

## REPENTANT CARTELS: THE NEW CRIMINAL CODE WILL INTRODUCE CHANGES THAT HAVE BEEN OPPORTUNE FOR A LONG TIME

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**The old ambition of competition law experts may come true from July 2013 upon the expected entry into force of the new Criminal Code: the new rules fundamentally break up with the previous practice, pursuant to which the employees of an undertaking who reported a cartel were not necessarily exempted from criminal liability, even if the competition authority in its own competency has not gained information on the concerned cartel yet.**

Leniency is an opportunity offered for undertakings which participate in cartels - capable to create monopoly or market predominance – to become exempt party or entirely from the fiscal penalty, if the cartel activity is voluntarily revealed by the undertaking to the authority.

The leniency policy which was introduced in Hungary as early as 2003, unfortunately failed to fulfil the high hopes of the legislator. The primarily possible reason for this could be the fear of the concerned undertakings from the potentially disadvantageous criminal consequences – accompanied by an obligation to reveal information – outlined as follows. A phenomenon which goes hand in hand with the market economy: competitors pressurize the fair competition with such a harmonized market behaviour that is capable to create an unbalanced market; where the aim is not to achieve a social advantage, but basically to reach a profit as high as possible benefiting the members of the cartel.

Due to the characteristics of cartel, the continuous controlling of the members is unavoidable, although this could lead to mistrust among the parties. With the leniency policy, the authorities intend to exploit this mistrust of the parties upon promising “exemption” from the disadvantageous consequences to those undertakings who surrender the cartel.

### **The criminal and competition law provisions with respect to leniency**

The legal basis of leniency is set out in section 78 of the competition act (“Tptv.”) and the rules are defined in a nearly 10 years old guide of the Hungarian Competition Office (“HCO”) regards to the practical application thereof. An undertaking who files for leniency must provide such information – relevant to the elimination of the cartel – which concerns the existence, the operation of the cartel and that has not yet been discovered by the HCO until the surrendering company filed for leniency. However - in spite of filing for leniency - someone cannot be certain that the actual filing is not arriving too late, in which case a five years of imprisonment may be levied based on the currently effective Criminal Code.

Additionally, the HCO is under a statutory obligation to file a report with the criminal authorities if it discovers an act of public procurement and concession cartel with the capability to restrain fair competition. Therefore, it shall not be a coincidence that leniency is rather considered as a theoretical opportunity due to the fact that the exemption from criminal consequences for executives of an applicant is not guaranteed.

However, there exist some outstandingly successful cases with precedent value: in the railway construction cartel, the investigation of the HCO was significantly facilitated by the leniency application of one of the cartel participants, whereas the HCO imposed a total fine of HUF 7,178 billion. In another salient case, thankful for a leniency application, the road-, bridge building, and renovation cartel – operating during public procurement

procedure between 2002 and 2006 – was successfully eradicated, with a fine equal to HUF 2,906 billion imposed on three undertakings. Meanwhile, the one filing for leniency was fully exempted from the penalty.

### **The impacts of the new Criminal Code, success to be expected**

To achieve results through the practical application of leniency policy, it seems to be not enough to ensure the partial or entire exemption from the fiscal penalty imposed by the HCO, rather the criminal law regulations shall be amended. In the Hungarian criminal procedure similar rules apply to the exemption of cooperating suspects from criminal consequences during the criminal procedure: in the case of cartels this could lead to the cessation of the criminal procedure, therefore the harmonisation of the two fields did not seem impossible even before. The long desired change seems to be realized with the new Criminal Code (Act C of 2012) entering into force on July 1, 2013.

One of the most crucial novelties is that earlier the employees of the cartel surrendering party were not automatically exempt from criminal liability, if the HCO has gained information in its own competence on the revealed cartel before. Opposed to this, according to the new provisions, the application for leniency shall also cover the criminal liability of the executive officers, members, members of the supervisory board, employees or authorized persons of an undertaking.

The new Criminal Code expressly denominates the procedure before the HCO: if before the investigation of the HCO, an application for leniency along with a request to set aside the fine is submitted, the perpetrator of the crime shall not be punished. The use of the unlimited mitigation and exoneration from the penalty in special circumstances will be also extended, as their application shall be possible in on-going competition supervisory procedures of the HCO.

Another positive feature of the new law is that for harmonised behaviour of competitors the fixed five years imprisonment will be amended to a maximum duration of 2 years for delict, and it shall be between one to five years for felony.

### **The future of leniency policy**

Legal professionals expect an increase in the number leniency filings along with the more frequent use of the leniency policy in practice due to above changes. The outlined new regulations were certainly essential for an efficient leniency policy and for achieving the actual targets thereof. For issues arising in front of the competent authorities, answers could be found later based on the precedents set in the future only, although the question remains, who will reach the target, namely what are the chances that the applicant will be ahead with its leniency filing of the official procedure of the competent authority. A further question is whether the intention of the legislator will be realized or the act of the applicant will result only in the mitigation or the exoneration from the penalty to be levied in an ongoing procedure.