

Unclassified**English - Or. English**

17 May 2018

**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
Ukraine****5 June 2018**

This document reproduces a written contribution from Ukraine submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

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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JT03431951

Ukraine

1. Challenges of amnesty/leniency programmes

1. Amongst the challenges that the Antimonopoly Committee of Ukraine (hereinafter – AMCU) has experienced in the functioning of amnesty/leniency programme there are: low awareness of leniency options and procedures; absence of satisfactory guarantees for applicants; heavy burden of collecting and submitting evidence of a cartel which is imposed by the law on the applicant; cultural reluctance to report to and cooperate with the competition authority with regard to competitors' infringements as being against traditional understanding of 'doing business correctly'.
2. As a result, AMCU has received very few leniency applications. This situation definitely calls for revision of the legislative framework in order to increase efficiency of amnesty/leniency programme.

2. Challenges related to the application of the programme

3. Hard core cartels and bid rigging are universally acknowledged as extremely harmful activities that must be deterred and prosecuted. The AMCU lacks many of the tools which are considered essential for effective tackling of such infringements, inter alia: limited powers to seize documents and to interview individuals; no right to search private premises; no provisions for immunity of subsequent applicants in the leniency regime; no sanctions for individuals (who are not deemed undertakings) for competition law infringements; and no effective fine collection system.
4. Cartels by their very nature are difficult to detect. The lack of an effective leniency programme that applies to individuals as well as corporations, together with the lack of personal liability has led to weak cartel enforcement in Ukraine. Individuals have little incentive to turn to the AMCU.

3. Challenges in coordination of amnesty/leniency programmes with other cartel enforcement policies

5. Article 6 of the Law of Ukraine «On Protection of Economic Competition» (hereinafter – the Law) sets forth legal framework for the Ukrainian leniency programme, namely explicates general conditions for release of undertakings from liability for anticompetitive concerted practices (i.e. cartel agreements) in case their co-operation with the AMCU is important to prove the existence of the cartel. According to this Article an undertaking, who had participated in anticompetitive concerted actions and voluntarily informed AMCU or its territorial office earlier than other participant(-s) of such actions and submitted information essential for taking a decision in the case, is discharged from liability for anticompetitive concerted actions. Information on such an informant is kept confidential upon his/her request.
6. At the same time, conditions of release from liability are limited due to a number of reasons. An undertaking is not entitled to immunity from liability if this undertakings:

- Failed to take effective measures to cease anticompetitive concerted actions upon notification thereof to the AMCU;
 - Was the initiator of or directed anticompetitive concerted actions;
 - Failed to submit all evidence or information on the infringement committed by the undertaking that it was aware of and had an easy access to.
7. Under the existing law, only the first applicant can benefit from leniency immunity; no immunity (even partial) is afforded to subsequent applicants who thus have no incentive to cooperate. This does not conform to international standards and best practices and shall be changed.
8. Also, the law has no criminal sanctions for participants (management) of cartels and other anti-competitive practices, nor are there any comparable administrative penalties such as disqualification of an individual from holding management positions for some time.

4. Challenges from differences between amnesty/leniency programmes of different jurisdictions

9. Ukrainian competition law in many respects is different from the EU acquis and procedures, but is expected to be gradually brought in conformity with the EU standards, in particular with regard to:
- Extending leniency rules to subsequent applicants (currently, only the first applicant is exempt from liability; no subsequent applicants enjoy any exemption or reduction of fines);
 - Relaxing requirements with regard to documents submission required from the applicants (currently Ukrainian law requires leniency applicants to provide full body of evidence which often effectively means impossibility to comply with the very high standard of proof to enjoy the exemption).

5. How amnesty/leniency programmes can be improved

10. Low efficiency of the leniency programme has been identified as one of the issues to be improved in the OECD Review of Competition Law and Policy for Ukraine 2016 (which AMCU has been implementing). Currently, there is a draft law (No. 6746) which has already passed the first reading at the Parliament and is being prepared for the final reading which aims inter alia at considerably improving the leniency programme legal framework, in particular by introducing reduction of liability for subsequent applicants (75 % to 25 % discount, depending on the sequence) and by improving leniency application procedures.

11. Furthermore, as a measure of increasing an overall AMCU efficiency in cases related cartels and other infringement, in line with the OECD recommendations, the Parliament is to pass the draft law (No. 6723) which is to introduce direct enforceability of the AMCU decisions. The draft law has passed the first reading and is being prepared for the final approval.

6. Improvement of co-ordination of investigations triggered by multi-jurisdictional amnesty/leniency applications

12. Up to date we have no such experience, but under the general rule, AMCU may cooperate with regulatory authorities from other jurisdictions, including by transferring the information to foreign competition authorities where the relevant international treaty exists. Confidential information may be provided to a foreign competition authority only if that authority:

- Will use the information exclusively for carrying out its duty;
- Can ensure that no disclosure for other purposes occurs.

13. Also, there is a complex mechanism of interaction between authorities (the transfer of confidential information).

14. The implementation of the EU approach should be considered concerning national leniency programme.

15. Alignment with the ECN Model Leniency Programme could be considered to facilitate application across jurisdictions.