

Kluwer Competition Law Blog

Hungary: A Long Desired Step in the Right Direction – Leniency Policy

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The leniency policy which was introduced in Hungary as early as 2003 to encourage “penitent” undertakings to confess, unfortunately failed to fulfil the high hopes of the legislator. One might wonder what could be the reason for the relatively low number of processed applications, which are not supported by exact statistical data (only informal data), but taking a look at the currently operative rules of the Criminal Code the answer is simple. At the moment, in the case of filing for leniency in accordance with the rules of the competition law act, there is no guarantee that the applicant will be exempted from the criminal consequences defined in the Criminal Code.

As the obviously incongruent regulation has a negative effect on the leniency programme, the Hungarian Competition Authority (“HCA”) itself, as well as the government, urged an amendment on the way towards making the leniency policy more attractive. As a result, this year a proposal of the new Criminal Code was finally accepted by Parliament during the parliamentary session held between June 18, 2012 and July 13, 2012, and it is now awaiting signature and proclamation. It is hoped that the new provisions therein will resolve the currently fearful contradiction.

The present scenario is rather risky and naturally frightens off most undertakings possessing information or participating in a cartel. Based on the fact that there were only a handful of cases, the offered benefits are not enough to outweigh the possible disadvantages imposed by criminal law. The current domestic system, frankly speaking, fails to support the participants in the leniency programme from all aspects uniformly. However, against this handicap, there were some outstandingly successful cases in the Hungarian story of leniency policy. For example, in one of the most prominent cartel cases, the railway construction cartel, the investigation of the HCA was significantly facilitated by the leniency application of one of the cartel participants, whereas the HCA 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.

Harmonisation – Criminal and competition law provisions

The HCA itself takes the view that the low number of applications is likely to be due to the disharmony above described. Pursuant to the current Criminal Code, the statutory rules applicable to cartels committed during public procurement and concession procedures are rather strict.

Someone who files for leniency under the competition act may be “rewarded” five years imprisonment, if the authority already has knowledge on the cartel activity, under the Criminal Code. It is also a negative feature that the “authority” which shall be informed first hand by the cartel perpetrator hoping to qualify for the exemption or mitigation includes both the competition and criminal investigative authorities, as well as the public procurement authority. It should also not be forgotten that the HCA is under a statutory obligation to file a report with the criminal authorities in cases where it discovers an act of public procurement and concession cartel which is capable of restraining competition.

Among others, the new national piece of legislation aims to offer a positive spin for undertakings, due to the new rules which certainly purport to eliminate the momentarily existing controversy. One of the most crucial novelties is a provision under which someone (an executive officer, member, member of the supervisory board, employee or an authorized person of an undertaking at the time of the perpetration of the cartel) who reveals the circumstances of the cartel in a leniency application can be exempted from the penalty or mitigated in situations where the HCA has already gained some information about the cartel activity but does not possess enough data to commence an investigation or procedure. An additional encouraging provision is the one under which the cartel “surrendering” party in cases requiring special consideration may qualify for mitigation or exoneration from the penalty even if the investigation of the HCA has already commenced. Another positive feature of the new law is that the fixed five years imprisonment will be changed to a period extending from one to five years. The concept of the authority which shall be notified by the “surrendering” party is also narrowed only to authorities acting in criminal cases.

In relation with the development of the leniency policy, it is worth noting that a new piece of legislation was introduced in 2009 to rule out another contradictory provision in the competition act under which the party filing for leniency had to bear the risk of paying damages similarly to the “silent” party. The conflict of law was finally resolved in 2009 and, in accordance with the current rules, the “surrendering” party shall decline payment of damages until the claim can be enforced against another cartel perpetrator.

The future of leniency policy

The Criminal Code along with the 2009 competition law changes are certainly welcomed by all in the hope of facilitating the true purposes of the leniency policy. The only regret is that the new law enters into force on July 1, 2013, which means that the new tools are not yet operative and are causing a delay to positive results.

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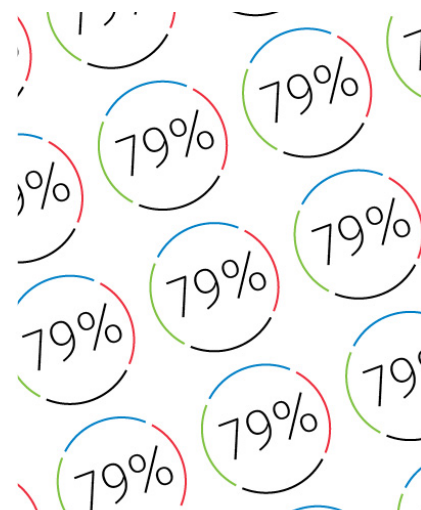
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