

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Croatia****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

Please contact Ms. Despina Pachnou if you have any questions regarding this document
[phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

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Croatia

1. Introduction

1. This contribution describes relevant elements of leniency programme applied in the practice of the Croatian Competition Agency (further: CCA) since 2010 addressing several challenges and changes introduced in the leniency program in order to improve its implementation.

2. Leniency program in Croatia

2. Leniency program was introduced in Croatia in 2009 with amendments to the Competition Act and further elaborated in the provisions of the Regulation on the immunity from fines and reduction of fines adopted in 2010. Croatian leniency program is to a large extent based on the corresponding EU rules such as the Commission Notice on Immunity from fines and reduction of fines in cartel cases and ECN Leniency Model Program. Croatian leniency program envisages both immunity from fines and reduction in fines. Main provision from the Competition Act states that in relation to disclosing the most severe infringements of the provisions of Competition Act and Article 101 TFEU, the CCA may grant immunity from fine to a cartel member who first comes forward and informs the CCA on the existence of a cartel and supplies evidence which will enable the CCA to initiate the proceeding in connection with the alleged cartel, or to the first cartel member who submits information and evidence which will enable the CCA to find the infringement of this Act in connection with the alleged cartel in the previously initiated proceedings where the CCA had no sufficient evidence to adopt a decision, i.e. to detect the existence of a cartel. Furthermore, undertakings disclosing their participation in a cartel that do not meet the conditions for immunity may be eligible to benefit from a reduction of the fine, if they provide the CCA with evidence which represents significant added value with respect to the evidence already in the possession of the CCA and which substantially contribute to the closure of the proceeding concerned. The level of reduction of fines is determined by the CCA for the first undertaking to provide significant added value 30-50 %, for the second undertaking a reduction of 20-30 % and for any subsequent undertaking that provide significant added value a reduction of up to 20 %.

3. There is no individual leniency, only undertakings a legal persons can be granted immunity from fines or reduction in fines. The exclusion from the benefits of leniency program applies to initiator or ringleader of the cartel who cannot be granted immunity from fine.

4. The Croatian leniency program is based on marker system meaning that the first one to apply for immunity can secure its position as immunity applicant until the adoption of final decision establishing cartel. In order to be eligible to secure a marker an undertaking – applicant for a marker has to provide to the CCA with justifications relating to his inability to submit all information, facts and evidence to the CCA which are considered necessary criteria to be fulfilled in order to be granted immunity from fines. The CCA may, in justified cases, grant a marker and determine the period within which the applicant has to perfect the market by submitting the relevant information, facts and evidence. If the applicant perfects the marker within the period set by the CCA, submits the requested information, facts and evidence, the provided information, facts

and evidence will be deemed to have been submitted on the date when the marker was granted by the CCA.

5. The requirements are described in more details in the regulation, the leniency statement can be submitted in writing or as oral statement and it has to contain main information about applicant, the parties to the cartel, the relevant product and geographic market, description of cartel and the nature of cartel conduct, the estimated duration of the cartel and information on other past or possible leniency applications or request for a marker to other competition authorities in relation to the cartel in EU Member States or outside EU. The leniency statement is protected from disclosure in the competition proceeding, it can be disclosed only to the parties to the proceeding, and only after the receipt of the statement of objections. In accordance with EU Damages Directive 2014/104 and Act damages claims for the breach of competition law, leniency statements are excluded from disclosure in court's civil proceedings for damages.

6. Leniency regulation was amended with the adoption of Regulation on the Amendments of the Regulation on the immunity from fines and reduction of fines which entered into force on 27 September 2017. First purpose of the amendments of Leniency Regulation was to align completely its legal terminology with the new Law on Damages Claims for the breach of competition rules which transposes EU Damages Directive 2014/104 in Croatian legislation. This refers primarily to the definition of leniency statement which is now aligned with the Law on Damages Claims for the breach of competition rules. Secondly, the amendments for the first time introduced summary applications in Croatian Leniency Regulation. The new chapter „Summary applications“ regulates the possibility for the leniency applicant to submit summary applications either for immunity or for reduction of a fine to the CCA or to other national competition authority which the applicant considers might be ‘well placed’ to act in cases when the European Commission is ‘particularly well placed’ to deal with a case relating to the establishment of breach of Article 101. of the TFEU.

3. Implementation of leniency in case law

7. Since the implementation of leniency in practice there were only two leniency applications received both in the same cartel case which is ongoing. First leniency application enabled the CCA to open the case and second leniency applicant approached the CCA after the CCA conducted surprise inspection.

4. Main challenges and solutions for better use of leniency program

8. The reluctance to use such instrument in the small country and on the market where you have inevitable business partners is one major challenge. The fact that most of the decisions of the CCA establishing cartels in recent years were not confirmed by High Administrative Court in the judicial review proceeding makes the leniency less attractive. The undertakings do not have incentive to apply for leniency if there is a large probability that such decision will not be confirmed by the court. Furthermore, the application of EU Damages Directive and Law on damages claims for the breach of competition rules transposing the Directive could have further deterrent effect on the willingness of potential leniency applicants to approach the CCA. Even though the Damages Law protects leniency statements in the courts proceedings for damages claims and there are

certain exemptions for leniency applicants in recovering, the undertakings are reluctant to apply for leniency because it is difficult to predict the amount of damages they would have to pay. Moreover, there is a certain risk that such undertaking can be sued also in another state and litigations costs vary between different countries. Some of the solutions for better use of leniency program could include: more awareness raising campaign about leniency among business society, judiciary and broader public.

9. On the international level, aligning the requirements for immunity and reduction of fines and procedures to the highest level possible would contribute to legal certainty of undertakings and individuals when deciding to apply for leniency. For example, this is the approach taken by the European Commission in the preparation of new Directive on empowering national competition authorities to be better enforcers. Development of international documents with exchange of experience in addressing particularly sensitive or challenging issues in leniency application is another helpful tool which can at the same time serve as advocacy tool.

5. Final remarks/Conclusion

10. The experience of Croatian Competition Agency in dealing with leniency applications is rather scarce in terms of number of received leniency applications. The legislation in force aligned with EU rules on leniency forms very good legal basis for implementation of leniency program. However, more could be done to stimulate further leniency applications. In that respect, further competition advocacy activities aimed at awareness rising among undertakings and among their legal advisers should be fostered. On the international level, the exchange of experience and sharing of knowledge between national competition authorities from different countries is another valuable tool to address the challenges in the use of leniency programmes.