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Taking counsel

By Mantas Petkevicius, an associate at Sorainen Law Offices in Vilnius

In the fight against cartels – a leniency program

Competition law encompasses different issues and deals with various types of prohibited agreements and business practices. However, one type of agreement stands out from others and is an obvious and paramount target for any competition law system. And if competition law would be about one thing it would be cartels.

The European Commission maintains a fierce determination to combat cartels, which is demonstrated by the large number of decisions imposing significant fines on hard-core cartels. The principal weapon in combating cartels is a leniency program, which is designed to break the biggest obstacle in stopping cartels – their absolute secrecy. The underlying idea for a leniency program is that it enables to uncover conspiracies that might otherwise go undetected, as well as make the running investigations more efficient and effective. Further, a leniency program provides the undertakings involved in illegal competition practice with a possibility to put an end to their participation and to avoid or, at least, to reduce, possible penalties. (In some jurisdictions participating in the cartels even amounts to criminal sanctions.)

Under the Community competition law, the Commission will grant an enterprise participating in a cartel full immunity from a fine if it is the first to provide information and evidence of the existence of a cartel if the Commission did not have, at the time of submission, sufficient evidence on the very same cartel arrangement.

There are some additional conditions that need to be fulfilled: the enterprise 1) must provide all the evidence and information available concerning the alleged cartel and cooperate fully, on a continuous basis and expeditiously with the Commission throughout the procedure; 2) must end its involvement in the suspected infringement no later than it submits evidence of the infringement; 3) have not coerced other firms to take part in the infringement – i.e. was not the cartel leader.

Even if the enterprise does not meet the conditions for complete immunity, it may be eligible, however, for a reduced fine (first cooperating undertaking up to 50 percent, second up to 30 percent, others up to 20 percent) if it is able to provide significant proof that represents added value as regards the evidence already in the Commission's possession and terminates its involvement in the illegal activity as soon as it submits evidence thereof.

The national competition laws of the Baltic states address the leniency issue differently. Currently, there is no leniency program in Estonia. In Latvia, the leniency regime for cartel whistleblowers grants full leniency from fines to a whistleblower that fully cooperates with the Competition Council of Latvia and provides information prior to the competition council being able to take any action, unless the whistleblower was a cartel leader. Voluntary significant cooperation subsequent to the competition council commencing and investigation can give up to 90 percent reductions of fines for the cartel member for first and reductions up to 49 percent for subsequent information providers.

In Lithuania, grounds for full amnesty correspond to those applied by the EU Commission. The cooperation subsequent to the Competition Council of Lithuania opening the investigation for the first cooperating undertaking, if it was not a cartel leader, grants reduction of fine up to 75 percent. Other

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cooperating enterprises are subject to 20 –50 percent reductions.

The leniency programs in the EU, as well as in the U.S.A., proved to be a successful weapon against cartels, and the key for its success is the transparency and certainty of the conditions on which reduction of fines will be granted. While the leniency programs in the Baltic states are just taking their first steps, the experience of other countries shows that it is only a matter of time before the number of whistleblowers come.

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