part of the supply or service chain of such undertaking (i.e. direct or indirect purchasers or suppliers). The leniency applicant shall only be liable vis-à-vis other aggrieved parties (such as consumers) where a full amount of damages cannot be successfully obtained from the other participants of an anti-competitive agreement. However, despite these safeguards, it is easy to imagine that the potential applicants can be discouraged from submitting leniency because of civil damages. Especially since there is still a low number of private enforcement cases in Polish courts and the potential amount of civil damages is difficult to estimate. So, taking into consideration on one hand the lenient courts' approach who tend to repeatedly lower the fines imposed by the competition authority and on the other hand possible high civil damages the potential applicants have no incentive to confess and submit leniency.

13. The leniency program offers no immunity from criminal sanctions, so it is less effective in relation to bid rigging, which in Poland is a criminal offence. Immunity from administrative pecuniary fines is no incentive if the manager can face imprisonment. The solution to this problem brings the new draft EU directive on empowering the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+), according to which current and former managers of applicants for immunity from fines to competition authorities are protected from any criminal and administrative sanctions.

14. Another caveat is the cooperation with the applicants. Although our experiences in this respect is rather positive – companies cooperate fully, sincerely and in good faith by handing over accurate and complete information. However this cooperation limits only to the course of antimonopoly proceedings. Leniency applicants are not willing to support the authority and are reluctant to „defend the case“ in court proceedings. It is important to strengthen the leniency policy by obliging the applicants to continue the cooperation during appeal and other court proceedings. This cooperation would also be necessary where the competition authority is performing in court as *amicus curiae*. Naturally, the cooperation would not be expected in private enforcement cases nor would the applicant be obliged to testify against himself. We also believe it is crucial that the companies approaching the authority with leniency provide significant assistance to the authority in organizing inspection with search.

15. The leniency program to be effective needs to ensure that the applicant's statement and information that he provided will not be disclosed. Confidential status of leniency statement is our highest priority. According to the Polish procedure only the parties to the proceedings have access to the information and evidence received by UOKIK in leniency application. However that access is granted only at the final stage of the proceedings, prior to the decision being issued. No access is granted at earlier stage of the investigation, unless the applicant agrees in writing to make the information available. To increase the protection of leniency statements the 2015 amendment to the Competition Act introduced a rule according to which documents containing an applicant's statement may be copied by a party of the proceedings only if the applicant provides written consent. The party may take notes provided it uses the information solely for proceedings before UOKIK or the court.

3. Conclusions

16. Undoubtedly, leniency policy is one of the most effective instruments in competition authority's toolbox to detect cartels and other illegal arrangements. However, it can be effective only if it provides clear, transparent rules to the companies and the threat of severe punishment is palpable. Therefore the Polish CA actively seeks new solutions that can reinforce the program and make it appealing to undertakings. Currently we are in a process of reviewing our legislation which may conclude in significant changes in Competition Act. UOKiK has little experience in coordinating multi-national cartel cases, however we believe more convergence and harmonisation of national leniency programs seems necessary, especially since cross-border cartel cases are emerging due to globalization and digitalization of markets. Nevertheless, as member of the EU, we cooperate with other national competition authorities and the Commission within the European Competition Network. The cooperation between NCAs including leniency coordination is of crucial importance. We believe the communication between NCAs should be strengthened in order to provide coherent application of the Treaty⁴. The information exchange regarding case allocation, summary applications should take place at the earliest stage to make it possible for the best placed authority to effectively and timely deal with the case. The proposed ECN+ directive is aimed to eliminate unnecessary divergences inter alia in leniency programs. We believe the new act will effectively provide for effective cross-border mechanisms on mutual assistance and provide greater legal certainty for EU companies.

⁴ Treaty on the Functioning of the European Union