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WHY IS LENIENCY POLICY LESS EFFECTIVE IN HUNGARY: IS THERE A REGULATORY ANSWER?

Hungarian leniency policy is generally considered to be less effective. Although, in regional comparison, it may appear to be successful, the statistical data shows that it falls behind the European average. This paper makes a comparative snapshot of Hungarian leniency policy in order to establish whether its relative ineffectiveness can be traced back to regulatory factors or to circumstances beyond regulation.

INTRODUCTION

Hungarian leniency policy is generally considered to be less successful (*Transparency International* [2013]). Although the Hungarian results are decent in comparison to other Central European Member States, they fall behind the European average.

The purpose of this paper is to inquire whether the moderate success of Hungarian leniency policy can be traced back to regulatory reasons and, hence, can be enhanced with regulatory means. This task is accomplished by comparing the Hungarian leniency regime to those of more successful systems. Section II sets out the legal considerations (legal risks) that influence the submission of leniency applications. Section III presents the regulatory regimes of four effective systems: the EU, Germany, the Netherlands and the United Kingdom. Section IV presents the Hungarian rules and their application. Section V provides an analytical presentation of the systems compared and demonstrates that the Hungarian leniency regime is, for the most part, in accordance with those of the comparators and, at certain points, is even more generous for leniency applicants. This suggests that Hungarian leniency policy cannot be further enhanced via regulatory means and its perceived ineffectiveness is due to peculiar social norms and cultural patterns.

LEGAL CONSIDERATIONS DETERMINING THE SUBMISSION OF LENIENCY APPLICATIONS AND THE EUROPEAN FRAMEWORK

The decision to submit a leniency application is determined by various legal and non-legal considerations and is featured by a complex cost-benefit analysis and entrenched social patterns of behavior. The decision-making hinges on the balance between advantages and the drawbacks, however, it has a very important characteristic: individual

stakeholders may have different interests, which may lead to a genuine principal-agent problem. Hence, outcomes may be different on the corporate and the individual level.

Under Hungarian law, the legal consequences faced by cartel companies have four strands: administrative sanctions (competition fine), civil liability for damages, exclusion from public tenders and criminal sanctions. One of the purposes of leniency is to generate distrust among cartel companies and, thus, rivalry to submit a leniency application (given that solely the first successful leniency applicant may benefit from a full immunity from the competition fine). This may be described as a prisoner's dilemma (*Blum et al.* [2008]) heavily impregnated by social patterns of behavior: if the chance that someone else may submit a leniency application is low, the interest in rushing to the competition authority will be equally low.

Corporate employees' legal risks may be boiled down to criminal liability and civil law (employment law) liability for the damages caused to the firm. These risks may sever the interests of the firm from those of the directors and employees, as the latter may be interested in not disclosing (or hiding) information to avoid personal liability, even in matters where the leniency could serve the firm's best interests. This conflict of interests may impact on the decision-making process, as the submission of a leniency application involves active cooperation and internal data-gathering.

Of course, the decision about whether to submit a leniency application or not hinges not merely on legal considerations. Such a move may seriously damage the firm's (and the managers') reputation and affect business relations and trustworthiness seriously. The leniency applicant may incur more costs on the "non-legal" side than the benefits it received on the "legal side." These are non-regulatory considerations and risks, which are difficult to gauge. However, if a comparison to the successful European systems reveals that the Hungarian regime is equally beneficial to cartels (or even more generous), it may be reasonably presumed that the leniency policy's relative ineffectiveness is due to non-regulatory considerations.

Even though national leniency policies concerning the competition fine significantly converge, formally, they have not been "Europeanized." Criminal and public procurement law sanctions come under national competence and may feature significant differences. Although the Public Procurement Directive (*EU* [2014a]) lists "grave professional misconduct" among the facultative grounds of exclusion, the definition of this is left to the Member States. Nonetheless, the Private Enforcement Directive (*EU* [2014b]) limits the joint and several liability of cartel undertakings benefiting from a full immunity from the fine. The successful leniency applicant's joint and several liability is restricted "to its direct or indirect purchasers or providers; to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law. (...) The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers." It has to be noted that this arrangement is not unknown to Hungarian law, in fact, Hungar-

ian law introduced this principle way before the Private Enforcement Directive. As from 1 June 2009,¹ the liability of enterprises benefitting from full immunity has been subsidiary: the injured party first has to seek recovery from the cartelists that have not been awarded immunity from fines.² Accordingly, this rule applies solely to applicants benefitting from full immunity, a reduction of the fine entails no such benefit (*Nagy* [2009a]).

It needs to be noted, however, that the Private Enforcement Directive's deadline of implementation was 27 December 2016 and before this German, Dutch and British law provided no such benefit to leniency applicants.

LENIENCY POLICY IN EU, GERMAN, DUTCH AND UK COMPETITION LAW

This section presents the leniency regimes of the EU, Germany, the Netherlands and the United Kingdom along the above four considerations: administrative sanctions (competition fine), civil liability for damages, exclusion from public tenders and criminal liability.

EU competition law's leniency program is generally considered to be effective (*Lowe* [2003]): even though the number of leniency applications seems to be on the decline (*Ysewyn-Kahmann* [2018]), they still account for the vast majority of competition matters.³

The European Commission's Leniency Notice (*EC* [2006]) distinguishes between two types of leniency: full immunity and reduction of the fine (partial immunity). An undertaking may benefit from full immunity, if it is the first to convey information and evidence that either helps the Commission to carry out a dawn raid or to establish the violation, and the Commission is not in the possession of sufficient evidence to adopt a decision to carry out a dawn raid or to find an infringement. An undertaking may not benefit from full immunity, if it coerced others to participate in or remain part of the cartel. If the conditions of full immunity are not met, the undertaking may benefit from a partial immunity (reduction of the fine), if the information and evidence represents significant added value with respect to the evidence that is already in the Commission's possession. The undertaking that first meets the conditions of partial immunity receives a 30-50% reduction of the fine, the second one 20-30%, while the third and subsequent leniency applicants receive an up-to 20% discount.

¹ Act XIV of 2009.

² Section 88/D HCA.

³ *Ysewyn-Boudet* [2018] ("a large majority of cartel decisions adopted by European competition authorities [is] based on immunity and leniency applications").

In addition to the above core requirements, the leniency applicant has to fulfill various conditions: it is expected to cooperate with the Commission genuinely, fully, on a continuous basis and expeditiously, to terminate its participation in the violation (unless the Commission instructs it otherwise), to have not destroyed, falsified or concealed evidence and to have treated the submission of the leniency application confidentially.

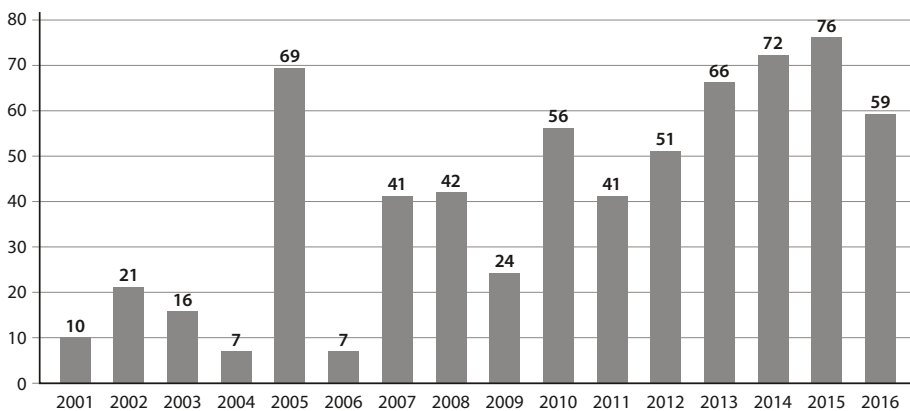
The German leniency regime has produced, on the average, 53 leniency applications per year (*Figure 1*).

According to the German competition authority's leniency notice (*Bekanntmachung* [2006]), an undertaking benefits from full immunity, if

- it is the first to contact the competition authority at a time when the authority does not have sufficient evidence to obtain a search warrant,
- the information and evidence provided by the leniency applicant enables the competition authority to obtain a search warrant,
- it was not the only ringleader of, nor did it coerce others to participate in the cartel, and
- cooperates fully and on a continuous basis with the competition authority (Para 3).

Once the competition authority gets into the position to obtain a search warrant, the undertaking normally (but not automatically) benefits from full immunity, if

- it is the first to contact the competition authority and the latter does not have sufficient evidence to prove the violation,
- the information and evidence provided by the leniency applicant enables the competition authority to prove the cartel,
- it was not the only ringleader of, nor did it coerce others to participate in the cartel,
- cooperates fully and on a continuous basis with the competition authority, and
- no other undertaking has been granted full immunity (Para 4).



Source: Bundeskartellamt [2016] p. 20.

FIGURE 1 • Number of bonus applications submitted to the Federal Cartel Office 2001–2016

If full immunity cannot be granted, the competition authority may reduce the fine up to 50%, provided the information and evidence provided by the leniency applicant amounts to “a significant contribution to proving the offence” and the applicant cooperates fully and on a continuous basis with the competition authority (Para 5). The amount of the reduction is based on the value of the contribution to discovering the violation and the sequence of the applications.

The submission of the leniency application entails no benefit or immunity as to the criminal and public procurement consequences: the natural persons concerned may face criminal liability [Para 24. Strafgesetzbuch (StGB) § 298] and the cartel undertaking may be excluded from public tenders.⁴

In the Dutch leniency regime (*ACM* [2014]), the leniency applicant, as a general requirement, has a wide duty to cooperate: until the competition fine becomes final, the leniency applicant has to cooperate with the competition authority fully and continuously, in line with the interests of the investigation and procedure [Article 17 (1)–(2)].

The undertaking benefits from full immunity, if it is the first to submit an application, the competition authority has not yet launched an investigation, the information provided enables the competition authority to carry out a targeted inspection, the undertaking has not coerced another undertaking to participate in the cartel, the applicant complies with the obligation to cooperate [Article 4(1)]. An undertaking may benefit from full immunity also in case it submits an application after the opening of the competition investigation, provided the statement of objections has not been issued and the undertaking provides new evidence on the basis of which the competition authority is able to prove the violation [Article 4(2)].

If the pre-conditions of full immunity are not met, the undertaking may benefit from a reduction of the fine, provided the leniency application is submitted before the issuance of the statement of objections and it contains information representing a significant added value. The reduction ranges from 20% to 50% (30–50% for the first applicant, 20–30% for the second, while the third and subsequent applicants benefit from a reduction up to 20%) [Article (5)–(7)].

Cartels are not criminalized under Dutch law and no public procurement sanctions apply (*Pree–Snoep* [2017] p. 224, p. 225)

The British leniency regime (*OFT* [2013], *CMA* [2017], [2020]) applies to horizontal hardcore violations and vertical resale price-fixing alike (Para 2.3). The general conditions of leniency (which apply to both full and partial immunity) are the following (Para 2.7): admission of the violation, full disclosure of (non-legally privileged) information, documents and evidence, continuous and complete cooperation and termination of violation. An undertaking may not benefit from full immunity (type “A” and “B” leniency), if it has taken steps to coerce another undertaking to take part in the violation.

⁴ Gesetz gegen Wettbewerbsbeschränkungen (GWB) § 124(1)(4). See *Mäger–Schreitter* [2017]: As to the earlier regulation, see *Pasewaldt* [2008], *Stein–Fritton–Huttenlauch* [2012], *Mäger–Bischke* [2013] pp. 90–91.

Leniency is classified into three categories: type “A” leniency guaranteeing full immunity, type “B” leniency, which may offer full immunity subject to discretion and type “C” leniency guaranteeing a reduction in the fine. An undertaking benefits from type “A” leniency, if it is the first to submit an application before the competition authority launches an investigation and before it has sufficient information to establish the violation (Para 2.9–2.10). The immunity extends to criminal liability: it guarantees “blanket” immunity from criminal prosecution for all cooperating current and former employees and directors and protection from director disqualification proceedings for all the directors. Type “B” leniency governs plights where the competition authority has already launched an investigation. In this case the undertaking may benefit from a discretionary immunity up to 100% and the competition authority may grant protection against criminal liability and directors’ disqualification (that is, this is not an automatic entitlement and is subject to the competition authority’s discretion) (Para 2.15–2.16). Type “C” leniency applies to cases where the undertaking is not the first to submit an application or it is the first but coerced others to participate in the violation, hence, it cannot benefit from type “A” and “B” leniency. Type “C” leniency offers a partial discretionary immunity up to 50%, protection from director disqualification proceedings and may involve discretionary criminal immunity for specific individuals.

As a sanction unknown to Hungarian law (*Nagy [2009b]*), the competition authority may sue for the disqualification of the directors involved in cartelization (for a period of up-to 15 years).⁵ Nonetheless, in accordance with the above, the OFT pronounced that it does not wish to make use of this power in relation to undertakings that were granted full or partial immunity. This does not apply to directors who coerced others to participate in the violation, were removed because of their role in the violation or for opposing the application for leniency, or failed to cooperate (*OFT [2010]* 4.13–4.14).

Cartelist companies are not automatically disbarred from public tenders, however, the contracting authority may exclude economic operator that “entered into agreements with other economic operators aimed at distorting competition.”⁶

As noted above, prior to the transposition of the Private Enforcement Directive, German, Dutch and British law provided for not special status for leniency applicants concerning (civil) claims for damages.⁷

⁵ Section 9A to 9E of the Company Directors Disqualification Act 1986

⁶ The Public Contracts Regulations 2015, http://www.legislation.gov.uk/uksi/2015/102/pdfs/uksi_20150102_en.pdf, Article 57(8)(d) („the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition”). The exclusion may take place within three years after the violations. Article 57(12).

⁷ As to English law, see *Morony–Alderton [2013]* p. 48. As to Dutch law, see *Smeets–van Empel–Brekhof [2013]* p. 110. As to German law, see *Rinne [2013]* p. 70.

LENIENCY POLICY IN HUNGARY

The Hungarian rules on leniency, in essence, follow the general European pattern, with the difference that as from 15 January 2017, in addition to horizontal hardcore violations, they also apply to vertical resale price fixing.⁸

Hungarian leniency policy is considered to be less effective, though in regional comparison it may appear to be relatively successful. For instance, in Romania, until recently, leniency applications have been rare (*Suliman* [2014]), it was as late as 2011 that leniency was applied for the first time,⁹ and the first competition decision emerging from a leniency application was adopted in 2015 (*Lacatus–Potlog* [2015]).

The statistical data shows that the Hungarian leniency policy has been gaining ground. None of the decisions adopted in 2006 and 2008 involved leniency,¹⁰ while in 2007 and 2009 there was a single case based on leniency.¹¹ 2010 saw a surge (three applications), however, in 2011 none of the 14 cartel investigations launched was based on leniency. In 2012, three leniency applications were submitted,¹² in 2013 one,¹³ in 2014 no application was submitted.¹⁴ Nonetheless, the last five years have seen a slight but lasting increase in the number of leniency applications: three in 2015,¹⁵ two in 2016,¹⁶ five in 2017,¹⁷ five in 2018¹⁸ and four in 2019.¹⁹ As the rules on leniency have seen no substantial change in the last years, this increase cannot be reasonably attributed to regulatory reasons.

In accordance with EU competition law, Hungarian law confers full or partial immunity from fines on cartel enterprises (“whistle-blowers”) that reveal a cartel before the HCO or contribute to the evidence the authority already has. The statutory rules on leniency are included in Sections 78/A-78/D HCA. Prior to 1 June 2009, the HCO’s leniency policy had no detailed statutory rules and was included in Notice 3/2003 on the application of the leniency policy facilitating the discovery of cartels, which was amended by Notice 1/2006 and Notice 2/2009. Leniency applications submitted as from 1 June 2009 are governed by the above statutory rules.²⁰

⁸ 78/A(1) HCA. In a case the HCO accepted a leniency application concerning a resale price fixing scheme before this date. Case Vj-81/2006/74 *Olympus*. See: *Nagy* [2016] p. 107.

⁹ Consiliul Concurenței a acordat prima imunitate la amendă prin programul de clemență (17 January 2011), <http://www.clementa.ro/news/5/23/Consiliul-Concurenței-a-acordat-prima-imunitate-la-amenda-prin-programul-de-clementa.html>.

¹⁰ Annual Report of the HCO 2006, p. 51; Annual Report of the HCO 2008, p. 64.

¹¹ Annual Report of the HCO 2007, p. 65; Annual Report of the HCO 2009, p. 86.

¹² Annual Report of the HCO 2012, p. 7.

¹³ Annual Report of the HCO 2013, p. 8.

¹⁴ Annual Report of the HCO 2014, p. 13.

¹⁵ Annual Report of the HCO 2015, p. 15–16.

¹⁶ Annual Report of the HCO 2016, p. 12.

¹⁷ Annual Report of the HCO 2017, p. 13.

¹⁸ Annual Report of the HCO 2018, p. 13.

¹⁹ Annual Report of the HCO 2019, p. 24.

²⁰ Sections 8 and 17(4) of Act XIV of 2009.

The leniency policy had been applicable to cartels (horizontal hardcore violations) from the outset and, as from 15 January 2017, it was extended to vertical resale price fixing.²¹ Nonetheless, it is to be noted that the HCO has interpreted the conditions of leniency very generously and in Case Vj-81/2006/74 *Olympus* it granted full immunity from the fine in respect of a vertical agreement at a time when the HCA applied solely to horizontal agreements.

The leniency applicant may be granted full immunity, if providing, directly or indirectly, determinant evidence, or partial immunity, if providing evidence that has an added value in comparison to the evidence already available to the HCO.

The following four general conditions apply to all leniency applications (irrespective of whether it is for full or partial immunity): disclosure of the violation: the admission of the infringement and full data disclosure,²² termination of participation in the violation, except the HCO instructs the undertaking otherwise,²³ good faith, complete and continuous cooperation until the end of the competition proceedings,²⁴ and confidential treatment of the leniency application and its content.²⁵

Full immunity from the fine is available to the undertaking that is first to provide determinant evidence concerning the cartel: the undertaking may supply the evidence directly or may assist the HCO to find it (through a dawn raid). An undertaking is eligible for full immunity from the competition fine, if it helps the HCO find the evidence proving the violation (it supplies evidence that enables the HCO to obtain a court warrant to conduct a dawn raid, provided at the time the leniency application is submitted the HCO does not have sufficient information to obtain a court warrant) or if it supplies the evidence proving the violation, provided at the time the leniency application is submitted the HCO does not have sufficient evidence for proving the violation and no undertaking fulfils the requirements of the preceding point.²⁶ As a negative condition, no undertaking can be granted immunity from the fine that coerced another undertaking or other undertakings to participate in the cartel.²⁷

No strict time-limit applies to the submission of the application for full immunity. While immunity under the first point (helping the HCO to find the evidence) cannot be granted once the HCO has already carried out a dawn raid, immunity under the second point (supplying evidence that proves the violation) remains available, provided the HCO has not collected sufficient evidence during the procedure. Section 78/A(4) HCA contains a specific provision on leniency applications sub-

²¹ Section 78/A(1) CA. The benefit of leniency was extended to vertical resale price fixing through Section 32(2)(27) of Act CLXI of 2016.

²² Section 78/A(1) HCA.

²³ Section 78/A(7)(a) HCA.

²⁴ Section 78/A(7)(b) HCA.

²⁵ Section 78/A(7)(c) HCA.

²⁶ Section 78/A(2) HCA.

²⁷ Section 78/A(8) HCA.

mitted after the launch of the procedure. If the leniency application is submitted after the moment the preliminary position or the case-handler's report is sent out or access to the file is opened for any of the parties, the fine can be reduced only if the undertaking conveys clear evidence substantively affecting the adjudication of the infringement as to a fact or circumstance that was unknown to the HCO.²⁸

Partial immunity from the competition fine (reduction of the fine) is available to an undertaking if full immunity cannot be granted and the undertaking supplies evidence that represents a significant added value relative to the evidence the HCO has.²⁹ Partial immunity may be granted to more than one undertaking, if the evidence supplied by subsequent whistle-blowers has added value, by way of example, through strengthening the proof of the violation or revealing that the cartel had a broader purview. Section 78/A (5) establishes the scale of fine reduction: the first undertaking is entitled to a 30-50%, the second to a 20-30% and the third and later undertakings to an up-to 20% reduction.

Cartelist enterprises are excluded from public tenders. Section 75(2)(n) of the Act on Public Procurement specifically excludes those undertakings from public tenders that violated competition law in the preceding three years. This rule applies only if the commission of the mischief was established and a fine was imposed. Accordingly, if the leniency applicant is awarded full immunity from the fine, it cannot be excluded from public tenders: although the HCO's final decision establishes the undertaking's involvement in the violation, it imposes no fine. On the other hand, leniency applicants receiving partial immunity cannot benefit from the above rule, since they are imposed a fine, even if a reduced one, and are, hence, excluded from public tenders.

Under Hungarian law, the cartelization of public tenders and concession procedures is criminalized (otherwise, the violation of competition rules triggers no criminal liability). The criminal prohibition was introduced in 2005 (effective as from 1 September 2005) via Section 296/B of the old Criminal Code. In 2012, the Hungarian parliament adopted a new Criminal Code (Act C of 2012), which reiterated the same statutory language in Section 420.

The person who, so as to manipulate the result of a public procurement procedure or of an open or closed tender published in respect to an activity that can be pursued only on the basis of a concession, concludes an agreement or engages in concerted practice concerning the fixing of the prices, fees, other contractual conditions or the division of the market and thereby restricts competition, may be liable to imprisonment for a term between one and five years. The same punishment applies if someone, so as to manipulate the result of a public procurement procedure

²⁸ Section 78/A(3) HCA

²⁹ Before 1 July 2014, Section 78/A(3) HCA embedded a strict time-limit and provided that the application for partial immunity had to be submitted before the HCO's preliminary position (equivalent of statement of objections) was served or, if this occurred earlier, before the file was opened for access by the parties.

or that of an open or closed tender published in respect to an activity that can be pursued only on the basis of a concession, takes part in the adoption of a decision of an association of undertakings that restricts competition.³⁰ The punishment is milder if the above is committed in respect of a public procurement value not exceeding HUF 50 million. In this case, the perpetrator is liable to imprisonment for a term not exceeding two years.³¹

It is to be noted that the criminal enforcement of competition law is highly under-developed: since the introduction of the criminal prohibition in 2005 (this rule applies as from 1 September 2005), according to the available information, criminal conviction occurred in a single case.³² This is basically due to two factors. First, criminal enforcement is not proactive but passive in relation to administrative enforcement. The usual way of handling cases is that the HCO files a criminal complaint after it completed the administrative procedure, so at a time when the criminal investigation's real-time data-gathering tools can no longer be used. Second, the burden of proof and the rules of evidence in the administrative procedure are so much more lenient as compared to criminal procedure, that the evidence gathered in the former is quite often of little use for criminal prosecution. Although the HCO has condemned the cartelization of public tenders in numerous matters, the evidence sufficient for an administrative fine is usually not sufficient to establish criminal liability. While the threshold of proof is pretty low in cartel cases, criminal matters are governed by the "beyond reasonable doubt" standard.

Section 420 of the Criminal Code reconciles criminal liability with the aims of leniency policy, translating the immunity from the fine to immunity from criminal liability.

First, the perpetrator cannot be punished if he reports the violation to the authority and reveals the circumstances of the commission before the criminal authority gains knowledge. This option is independent of the operation of the leniency rules under competition law: it is available also in cases the undertaking connected to the perpetrator submits no leniency application.³³

Second, the perpetrator is not punishable if the undertaking submits an early leniency application for full immunity from the competition fine: the undertaking's executives, members, supervisory board members, employees and their agents (who have this status at the time the act was committed) cannot be punished if the undertaking, before the institution of the HCO's competition proceedings, submits a successful leniency application entailing full immunity from the fine and reveals the circumstances of the commission. According to the HCA, an undertaking may

³⁰ Section 420(1)-(2) of the Criminal Code.

³¹ Sections 420(3) and 459(6) of the Criminal Code.

³² This occurred in a criminal matter emerging from competition case Vj-28/2013. The judgment is not publicly available.

³³ Section 420(4) of the Criminal Code.

be granted full immunity from the fine also in case the application is submitted after the institution of the competition procedure (albeit it is certainly more difficult for the undertaking to comply with the requirements). On the other hand, immunity from criminal liability is available only if the undertaking submits the leniency application before the competition procedure's institution; that is, if the leniency application is submitted after the start of the proceedings, the undertaking may but the perpetrator may not automatically benefit from a full immunity from the punishment.³⁴

Third, if the undertaking submits a leniency application for full or partial immunity, the punishment can be reduced with no restrictions and in case it is particularly equitable the perpetrator may be exempted from it. The punishment of the undertaking's executives, members, supervisory board members, employees and their agents (who have this status at the time the act was committed) can be reduced or put aside if the undertaking submits a successful leniency application to the HCO that entails full or partial immunity from the fine and reveals the circumstances of the commission.³⁵ Under this provision it is irrelevant when the application for full immunity was submitted, that is, whether before or after the institution of the competition procedure; however, as in the event the submission predates the institution of the proceedings, the perpetrator is automatically entitled to full immunity, this provision in fact applies only to cases where the application for full immunity is submitted after the procedure's institution and where an application for partial immunity is submitted.

Accordingly, immunity from criminal liability is guaranteed solely in case the leniency application is submitted before the institution of the competition procedure. If the leniency application is submitted afterwards, a discretionary immunity from criminal immunity may be granted by the court: if it finds this equitable, the court may decide to grant full immunity; otherwise, the perpetrator is automatically entitled to a reduction of the criminal punishment. Furthermore, the perpetrator benefit from full immunity from criminal liability (if the court finds that this is equitable) even in case the undertaking submitted merely an application for partial immunity.

Under Hungarian law, legal persons have criminal liability in certain cases, where a natural person connected to the legal person commits a criminal act. As a corollary, an undertaking runs the risk of facing derivative criminal liability if a person connected to it gets involved in the cartelization of a public tender. Act CIV of 2001 on the criminal law measures applicable to legal persons establishes certain measures, which can be applied to legal persons, if there is a link between the perpetrator and the legal person. Nonetheless, the criminal liability of legal persons is rarely invoked in practice and has never been used in competition matters.

³⁴ Section 420(5) of the Criminal Code.

³⁵ Section 420(6) of the Criminal Code.

CONCLUSIONS

The regulatory comparison carried out above reveals that Hungarian leniency policy does not differ from the comparators in any significant way, what is more, it is more favorable to leniency applicants.³⁶

	Full immunity (pre-procedure application)	Full immunity (in-procedure application)	Partial immunity (reduction)	Criminal liability	Public procurement exclusion	Civil liability (before the Private Enforcement Directive)
Hungary	Automatic	Automatic if it proves the violation.	30–50%, 20–30%, 0–20%.	Early leniency application for full immunity: full criminal immunity. Other leniency application: discretionary criminal immunity and extenuative circumstance.	No exclusion in case of full immunity.	Subsidiary liability.
European Union	Automatic	Automatic if it proves the violation.	30–50%, 20–30%, 0–20%.	No criminal liability.	No exclusion at all.	No protection, joint and several liability.
Germany	Automatic	Subject to discretion (usually granted).	0–50%	The leniency application entails no criminal immunity.	Exclusion applies, no protection for leniency applicants.	No protection, joint and several liability.
The Netherlands	Automatic	Automatic if it proves the violation.	30–50%, 20–30%, 0–20%.	No criminal liability.	No exclusion at all.	No protection, joint and several liability.
United Kingdom	Automatic	Subject to discretion.	0–50%	Pre-procedure leniency application: full criminal immunity. In other cases: discretionary criminal immunity.	Exclusion applies, no protection for leniency applicants.	No protection, joint and several liability.

The Hungarian leniency regimes is more favorable than the comparators at numerous points.

First, the Hungarian rules make no formal distinction between leniency applications submitted before opening and during the procedure. This clearly benefits leniency applicants. Accordingly, leniency applicants may, as an automatic entitlement, benefit from full immunity, even if they submit the application after the procedure

³⁶ Cf. *OFT* [2009] p. 52.

is launched. On the contrary, in Germany and the United Kingdom, the applicant benefits from a discretionary immunity and it is up to the competition authority to determine the extent of this, although it has the power to grant full immunity.

Second, in case an enterprises benefits from full immunity, this automatically implies immunity from criminal liability and exclusion from public tenders, while, as to claims for damages, its liability has been subsidiary since 1 June 2009. These benefits are rather generous. The highly successful German regime provides no protection against criminal liability and, before the adoption of the Private Enforcement Directive, none of the comparators provided any benefit concerning actions for damages. Likewise, none of the comparators provide any benefit for leniency applicants against exclusion from public tenders.

The above showcase that Hungary's more favorable regulatory regime produces significantly weaker results. This suggests that the Hungarian regime's relative ineffectiveness cannot be explained with regulatory reasons and, hence, its root-causes can be found beyond the law and cannot be eliminated by means of regulatory means, at least not in the short run. Settled social patterns not only create alternative social norms but may also distort how the prisoner's dilemma plays out and reduce the risk that other cartel companies submit a leniency application (*Jaspers* [2020] p. 117). Furthermore, in such an environment, long-term effects in terms of reputation and business relations may outweigh the short-term benefits. Finally, there may be a principal-agent problem, in the context of both competition law compliance and leniency.

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