THE EFFECTIVENESS OF THE LENIENCY PROGRAM IN COMBATING CARTEL AGREEMENTS IN POLAND

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Abstract
The Leniency program that has been analyzed raises the question concerning its effectiveness in fighting with the cartel agreements and whether it encourages the participants of the cartel enough to betray other participants of the cartel agreement. Examining such effectiveness is hard enough because of the secret character of functioning of cartels themselves and, in fact, it is not known how many cartel agreements exist in the Polish economy. The aim of the article is to analyze the effectiveness of methods of combating anti-competitive agreements such as cartels through mechanisms of the Leniency program. The intention of the Author is to make an attempt at researching the construction of the Leniency program itself and then, basing on the analysis of documents and reports of the Office for Competition and Consumer Protection, researching the rate of cartel agreements from 2005 to 2012.
Keywords: *cartel, competition law, Leniency program.*

1. Introduction

Cartel agreements, which are aimed against the competition, constitute one of the toughest areas for the competition law and institutions that uphold the law to deal with. The negative and multidimensional influence of such agreements on the situation of other participants of the market game brings about the situation in which the fight with cartels is particularly important from the viewpoint of the development of the economy of the particular country. On the other hand, the high "attractiveness" of this form of cooperation offering benefits for cartel members as well as the characteristic "conspiratorial" nature of the cooperation make the combat with cartels very hard.

The aim of the article is to analyze the effectiveness of methods of combating anti-competitive agreements such as cartels through mechanisms

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of the Leniency program. The intention of the Author is to make an attempt at researching the construction of the Leniency program itself and then, basing on the analysis of documents and reports of the Office for Competition and Consumer Protection, researching the rate of cartel agreements from 2005 *to* 2012.

2. The specificity of cartel agreements

Companies, in their activities on different levels of development and trying to strengthen their competitive position, often enter into various contracts between themselves. Some of those contracts are compliant with the law and made in honest circumstances such as strategic alliances. Others are unfortunately forbidden by the law because of the fact that they are aimed against the competition and free market mechanisms.

Cartel agreements, which are made between competitors - entities that function on the same level of production or turnover - constitute one type of such anti-competitive agreements. One should consider agreements between competitors that function in the market on the side of supply as well as demand. In this case, companies that are usually competing with each other can be particularly interested in achieving the cooperative market result and sharing the achieved benefits between themselves. Such an agreement can contain arrangements regarding prices, the scale of production and sale, the division of the geographical and product market and, in result, give each participant of the agreement the comfortable dominant or even monopolistic position at the allowed segments of the market. The stability and durability of those agreements are favored by such factors as: market transparency, the lack of internal competition, low asymmetry of participants and less elastic demand. Companies that create anti-competitive agreements by settling the price policy, the scale of production or dividing sales markets between themselves behave as an ordinary monopolist or a company that holds the dominant position. It means that they can maximize profits by limiting the scale of production and raising prices. Every company that is separately operating on the market would never achieve such profits and such a market position.

The anti-competitive agreement should be distinguished from so-called parallel behaviors (Piejko, 2007, p. 145). Successive, related, and very similar actions of competitors constitute parallel behaviors. However, they do not result from earlier arrangements but from natural observations of the market, analyzing moves of competitors and adjusting to them. Quick reaction to promotional actions, changing prices of the company as an answer to the earlier changes in prices of other market players, and imitation within the framework of the distribution constitute the sign and result of the competition and not

the lack of competition. Thus, parallel market behaviors of the company are distinguished from agreements that are forbidden by the law and limit the competition by the lack of the characteristic element of agreement taken in any form.

Cartels constitute one of agreements limiting the competition. The cartel is the agreement between competitive companies that observe, with respect to each other, the legal, economic and organizational independence. It aims at limiting or eliminating the competition on the market – companies that did not join the cartel (Sloman, 2001, p. 163). Such agreements can be made between salesmen and customers. The reason why salesmen create the cartel is to make the agreement concerning prices of selling products, division of the market, assigning recipients to particular suppliers and markets, quantitative amounts of the sale or arrangement regarding the tenders lodged. On the other hand, the motives that push purchasers forward to create the cartel are common shaping of purchase prices, agreements in the range of allocation of suppliers among participants of the agreement, division of the supply market and arranging the principles of procedure in putting purchase of goods and services out to tender (Fornalczyk, 2007, p. 86). In general, those motives of companies creating the cartel have an effect in achieving profits which are usually gained only by the monopoly.

The essence of the cartel agreement is the coordination of the business of its participants, which is the settling of such parameters as: contribution to the supply and sales market, the scale of the sale and the price. Thus, in this case, it is the serial coordination because of the fact that the subject of arrangements comprises only some symptoms of the economic activity, and not the full coordination, whereby the agreement in the range of more than one parameter is possible (Włodyka, 2006, p. 127).

Therefore, cartel-type agreements can contain a larger or a smaller number of parameters of the market activity, which are used by businessmen in the market. Such a parameter, for example the price, which becomes the subject of the agreement between participants of the cartel, stops being the instrument of the competition for the individual businessman – a participant of the cartel, and becomes the variable known, which is artificially shaped, and not the variable unknown, which is proposed by the market but not influenced by it.

From the point of view of the price and production policy, the cartel is comparable with the monopoly consisting of many companies. It comes into being when companies of one branch bind together in order to coordinate the scale of the production or activities concerning the sale. According to Hovenkamp (Hovenkamp, 1989, p.55), cartels are more dangerous than the monopoly because they originate more quickly and do not need so many expenses that are necessary for setting a monopolistic company through the

internal development or making capital takeovers or the amalgamation. On the other hand, in accordance with features of agreements that have been already presented, they are more impermanent than the group of companies or the linked enterprise.

Therefore, cartels are very dangerous for the market. Forming a cartel helps to minimize the amount of production, increase prices, decrease the quality of production and, thanks to this, significantly increase the profit while minimizing costs of production. They deal with the pressure of the market in the direction of taking actions in order to increase the productivity, improve the technology, increase the quality and rationalize methods of production and sale. Such cartels help less effective companies to survive. They deprive companies of stimuli to improve honest ways of market fight. Those cartels are also very dangerous for customers, who receive the product that is more expensive, has lower quality and is technologically less advanced, in relation to such a situation in which there would be high intensity of the competitive fight on the market.

3. Cartel agreements in the eyes of the competition law

From the legal point of view, anti-competitive agreements such as cartels are broadly understood as all contracts between businessmen, arrangements made in any form by two or more businessmen as well as resolutions and other acts of businessmen associations made both in writing and verbally, which constitute agreements (Bernatt M. Jurkowska A, Skoczny T. 2007, p. 43). The inclusion of arranged behaviors of companies in legally forbidden anti-competitive practices stems from the need to counterattack circumventing of the ban on making agreements in the form of legal activity – the contract, through the cooperation of businessmen in other forms that, de facto, will be limiting the free-market competition. Such arrangements can be understood as behaviors that escape formal rigors, which are characteristic for agreements and acts of associations. These are all situations in which partners act in harmony, but without obvious traits of the open connection between them when it is decided that their behaviors have characteristics of cooperation made in any form and directed to the competitors who are not covered by this cooperation. Therefore, the prevailing meaning (negative impact on the market) belongs to the economic criteria, not formal and legal ones. It is even assumed in the doctrine that the agreement which expired, for example, as a result of the passage of time can be questioned as the competition law-breaking if the results of such agreement are still noticeable. Similarly, it is assumed that all participants of the forbidden agreement, regardless of their actual involvement

in the current activity of the cartel, are responsible (Krasnodębska-Tomkiel, 2006, p. 38).

In order to affirm that the certain agreement was forbidden by the Protection of Competition law, it is important to present anti-competitive results, the loss that the competition suffered on the relevant market. However, there is a presumption regarding a certain group of agreements saying that agreements aimed at harming the competition and because of that they are "automatically" considered as violating competition law. This group includes agreements concerning, for example, setting prices, the division of the market, the purposeful limiting of the production, limiting of the sales as well as exchanging information about prices, setting the minimal prices of resale and imposing the export limits. Therefore, in such case, the fact that the aim of such agreements was anti-competitive would be enough to prove it legally and it is not necessary to present its anti-competitive results (Etro, 2006, p. 78).

For assessing if the agreement violates the competition rules, it makes no difference if it was realized in the practical way. Thus, such an agreement that aims at distorting the conditions of the competition on the market, but, for some reason, was not carried into effect, would be the violation of the competition law. Moreover, the agreement that only aimed at the intended limitation or distorting the competition is illegal. In order to assume that the competition regulations were violated, the awareness of violating law regulations by the parties of the agreement is not necessary (Jurczyk, 2004, p. 38). It is enough that they are aware of the fact that this agreement menaces the competition. Everything speaks for the high rate of the restrictive character of the competition law.

In the light of the above consideration, it is worth emphasizing that it is not important if the cartel conspiracy was made in writing, verbally, as so-called *"gentlemen's agreement"* or any other form. Any cartel agreements that result in or even aim at the limitation of the competition are forbidden. The Protection of Competition law allows financially penalizing also those companies that participated in the unrealized conspiracy or even those that belonged to the cartel but did not apply to all decisions of the cartel.

When starting the analysis of legal regulations concerning cartel agreements, it can be affirmed that, on the basis of the Protection of the Competition law, they are absolutely forbidden. The general clause contained in the article no. 101 of the Treaty on the Functioning of the European Union (old article no. 81 of the TEC) outlaws any agreements between companies, decisions made by associations of companies and agreed practices that can have the influence on the trade between member states and whose aim or result is prevention, limitation or violation of the competition within the Common Market and especially those that concerns:

- setting prices of purchase or sale or other conditions of the transaction in the direct or indirect way,
- limiting or controlling production, markets, technological development or investments,
- the division of markets or the source of supply,
- applying inconsistent conditions for equivalent services for trading partners and as a result generating disadvantageous competitive conditions for them,
- concluding the contract which is dependent on the acceptance of additional obligations by partners who, because of their character or trading habits, do not have any connection with the subject of those contracts.

It is worth to mention Polish regulations of the anti-monopolistic law, because, according to the Protection of Competition and Consumers Act of February 16, 2007, it is forbidden to take actions that limit competition, aiming at creating forbidden agreements that limit the competition (art. 6, paragraph 1), especially those connected with:

- setting prices personally or indirectly,
- limiting or controlling production and sales,
- division of the sales market or purchase,
- applying strenuous or homogenous work conditions, which can create various competition terms for those people in similar agreements with third parties,
- making the agreement dependent on the acceptance or fulfillment of the other service which does not have factual and common connection with the subject of the agreement by the second party,
- limiting the access to the market or excluding businessmen that are not covered by the agreement from the market,
- setting conditions of the offers and, especially, the range of jobs and the price by the businessmen, who join the bidding or by those businessmen and the organizer of the bidding.

Both catalogues are not complete, as they include only examples of inconsistency with the law in agreements made between businessmen.

Legally forbidden cartel agreements constitute one of the most serious breaches of law and that is why their participants have to take into consideration very serious consequences. The administrative procedure concerning the practice of cartels is launched by the President of the Office for Competition and Consumer Protection (UOKiK). The procedure is instituted ex officio and everyone can put the written notification about the suspicion of using cartel practices. As a result of anti-monopolistic proceedings, the President of UOKiK can give the decision on accepting the particular practice as limiting the competition and order omission of its use. Apart from the administrative sanction, the President of UOKiK has the possibility of fining with the financial

penalty that constitutes 10% of the income for the settlement period preceding the financial fine.

4. The Leniency Institution

Applying anti-cartel regulations in the European Union is accompanied by the Leniency program, which for the first time was introduced in 1978 in the USA by the Justice Department (Król-Bogomilska, 2013, p. 18). In the European Union this program has been used since 1996 on the basis of the special Notice of the European Commission. From the beginning of applying this program in the European Union, it has had the form of the soft regulation prepared by the European Commission, which means that the Commission is not in any formal way connected with any procedure or any results of submitting the application for leniency of the penalty by the businessman (Kovacic and Shapiro 2000, p. 98). In Poland, the Leniency institution was introduced as legal regulation in 2004. At present, only few participating countries do not have the prepared Leniency system in their legal systems.

The aim of the Leniency program is to break the conspiracy of silence among the participants of the cartel and reveal such agreements more easily. It has to be remembered that agreements that limit the competition belong to the most serious breaches of the competition law. Because of their top-secret character, it is very hard to reveal them as well as overcome them. That is why businessmen, who decide to cooperate with the anti-monopolistic body and provide the proof of the existence of the cartel conspiracy, will be treated leniently.

Only the businessman who is the first to apply for the Leniency and was not the originator of creating the cartel (art. 109 of the Protection of Competition and Consumers Act) can count on the full leniency of the penalty. The rest of participants who applied can receive the reduction of penalty (Leniency, 2004):

- The second applicant in the line – reduction of the penalty up to no more than 50%
- The third applicant in the line - reduction of the penalty up to no more than 30%
- The rest of applicants - reduction of the penalty up to no more than 20%

Thus, this construction pays a bonus to first businessmen who will inform UOKiK about the cartel. It is worth mentioning that changes which were proposed in the project of the new Protection of Competition and Consumers Act are going further when it comes to the above solutions. Suggested changes constitute so-called "*Leniency plus*" that can help the businessman who applied

as the second or the next to receive the additional reduction of the penalty up to 30% if they inform the Office about another conspiracy in which they were also participating. In the second case they will have the status of the first applicant and avoid the financial penalty.

Thus, the Leniency construction itself somehow resembles the institution of the key witness, who, despite the fact of being one of the offenders of the prohibited act, can count on the leniency of the penalty, but certainly, only when they decide on revealing details of the activities of the criminal association. Therefore, both institutions – the Leniency and the key witness are based on a similar assumption: instead of giving information on the forbidden act and withdrawing from the legally forbidden activity, the person or the subject can count on the specific reward in the form of withdrawal from the penalty. The additional impulse in the case of the Leniency institution, in order to "reveal the participants of the forbidden agreement", is the gradation of the award, which means that only the first subject can count on the full remitting of the penalty. The point is to break the conspiracy of silence among participants of the cartel, spread the suspiciousness, raise a kind of competition of being the first to inform about the cartel and, in this way, try to break the cartel agreement.

Discussing the legal construction of the Leniency institution, it has to be mentioned that it is the legal act or another document (announcement, directives) that generates legal expectations on the side of businessmen participating in the cartel that are declared at the address of the anti-monopolistic body, on the basis of which such a participant can apply for withdrawing from the penalty or reducing the penalty for the participation in the cartel, in the case that they freely provide the anti-monopolistic body with the information on the existence of the cartel.

The cooperation within the framework of the Leniency is always based on the assumption that the participant of the cartel decides on full cooperation with the anti-monopolistic body and reveals everything that is known. Revealing part of the truth or the untruth is out of the question because, in the case of insufficient cooperation, the benefit of withdrawing from the penalty can be retreated in any moment. In such a situation the businessman stays somehow empty-handed: as they devoted good relations with the cartel partners, who may take revenge in some ways, and, on the other hand, they did not benefit from betraying their partners in the form of the simple leniency of the penalty.

The businessman who applies for being covered by the program can personally put forward the formal application (as well as the abridged and simplified version) to the headquarters of the Office for Competition and Consumer Protection in Warsaw, to the worker of UOKiK for the report, by post, fax as well as email. In the last two cases, it is necessary to provide the

Office with the original application within 3 days (Directives of the President of the Office for Competition and Consumer Protection concerning the Leniency program).

The application of withdrawing from the financial penalty or reducing its range should include the description of the agreement presenting:

- businessmen that made the agreement,
- products or services that are mentioned in the agreement,
- the area covered by the agreement,
- the purpose of the agreement (for example, setting the minimum prices of the resale, the division of the market),
- circumstances of making the agreement,
- roles of the particular participants of the agreement (mainly, presenting the originator of the agreement),
- the duration of the agreement,
- if the application was also put forward to protection of competition bodies of other participating countries and European Union,
- how the agreement functioned, especially including dates, places, content and the frequency of meetings of participants of the agreement,
- names and positions of people that play key roles in the agreement.

The declaration of desisting the participation in the forbidden agreement as well as the statement that the applicant was not the originator of the agreement and did not encourage other businessmen to participate in the agreement should be attached to the application. Moreover, the proof of supporting the statements should be attached to the application.

5. The analysis of the effectiveness of the Leniency program

The Leniency program that has been analyzed raises the question concerning its effectiveness in fighting with the cartel agreements and whether it encourages the participants of the cartel enough to betray other participants of the cartel agreement. Examining such effectiveness is hard enough because of the secret character of functioning of cartels themselves and, in fact, it is not known how many cartel agreements exist in the Polish economy. This effectiveness can be examined for the number of applications that were put forward by repentant businessmen as well as for amounts of money that had to be paid by participants of the cartel. Examining the effectiveness of the Leniency program, decisions of the President of the Office for Competition and Consumer Protection as well as reports of UOKiK from 2004 to 2012 were analyzed.

The table mentioned below presents the summary report of the number of applications that were put forward to UOKiK within the Leniency programme framework.

Table 1. The number of applications that were put forward to UOKiK regarding the Leniency programme

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
The number of applications put forward to UOKiK	0	2	3	6	3	6	8	2	16

Source: Own elaboration based on the reports of UOKiK.

Analyzing data contained in the Table 1 it can be affirmed that in the initial term of the program its effectiveness was not very high, which could arise from the novelty of this mechanism and its little command by businessmen as well as a number of formal requirements that need to be fulfilled while putting forward the application to UOKiK. However, beginning from 2007 to 2012, the number of applications concerning the information on the existing cartel, which were put forward to UOKiK, increased. In this respect, 2012 turned out to be the record-breaking year in which 12 businessmen who were earlier participating in cartel agreements freely informed UOKiK about that fact.

Table 2. Main cartels that were found from 2005 to 2010 by means of the Leniency institution and the penalty amount that was fined by the president of UOKiK

No.	Year	Cartel	The total penalty amount fined by the president of UOKiK
1.	2012	Cartel at the market of wood-like boards	PLN 14 million
2.	2011	Household chemicals cartel	PLN 2 million
3.	2010	Paper cartel	PLN 89 343
4.	2009	Cement cartel	PLN 411 586 477
5.	2008	Cartel of paints and varnishes	PLN 45 758
6.	2007	Cartel of paints and varnishes	PLN 2658 257
7.	2006	Cartel of paints and varnishes	PLN 110 million

Source: Own elaboration based on the reports of UOKiK for the period of 2006-2012.

Analyzing the Table 2 presenting main cartels that were revealed thanks to the Leniency institution, it can be claimed that the penalty amount imposed on participants of the cartel by UOKiK increases all the time, which is mainly the result of the fact that, thanks to the Leniency program, bigger cartels are found (as it was said before, the penalty is connected with incomes of the participant of the cartel).

6. Conclusion

In conclusion, as the last period from 2008 to 2012 is taken into consideration, it can be claimed that the effectiveness of the Leniency institution in revealing cartels is moderate, or even low. For example, in 2008 and 2011 the number of applications was very small and amounted to three. 2012 turned out to be the exceptional year and, if this tendency lasted for a longer period of time, then one can argue for the growing effectiveness of the Leniency institution in revealing cartel agreements. The circumstance that can have positive influence on the shape of the growing trend is basically the fact that businessmen are more aware of violating the law by creating cartels and penalties that threaten for that practices. On the other hand, it is the increasing knowledge of businessmen about the Leniency institution itself. It is not accidental that the greatest number of applications on benefitting from the Leniency program was in 2012, when the intensive informative action of UOKiK, concerning the essence of the Leniency program as well as penalties for participating in such an agreement, was taken. Greater knowledge of professional participants of the market about the Leniency institution arises from actions taken by UOKiK. It can be certified by the newest research, which was conducted by EU-Consult as requested by UOKiK. From March to May 2012, 1200 businessmen answered questions in the poll. As the surveys present, 41.5% of subjects know about the Leniency program. It is much more than, for example, in 2009 when only 19% of respondents demonstrated such knowledge.

Big companies turned out to constitute the biggest group that knows the Leniency program. Among subjects of at least 250 employees, 57.4% of them knew about the program, and in the case of employers of maximum 9 employees, only 15.4% of interviewees heard about the Leniency program. Among those who know the Leniency institution, more than 45% of them believe that the Leniency program can persuade businessmen to reveal price fixing (10.4% - YES answers, 35.7% - RATHER YES answers), and 70% of them would be willing to use it (YES answers – 19.4%, RATHER YES answers – 48.6%).

All in all, one can be sure that the Leniency institution will not fully eliminate the phenomenon of cartels as the temptation to take huge advantages and function comfortably for participants of cartels is too big – there will always be a certain group of dishonest companies that will be taking "shortcuts" when it comes to the improvement of the competitive position. However, the Leniency institution can be an efficient tool in fighting with cartels and its strength will be dependent on several factors:

- the awareness of businessmen about the illegality of actions taken by participants of the cartel and the amount of penalties for participating in the cartel,
- the awareness of the fact that the extraordinary program of mitigating penalties among businessmen exist,
- successes in the amount of cartels that were revealed during the inquisitorial procedure by UOKiK,
- simplifying the procedure of applying for the Leniency program.

The Leniency program itself and its influence can be additionally strengthened by increasing penalties for the participation in the cartel. The penalty of 10% of incomes for a very big company which enjoys great profits for participating in the cartel, might not be the sufficient impulse to discourage them from participating in this type of agreement and encourage this participant to cooperate with UOKiK. Also, the modification of the Leniency institution, so-called Leniency plus, which was proposed in the project of the Protection of Competition and Consumers Act, can contribute to the increase in the effectiveness of revealing new cartels. The future will show if the Leniency program will be more useful for revealing anti-competitive agreements between companies.

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