Romania's leniency programme: critical overview

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Romania's competition laws and leniency programme have been in place since 2004. However, since its introduction, there has been only one confirmed case of a successful immunity application. This article attempts to analyse why the introduction of the leniency programme has failed to produce the expected results, and as such, has failed to help Romania become a more competitive market place.

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Romania's competition laws are fully harmonised with the EU's Regulations and Commission's Guidelines, and so is its leniency programme, in place since 2004. In early 2010, the competition regulatory and enforcement agency, the Competition Council (Council), set up a special team and a hotline number to deal with self-reporting, while the leniency features and benefits are explained extensively on the Council's website and in its various published materials. Major local law firms consider the leniency programme as a sophisticated tool that may help their clients.

However, despite all this, there has been only one confirmed case of a successful immunity application since the introduction of the leniency programme in 2004. One can thus probably understand why the May 2012 OECD Annual Report on Competition Policy Developments in Romania does not mention leniency at all.

Against this background, this article attempts to analyse why the introduction of the leniency programme has failed to produce the expected results, and as such, has failed to help Romania become a more competitive market place.

Legal framework

Leniency Regulation 2004. The Council issued its first Leniency Regulation in 2004 (2004 Regulation), just two years after the publication of Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2002 C45/03*) (2002 Leniency Notice). However, the Regulation never became popular as in its five years of existence there were no reported cases of Council investigations initiated following an undertaking's self-reporting.

There may be two principal reasons for this negative track record. First, one could argue that the 2004 Regulation abounded in ambiguities and granted the Council almost discretionary powers when granting or denying full or partial immunity. It is likely that this would deter undertakings from self-reporting. Second, the Council's detection and fining track record at that time was not sufficiently strong so to persuade undertakings to choose the route of an ambiguous, outcome-uncertain leniency application over the sufficiently remote risk of detection and then rigorous prosecution by the Council.

Leniency Regulation 2009. Following the appointment of Bogdan Chiriţoiu as the Council Chairman in April 2009, the Council began to encourage companies more insistently to voluntarily disclose their anti-competitive conduct through the leniency programme. Around that time, the Council also became more active in conducting dawn raids and started being visibly more aggressive in terms of market scrutiny.

It is in that context that a new leniency Regulation was adopted in 2009 (2009 Regulation). The 2009 Regulation implemented the revised and improved Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2006 C298/17*) (2006 Leniency Notice). The 2009 Regulation covers all types of infringements, whether horizontal or vertical.

Despite such positive developments, the only case that successfully applied leniency remains a minor case involving a price-fixing agreement among taxi firms operating in a Western city of Romania.

It should be clarified at this point that the reason for the failure of the leniency programme is not the absence of anti-competitive practices or cartels. As a matter of fact, a number of cartels have been uncovered and sanctioned following the introduction of the leniency programme in Romania.

2009 Regulation: shortcomings

Laws and Regulations are generally not flawless. There is always room for improvement and the Leniency Regulation 2009 is no exception to that. One could always choose to view the technical shortcomings found in the Regulation, affecting its practical implementation, as the main reason behind the fruitlessness of the leniency programme.

However, it is hard to believe that such shortcomings, whether or not inherited from the EU Leniency Notices, are to be blamed for the underperformance of the leniency programme. Competent counsel can normally find ways to overcome or mitigate most of these shortcomings, so as to ensure that a leniency application has chances to succeed and immunity is preserved. Thus, while the imperfection of the legal framework or lack of legal safeguards may discourage potential leniency applicants, one should also bear in mind some of the social and cultural differences (*see below, Social and cultural differences*).

The deficiencies of the current leniency regime can be summarised as follows.

Ringleaders cannot obtain immunity. Unlike the actively involved, easily detectable coercers, ringleaders may prove difficult to identify, even by way of self-assessment. Although it seems rational to deprive the "root of evil" from immunity, the Leniency Regulation 2009 fails to account for those scenarios where the participating undertakings cannot determine whether or not they are in fact ringleaders. Well-established, complex or regionally fragmented cartels are just some examples of where this uncertainty may arise. The harsher treatment of the ringleaders may thus be a deterring factor.

Withdrawal of immunity: sword of Damocles. Failure to co-operate with the Council may result in the withdrawal of immunity. Notwithstanding the fact that an undertaking may have come forward and provided the Council with valuable information and evidence regarding a cartel, if the applicant does not meet all the co-operation requirements, it may lose the provisional immunity. The loss of immunity along with the Council's broad discretion in determining the level of co-operation may be a disincentive for an undertaking considering a leniency application.

Unavailability of " dormant immunity". Even if the evidence submitted by the immunity applicant is sufficient, the Council has certain discretion not to initiate an investigation. The 2009 Regulation fails to indicate the fate of a leniency applicant in a cartel that the Council decides not to investigate. Absent express legal provision for the "dormant" immunity, there is a risk that the Council might later decide to investigate the same cartel and fine the very applicant who supposedly failed to provide sufficient evidence.

Additional uncertainty for leniency applicants. An applicant for a reduction of fines must co-operate with the Council to the same extent as an undertaking applying for immunity. Unlike the immunity applicant, however, who knows it has conditional immunity early in the proceedings, the undertaking seeking a reduction in fines may have to wait until the Council issues the statement of objections. Since the Council requires the same degree of assistance and co-operation, there is no reason why the applicant for a reduction in fines should not benefit from the same level of certainty. There is a risk that the onerous requirement of continuous co-operation along with the increased uncertainty may significantly reduce the incentive to come forward with information.

Hypothetical submission is an illusory option. Theoretically, an immunity applicant can first present the information and evidence in hypothetical terms. However, the Leniency Regulation 2009 requires disclosure of the product or service concerned by the alleged cartel, as well as its geographic scope. This requirement makes it virtually impossible to submit a hypothetical application in certain industries where very few players operate. This is particularly the case in relation to oligopolistic markets where cartels often occur.

It may not be so easy to obtain a marker. The underlying rationale for the marker system is to reduce the threshold for making initial contact with the Council and to provide comfort that an applicant's position in the leniency queue is secure. Nevertheless, the Leniency Regulation requires the applicant to actually justify its marker request. The applicant's otherwise unquestionable discretion in determining whether a marker is required or not is thus fettered by the Council's right to request sufficient justification.

Insufficient time to perfect a marker. The time for the perfection of a marker is to be determined on a case-by-case basis by the Council. This seems reasonable since rigid time limits would be counterproductive. However, the Council's leeway in calculating the time granted for perfection has no formal restraints or criteria such as, for example, difficulty of gathering sufficient evidence, recent acquisition of a cartel member, destruction or withholding of evidence by the previous management, and geographic spread of the documentary evidence. Thus, applicants who know little about the cartel will always fear the Council

not giving enough time for them to further investigate and perfect the marker.

Too onerous and detailed marker system. To obtain a marker, an applicant must disclose:

- Its name.
- The participants.
- The product/service and geographic market.
- The duration of the cartel and its mode of operation.

The amount of information is therefore excessive. Some of the information, such as the duration of the cartel or the nature of the conduct, will often not be known to the applicant at an early stage and will need to be further investigated. The very reason behind a marker system (that is, enabling further collection of such evidence) is thus negated.

Only immunity applicants can obtain a marker. Leniency applicants have as much interest in protecting their position in the leniency queue as immunity applicants, as the level of their fine reduction depends on the chronological order of their application. However, under the Leniency Regulation leniency applicants cannot be granted a marker.

Criminal liability: conflict of interest between the applicant and its employees. Individuals who deliberately and decisively participate in the setting-up or the implementation of violations of what is the Romanian equivalent of Article 101 of the Treaty on the Functioning of the European Union (TFEU) may face imprisonment from six months to four years or a criminal fine. Therefore, there is a natural conflict of interest between the applicant on the one hand and its employees and directors on the other. The employees or directors may choose not to co-operate with the applicant for the purpose of uncovering and submitting to the Council evidence regarding the applicant's involvement in the alleged cartel, since this evidence may lead to criminal liability on their part. The applicant's ability to prepare a leniency filing may be seriously impaired as a result of this conflict of interest, even though one could reasonably expect a more lenient treatment.

2009 Regulation: attractive features

In spite of its flaws (*see above, 2009 Regulation: shortcomings*), the 2009 Regulation is more attractive in a few significant respects from the point of view of potential applicants, as compared to the 2006 Leniency Notice. The position can be summarised as follows.

Larger scope: vertical agreements are covered. Vertical price-fixing and resale price maintenance, as well as other forms of vertical concerted practices, can be just as harmful to consumer welfare as horizontal agreements. The EC Leniency Notice is silent as to whether leniency may be extended to vertical agreements/concerted practices. Conversely, the Leniency Regulation expressly covers vertical agreements/concerted practices.

No requirement to make current/former employees available for interviews. It always takes some convincing to encourage employees and directors to disclose their illegal dealings. Directors or employees

who have taken part in a cartel may consider that acknowledging and describing their role would not be in their interest and refuse to co-operate. Under the EU leniency programme, the Commission could easily interpret a cartel member's difficulty in overcoming a director's reluctance to speak as a lack of co-operation. In this scenario, the undertaking would lose immunity despite having provided significant assistance and co-operation during the Commission's investigation.

Failure to co-operate does not affect eligibility for a fine reduction. The EC Leniency Notice provides that, if at the end of the administrative procedure, the undertaking that was granted conditional immunity has not met the co-operation requirements set out in the Notice, the undertaking will not benefit from any favourable treatment, not even from a fine reduction. Under the Leniency Regulation, on the other hand, failure to co-operate will not necessarily result in the loss of any favourable treatment, with the immunity applicant still being potentially eligible for a fine reduction.

Additional facts: lower evidentiary threshold. Under the EC Leniency Notice, an applicant for a reduction in fines who is the first to submit evidence with respect to additional facts in relation to the gravity or the duration of the cartel receives immunity with regard to those facts. However, this ability to obtain immunity is seriously weakened by the requirement to submit compelling evidence in respect of such additional facts (that is, evidence that would not require any corroboration if contested). Under the Leniency Regulation, the threshold for obtaining protection with respect to such additional facts is lower: the applicant will be granted protection if evidence provides "significant added value", even if it is not "compelling". Significant added value refers to evidence that "strengthens, by its very nature and/or its level of detail, the Council's ability to prove the alleged cartel" and there is no requirement that such evidence should not require corroboration if contested.

Destroying of evidence. The EC Leniency Notice provides that "when contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel". It is viewed that such actions could seriously undermine the investigation and are flagrantly against the spirit of co-operation under the EC Leniency Notice. This raises potential difficulties since individuals who are directly involved in the cartel may have destroyed evidence out of fear of the consequences for their jobs in an almost natural panic reflex. Such a requirement does not exist under the Leniency Regulation as the applicant's obligation to co-operate with the Council does not extend to the period leading up to the leniency application.

Protection from joint civil liability. The Romanian competition law expressly provides that a successful immunity applicant may not be jointly liable with other cartel members with respect to those uncovered breaches. Nevertheless, the applicant would not be protected from having to pay damages in subsequent civil proceedings brought directly against it.

It remains to be seen whether these appealing features (aimed at facilitating access to the leniency programme) are in fact powerful enough to produce results. The current state of affairs, however, is further proof that technical aspects of the leniency framework do not by themselves entirely explain the failure of the leniency programme.

Social and cultural differences

Like any other country, Romania has its own characteristics and ways of doing things, which are reflected in anything from daily life to how the governments, laws and businesses operate. These national differences

affect and shape all matters, including the leniency programme. The results produced by a leniency programme are also affected by complex social factors. The following factors, in particular, can help explain the fruitlessness of the leniency programme.

Low awareness of cartel Regulation. Despite a relatively old Competition Law (in place since 1996), the increased enforcement activity on the part of the Council, and the Council's publicity efforts, local companies do not yet seem to have sufficient knowledge about cartels and their legal implications. Naturally, in circumstances where undertakings are not aware that they are part of a cartel, applying for leniency does not even arise as an option.

Fear of criminal liability. As recently as 20 years ago, Romania was a communist country, having maintained a communist regime for almost 50 years (including a harsh dictatorship in the end). Some historical issues are yet to be settled. Whether justified or not, there remains an inherent social sentiment of fear of arbitrary prosecution and a certain degree of distrust as regards the ways criminal cases are handled by the law enforcement agencies. The criminalisation of virtually all types of competition law infringements (potentially, directors and employees may be prosecuted and obtain a criminal record not only for hard-core cartels, but also for vertical restraints) is a competition law feature that does not seem to be helping the Leniency Regulation.

Perception of whistleblowers. In the authors' opinion, the local business culture has not yet evolved to the point where whistleblowing is deemed ethically acceptable if it facilitates law enforcement and, indirectly, creates a more competitive environment. It seems that local business culture needs more time to start viewing the leniency application as a legally sanctioned behaviour as opposed to a purely ethical issue.

Fear of retaliation. Romania has relatively small markets, where participants know each other very well. Considering the Leniency Regulation requirements, a local company may find an anonymous hypothetical filing nearly impracticable. A relatively weak competitive environment, significant transparency in the markets, and uncertainty as regards the privacy of information submitted, are the factors which make a local full-fledged immunity application potentially open to retaliation by competitors. Local companies are yet to obtain reassurance that regulatory safeguards are effective enough to protect them from any unethical reaction by their competitors following a leniency application.

Lack of proper training and internal compliance. Organisational and ethical values are still evolving, and are yet to become the norm within local companies. Specialised training and/or internal compliance manuals are almost nonexistent among domestic businesses. A decision to self-report and, perhaps more importantly, the leniency filing itself, presuppose thorough internal preparation and extensive data gathering. Data mismanagement and loose document retention policies (with information leakage being a point of strong concern) may simply render local companies unable to prepare a dossier for the Council.

What's next for the 2009 Regulation?

Hopefully the 2009 Regulation will eventually provide results. How significant those results will be and when they will be achieved depends on many factors, such as the development of the local competitive environment, and the local corporate culture and, generally, a more robust protection of the rule of law. It is equally important for the Council to keep up with, and even increase, the industrious enforcement of the anti-cartel Regulations. The Council will also need to continue to evolve and adapt its policies to promote the use of the leniency programme.

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- Romanian chapter of Merger Control - Jurisdictional comparisons (2011) (part of The European Lawyer Reference series) (co-author with Razvan Bardicea).

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