

Agnieszka Barcik*, Piotr Dziwiński**

Leniency Program as an Innovative Legal Tool for Fighting Cartels within the European Union

1. Introduction

The prohibition of anti-competitive agreements is one of the key competition-oriented regulations in the European Union and attaching importance to its effective enforcement is related to the awareness of the need to protect the economy from the harmful cartel-like agreements. Cartel monopoly appropriating the market is a hidden phenomenon which means it is difficult to detect so its prevention appears to be a much more complicated task than fighting any other anticompetitive practices, including the abuse of a dominant position. It has been attempted in this paper to explain the reasons for establishing the illegal collusions and to answer the question what makes them constitute such a great threat for other participants of economic relations that they are pursued and punished with the whole severity of the law.

The traditional measures aimed at protecting the market and taken by the European Commission and by regional antimonopoly bodies, including the detailed studies of its segments and independent creation of evidentiary materials, are expensive and long-lasting and which is most important they do not give a full guarantee for the cartel to be detected and punished before it stops its activities. Implementation of leniency regulations has made the European Commission possess an innovative legal tool enabling a more effective enforcement of art. 101 of the Treaty on the Functioning of the European Union (TFEU). This program was based on the experience of the states outside Europe (mainly the USA) and assumed the elimination of cartel agreements exploiting the market to be the paramount value. In the consequence the regulations have been introduced

* University of Bielsko-Biala, Faculty of Management and Computer Science

** Andrzej Frycz Modrzewski Krakow University, Faculty of Law and Administration

which foresee the sanctions to be mitigated for the penitent businessmen who have participated in the illegal collusions, but they voluntarily give up the illegal activity and get involved in an effective co-operation with the Commission's services. In the course of time the leniency has become the main weapon at the Commission's disposal for fighting the anticompetitive practices which has made other member states, including Poland, introduce it.

The paper focuses mainly on the analysis of the influence of practical application of leniency institution on the effects of proceedings carried out by the European Commission and by the Polish Office of Competition and Consumer Protection.

Research thesis: the leniency program is a significant legal tool aimed at fighting cartel-type agreements and besides, it plays a role of a preventive measure which effectively discourages the entrepreneurs from illegal collective activities aimed at maximizing profits in a dishonest way. The method which allows to prove the above thesis was the inquiry into the European and Polish literature regarding competition protection law, documents of the European Commission and the Polish Office of Competition and Consumer Protection as well as the European and Polish regulations including the jurisdiction of the Court of Justice of the European Union.

2. Competition rules on the market of the European Union

The single market covering member states constitutes the essential element of the European integration. It enables the integration to be tighter and much faster. It is all the more significant because of its being a regulator of economic processes occurring in the European Union which results from the functioning of a market-oriented economy model. Then, such a type of economy is based on competition in the framework of which all economic subjects situated on the market [1] can compete with one another. It occurs when different entrepreneurs offer similar or identical products to the consumer at the same time and within the same territory. Because of the limited quantity of available resources for each market participant, the consumer can make his own choice among the offers presented to him. These differ from one another in respect of price, quality and other parameters. The measurable effect of the competition between enterprises is price reduction, improvement of product quality and, finally, the optimal allocation of resources [21].

In order to enable the correct functioning of competition, it is necessary to introduce some legal mechanisms aimed at protecting it from violations [4]. When creating the foundation for the European integration it was the priority to avoid substituting the removed trade barriers, including customs duties and

quantitative restrictions introduced by the state, with new ones. They would result from the excessive autonomy of enterprises or from the measures taken by the state. Therefore, it was assumed that the integration would be based on “the system ensuring undisturbed competition on the internal market”, which was mentioned under former art. 3 section 1 letter g of TWE [26]. In view of the jurisdiction of the European Court of Justice stating this regulation to be the directly binding legal norm, there emerged the need to create the basic competition rules [20]. Two main categories of these rules can be distinguished on the internal market, i.e.:

1. The rules aimed at enterprises and preventing them from collective or individual activities which could lead to competition disturbance. They cover preventing excessive concentration, prohibition of dominant position abuse and the prohibition of entering into anticompetitive agreements;
2. The rules aimed directly at member states whose goal is to eliminate the behavior which could lead to the violation of the rule of trading equality on the internal market, which also means a competition disturbance. This group covers the following: prohibition of the aid granted by member states out of their own means (the so called public aid) which is harmful for the market, and the requirement of matching the state of their own commercial monopolies to the market conditions in order to ensure equal chances in the access to supplies and market [1].

2.1. Cartel agreements within the European Union

In 2008 the Commissions services decided to make the valuation of losses suffered by the economy in the consequence of cartel activities. 18 cartels were surveyed which were the object of proceedings in the period 2005–2007, taking the size of objective markets and the time of the existence of cartels into consideration. Prudent assumptions were also made regarding the estimated prices inflated by them ranging from 5 to 15 per cent, which means that the loss caused by the above mentioned cartels ranged from 4 to 11 billion EUR. It has been decided to assume the average value, i.e. 10 per cent which determines the amount of losses borne by consumers to be as much as 7,6 billion EUR. When analyzing the economic literature according to which the prices were inflated by cartels by 20–25 per cent, it can be found that the amount calculated by the Commission’s services is seriously lowered [22]. Consumer losses resulting from cartel activities reach a shocking size like those borne by other enterprises, which can be shown by analyzing particular examples of illegal market agreements cartels broken by the European Commission or competition protection bodies of member states.

LCD cartel participated by six companies acting on the European market, inter alia Samsung and LG Display, was a clear example of cartel collusion which caused losses to consumers and to the companies acting honestly. The companies were regulating the prices of displays mounted in TV sets and telephones in the period from October 2001 up to February 2006 and faced the allegation of the European Commission of acting to the disadvantage of consumers and the fine in total amount of 649 million EUR. The cartel arranged price ranges, minimum prices, and exchanged information on production plans and future prices which was to the disadvantage of the enterprises not participating in the agreement [12].

A specific example of a cartel-type agreement is the resolution taken by the Polish National Notarial Council (a self-governmental body of notaries) in 2002 which introduced the provision into the moral code stating that attracting customers by proposing a lower price constitutes a glaring violation of vocational moral rules. It meant that a notary could not propose a lower price to the customer than the maximum price given in the ministerial decree, and without any disciplinary consequences. It caused the maximum rates to be the only compulsory ones which has totally eliminated the price competition, i.e. the most important one on the market of notary services. The lawmaker has purposely established the upper limit of the price for notary services taking into account the significance of social accessibility to their services. The resolution of the Notarial Council obliging all its members to use the maximum remuneration secured the interest of this group. Because of identical rate it was not important for the customer whose services to use and that situation implies deterioration of service quality comprising competent service, working time of notary public or the location of the notary's office. The resolution has been found to be contrary to competition law [31].

The agreement between the operator of a section of A4 toll road Katowice–Kraków with some selected enterprises was aimed at ensuring them exclusivity for providing road assistance services in particular sections of the highway. The authorized entrepreneurs were appointed by way of an offer of competition based on unclear rules. Arrangements with the traffic police were made whereby it was declared that the operator had concluded agreements with four road assistance companies which would be the only ones to be called to any events occurring on the highway. The consequence of the above agreement is very harmful for drivers (consumers) as the exclusivity-based authorized enterprises establish higher prices for their road assistance services than under normal market conditions. It forces the holders of uninsured cars or those who have a policy but do not want to make use of it, to use the services offered for an inflated price. The second consequence of the similar nature is the increase of insurance policy price which is determined taking into account many factors including road assistance costs [11].

Fighting cartels is in the interest of all market participants and the whole economy, as they lead, in a longer period of time, to a drop of competitiveness and employment reduction [7]. Elimination of illegal collusions belongs to the priorities of the Directorate General for Competition of the European Commission and of national competition protection bodies. However, it is a very difficult task. Detection of a cartel and proving infringement to the entrepreneurs participating in it, is not an easy task, as for obvious reasons the parties to the forbidden agreement try to hide its existence [10].

3. Leniency – origins, scope and assumptions of the program

The first leniency program was introduced by the US Justice Department in 1978. However, it was not very effective and only a small number of reports were received which made it impossible to fight cartels. The old version of the program was modified as late as 1993 by introducing a very important amendment admitting an automatic remission of a penalty for the entrepreneur who is the first to disclose cartel existence and provides information about it. This amendment brought the desired effect whereby a large increase of the received applications was reported (in the period 1993–1999 the number of applications increased by twentyfold as compared to the period of 1978–1993). The attractiveness of the American leniency program was also raised by the fact that the local entrepreneurs knew what penalty reduction they could count on before launching co-operation with the antimonopoly body.

Success of the American antimonopoly body in fighting cartels brought an effect in the form of a great interest of other countries in leniency. Australia, South Korea and Canada decided to copy the American concept as early as in the nineties. In Europe it was the European Commission which initiated it as first in 1996. The first EU leniency program was based on the Commission's Notice on immunity from fines and reduction of fines in cartel cases. These cases were related to the activities which were in conflict with the EU law and covered illegal agreements and practices aimed at reducing the competition within the internal market [7]. The above act ceased to be binding six years later when it was substituted with the new Notice in 2002 [14]. The presently functioning leniency program for penitent participants of cartel collusion is based on the Notice of 2006 [13]. Program efficiency expressed by the data received from the European Commission and the USA and other countries made Germany and the United Kingdom decide to implement leniency oriented regulations into their legal systems in 2000. Later the group the countries using the program was joined by France, Ireland, Sweden, the Netherlands, Czech Republic, Slovakia, Hungary, Lithuania,

Cyprus and Poland. Legal regulations on which the functioning of leniency is based in particular countries are contained in the detailed notices or directives issued by competent bodies which have been based on the laws on competition protection or fall within the scope thereof [7]. However, they are systematically matched to the model leniency program approved by the Commission and by national antimonopoly bodies of member states.

Even though the program was successful in the United States the European Commission developed a different policy. The most important differences between the US and the European Union program are as follows (Table 1):

Table 1
Key differences between US and EU Leniency program

United States	European Union
the first company which reports gets 100% amnesty	The first company gets only a partial amnesty
fine reduction does not depend on the evidence provided	fine reduction strictly depends on the evidence provided.
the second company which reports gets no reduction at all	fine reduction is also intended for other self reporting companies.
individual leniency is possible	no individual leniency for managers or other employees is possible
leniency applications to the Antitrust Division are privileged under the US law	the European Commission may disclose the evidence to national court of any member state
full immunity can also be granted if the case is already under investigation	maximum fine reduction of 50% is granted if the case is already under investigation
granting immunity from fines is automatic	granting immunity from fines is dependent on the value of submitted information

Source: [3, 27]

The objective scope of the European Commission's leniency program covers the agreements determined under art. 101 TFEU [25]; in Poland it is regulated by art. 6 section 1 of the Law on the Protection of Competition and Consumers. The subjects authorized to enjoy the benefits offered within leniency are the participants of a cartel agreement, however, the fine reduction depends on meeting numerous conditions which will be described below in this section.

The anti-cartel program assumes an increase of entrepreneurs' awareness of the risk related to participation in a cartel. Due to its introduction there is no collusion, even the best organized and carefully concealed one, to give a full guaran-

tee of impunity. The essence of the whole undertaking is to encourage informing against other partners in order to avoid fines, so it can be said that the assumptions of leniency are similar to those of another institution functioning within the law, i.e. the institution of crown witness which used to face distrust but today it has become an important tool for fighting the organized crimes. Another similarity between the above mentioned legal measures is constituted by the fact that both cartel collusion and an organized criminal group are difficult to be broken up in another way than by hitting its unity and solidarity. Moreover, the leniency program was intended to trigger rivalry among collusion participants in submitting applications. It is fastness and efficiency that matters as only the first entrepreneur may count on full fine remission. Practice shows the matters to happen where each day and hour of delay in submitting application with antimonopoly body, is decisive. The entrepreneur who joins the program later may only count on a partial reduction of the fine, although it also seems attractive in the light of loss of 10 per cent of the annual revenues [9].

4. Leniency program in the light of European Commission Notice of 2006

The Notice of the European Commission which has been in force since 2006 determines the framework of rewarding the co-operation of cartel participants (entrepreneurs participating in the agreement prohibited by virtue of art. 101 TFEU), who, due to their activity, exerted an influence on the functioning of the internal market. According to its provision it is in the interest of all the citizens of the European Union to reward any initiative aimed at a voluntary withdrawal from a cartel. Moreover, the Commission finds the co-operation of an enterprise in respect of detecting the existence of a collusion to be very valuable. Its contribution to the initiation of legal proceedings or to the establishing of a violation may be a factor which justifies the immunity from any fines, provided that certain complementary requirements are met. It should be stressed that immunity from fines may cover only one subject. Co-operation of one or several enterprises can be regarded as the justification for the reduction of a fine. Any fine reduction is directly proportional to the real contribution of a subject covering the time of co-operation and its quality for the Commission in respect of establishing the existence of a cartel. Reduction of a fine may be offered to those enterprises which provided the evidence complementary to the materials already possessed and, at the same time, increasing their value as a whole. However, it should be noticed that both immunity from and reduction of the fine resulting from the participation in leniency program do not protect the enterprise from civil sanctions related to the violation of the competition law.

According to the Notice an enterprise can provide the Commission with the already existing documents and a free description of its knowledge of the cartel and its participation therein. Such a description is prepared and submitted in the framework of the leniency program. According to the Commission such solutions have proved useful from the point of view of proceedings efficiency and elimination of cartels. The possibility of submitting voluntary explanations should not be substituted with order of disclosing the information which is issued in civil legal actions. Such a status could effectively discourage enterprises from co-operating with the Commission within the framework of the Notice, as the potential program participants would regard their situation in the civil legal proceedings to be worse than that of other enterprises which were not prone for co-operation. The eventual consequence of introducing the order would affect the widely understood public interest which assumes the efficient enforcement of art. 101 TFEU by public authorities in the matters concerning cartel-type agreements which in turn is connected with the inefficient enforcement of these regulations in the framework of private actions. Testimonies given before the Commission are subject to strict protection but it does not mean that the prohibition of disclosing them to the addressees of reported charges in order to ensure their right of defense. The entrepreneurs may view the files of a given case in the Commission's headquarters upon submitting their objections. Moreover, the declaration given by enterprises are transmitted to the public bodies for competition protection in the framework of co-operation within the European Competition Network which tackles the matters of cartels acting in the area of their domestic markets. The Commission tackles those collusions which are functioning in at least three member states [6].

The issued notice determining the rules of the leniency program application and participation describes precisely the requirements qualifying for two categories of sanction mitigation which are functioning within the program. The first of the categories which foresees the possibility of making maximum use of the benefits offered within the leniency program resulting in the immunity from the fine, has been regulated under section II A of the Notice. As already mentioned, the basic condition for the fine to be remitted is the informant's priority in transmitting the evidence of the existence of a cartel influencing the EU internal market; additionally, this evidence must be important enough to enable specific inspection to be carried out at the enterprises in connection with the alleged cartel activity, or to enable the violation of treaty regulations to be detected. In order to carry out an inspection by virtue of the law, the co-operating entrepreneur must provide the Commission with the information and evidence materials which cover the following:

- The entrepreneur's statement containing the following information, if known to the entrepreneur when submitting the application:

1. A precise description of a cartel's alleged practices covering its goals, activities and way of functioning, the products or services covered by the cartel, its geographical scope, duration of the cartel and the estimated size of the market influenced by the alleged agreement, the detailed information on the dates and participants of contacts regarding the cartel and, additionally, any explanations in the framework of evidence of any items of importance attached to the application;
 2. Name and address of the legal entity applying for the immunity from the fine and the names and addresses of all the entrepreneurs who belong or have belonged to the alleged collusion;
 3. Personal data, functions, business or home addresses of natural persons (if necessary) who, according to the applicant's knowledge participated in the alleged cartel, including the persons on the side of the applicant;
 4. Information related to the alleged cartel on the basis of which the entrepreneur has addressed or intends to address other antimonopoly bodies in or outside the European Union;
- Other evidence materials related to the alleged collusion which are in direct possession of the applying entrepreneur or are available to him at the moment of submitting the application; they cover especially the evidence from the period when particular events occurred.

Providing the materials enabling a control of participants of the alleged cartel or detection of the violation of the Treaty of the Functioning of the European Union does not give a full guarantee of avoidance of the fine. According to the Commission's decision immunity from the fine shall not be applied towards the applicant who disclosed the evidence authorizing for an inspection, if on the date of his application for leniency program participation the Commission was entitled to carry out such an inspection in the light of the evidence which had already been in its possession or such an inspection had already been carried out. Moreover, the immunity from the fine shall be applied when three following conditions are jointly met:

- On the date of application the Commission did not have sufficient evidence materials to establish the violation of art. 101 TFEU;
- No other entrepreneur has been offered the conditional immunity from the fines, i.e. no other subject has been covered by the leniency program on the grounds of the evidence transmitted to the Commission before the proceedings in the same case is launched [7].
- The entrepreneur has provided the charging materials and was the first to submit the declaration to the Commission.

Apart from meeting all the above conditions, according to the Commission's requirements, the enterprise should definitely obey the additional directives

regarding the co-operation in explaining the cartel affair. In order to be qualified for immunity from the fine it must co-operate in a truthful, complete and continuous way beginning from the moment of submitting the application and within the framework of the procedure carried out by the Commission. The enterprise is obliged to give precise not misleading and incomplete information. According to the jurisdiction of the Court of Justice the reduction of fine on the basis of a communication regarding the co-operation is justified only if the behavior of the enterprise could be the evidence of its real will of co-operation [30]. According to the above said it should include the following:

- Transmitting any important information and evidence available for the enterprise related to the alleged cartel to the Commission,
- Remaining at the Commission's disposal in order to give answer to any questions asked by the Commission,
- Enabling the Commission to question its current or former employees of any rank,
- Disclosing the full content of any available evidence items,
- Concealing the fact of submitting the application and its content up to the moment of issue of the Commission's allegations in writing; additionally even the intention of submitting the application must be kept secret.

What is more, the entrepreneur is obliged to withdraw from the cartel on the date of launching the co-operation at the latest, unless the Commission's decision states otherwise, finding it undesirable in the light of an efficient inspection at the alleged cartel participants. The last condition of the remission of the fine is the lack of the status of a cartel initiator. It means that the entrepreneur who submits the application could not be a subject inclining other to enter into the cartel collusion [7]. Otherwise, he is only entitled to apply for a reduction of the fine.

5. Leniency program in the practice of the Office for the Protection of Competition and Consumers

The leniency program functions within the Polish legal system on the basis of the following acts:

- Law of 16 February 2007 on the protection of competition and consumers [28];
- Decree of the Council of Ministers [19];

and other related documents:

- Explanatory Notes concerning the determination of fines for competition reducing practices [29];

- Guidelines of the President of the Office for the Protection of Competition and Consumers regarding the leniency program [6].

The program is regulated by art. 109 section 1 and 2 of the Law on the Protection of Competition and Consumers. The Polish version of the leniency program was modeled after penalty mitigation programs which are functioning within the European legal systems, especially the regulations applied by the European Commission. The regulations related to the application of the leniency procedure by the Office for the Protection of Competition and Consumers cover numerous analogies as compared to the regulations contained in the above analyzed Commission's Notice.

On the basis of art. 109 of the Law, the Council of Ministers has issued a decree which is an executive act to the provisions of the Law. It defines the procedure in case an entrepreneur applies for participation in the program. Its provisions also specify the procedural requirements concerning the submission and consideration of applications and the methods of notifying the entrepreneurs of the standpoint of the President of the Office for the Protection of Competition and Consumers (UOKiK). The detailed determination of the conditions of leniency program is to guarantee the possibility of carrying out the detailed analysis and a fair assessment of meeting the requirements by the subjects involved to be covered by penalty mitigation program [7]. What is more, the regulations added to the above mentioned decree by way of the amendment thereto of 2009 enable the entrepreneurs to submit shortened applications [16]. In order to increase transparency of the regulations contained in the Law and the Decree, the President of the Office for the Protection of Competition and Consumers issued guidelines regarding leniency which constitute a practical manual for the entrepreneurs who want to participate in the program; however, they do not have legal status.

According to art. 109 of the Law [28], two forms are admitted for the lenient treatment of entrepreneurs by the President of the Office for the Protection of Competition and Consumers, i.e.:

- immunity from the fine;
- reduction of the fine.

Remission or reduction of the fine can be applied for by the entrepreneur who participated in an agreement covered by the catalogue of prohibited agreements according to art.6 of the Law on the protection of competition and consumers. As in the Commission's program total remission of the fine can be enjoyed by one single subject which is the first to submit the application and to meet additional conditions, while the reduction may be granted in the case of a larger

number of entrepreneurs. Reduction of the fine shall be granted in the following amounts:

- the second applicant to submit the application – reduction of the fine up to 5 per cent of the annual revenues;
- the third applicant to submit the application – reduction of the fine up to 7 per cent of the annual revenues;
- the remaining applicants – reduction of the fine up to 8 per cent of the annual revenues;

6. Results of the leniency program

According to more than ten years experience of the Commission in applying the penalty mitigation program has shown it to be an efficient tool for fighting cartels. In the course of time the number of entrepreneurs applying for leniency has successively been increasing which was undoubtedly the effect of subsequent amendments introduced into the regulations, aimed at increasing the efficiency of this institution.

In the period 1998–2001 above 80 entrepreneurs accessed the program by virtue of the notice of 1996. In the same period the Commission made reference to the above mentioned notice in 16 out of 18 decisions in cartel-related cases. In 2003 the Commission issued 4 decision based on the information provided within the leniency program, imposing fines for participants of the detected cartels exceeding 100 million EUR. The activities of these cartels covered the whole EU market for a significant period of time; it was even 28 years in one case. The entrepreneurs who informed about their existence have really deserved the remission or reduction of their fines.

The amendment to the notice of 2002 aimed at modernizing the program was very successful. Due to its introduction the Commission managed to raise the trust of entrepreneurs towards the leniency institution. Above 20 company representatives were registered by the Commission's contact points during the very first year of the new regulation being in force. Conditional waiver of imposing a fine was applied in more than ten cases, while in the period 1996–2002 it was the case three times only [32]. In the course of time the leniency procedure was becoming more and more efficient which allowed the co-operating entrepreneurs to avoid fines amounting to millions or, sometimes, even hundreds of millions euro [3]. This tendency has been kept up-to-date enabling market collusions to be eliminated and the budget of the European Union to be fed with billions of euro from the fines imposed on their participants.

The potential of leniency can be best illustrated by analyzing the statistics of the European Commission regarding cartels [5]. The total amounts of fines imposed on entrepreneurs and the number of decisions in cartel cases in particular periods of time, have been presented below (Tables 2 and 3):

Table 2
Fines imposed by European Commission

Period	Amount in Euro
1995–1999	270 963 500.00
2000–2004	3 157 348 710.00
2005–2009	8 456 838 162.50
2010–2012	3 883 258 432.00
Total	16 112 691 354.50

Source: [3]

Table 3
Number of decisions

Period	Undertakings
1995–1999	45
2000–2004	157
2005 -2009	203
2010–2012	112
Total	702

Source: [3]

It should be stressed that not all the cartels covered by the above statistics were detected and fined due to leniency applications. The Commission managed to eliminate some of them due to precise market studies and the effective work of its services which were collecting the evidence materials by themselves. However, it can be easily seen that the rising tendency has been kept in respect of the amounts of fines and number of decisions since the program was launched. The amendments to the leniency regulations of 2002 and 2006 and the aggravation of the antimonopoly policy have implied a further increase of revenues for the EU budget from the fines whose total amount increased by eleven fold in the period 2000–2004 (as compared to the period 1995–1999), and then it tripled within the period of 2005–2009. The fines imposed in 2010 only, reach the level

of nearly 30 per cent of the fines imposed within the preceding five years. The rising trend can be expected to be kept during next few years.

The list of ten cartels which have been fined most severely by the Commission in the history can be regarded as the interpretation of the program efficiency (Table 4):

Table 4

Cartels fined most severely by European Commission, <http://ec.europa.eu/competition>

Year	Case	Amount in Euro
2008	CAR GLASS – cartel of car glass manufacturers	1.383.896.000
2007	ELEVATORS AND ESCALATORS – cartel elevator & escalator manufacturers	832.422.250
2010	AIRFREIGHT – cartel created by air lines	799.445.000
2001	VITAMINS – cartel of vitamin manufacturers	790.515.000
2008	CANDLE WAXES – cartel paraffin manufacturers	676.011.400
2010	LCD – cartel LCD panel manufacturers	648.925.000
2009	GAS – German-French gas cartel	640.000.000
2010	BATHROOM FITTINGS – cartel of bathroom fittings manufacturers	622.250.782
2007	GAS INSULATED SWITCHGEAR – cartel of gas insulated switchgear manufacturers	539.185.000
2006	SYNTHETIC RUBBER – cartel of synthetic rubber manufacturers	520.000.000

Source: [3]

It results from the open-access information disclosed by the Commission that the „active regret” institution has contributed to breaking up 9 of 10 above agreements (gas cartel was the only exception). Leniency applications brought to contact points revealed the activity of a cartel which had been unknown before, or they shortened proceedings duration when the Commission collected sufficient evidence for launching an inspection or explanatory proceedings, by itself. An analysis of the proceedings carried out and the decisions issued by the Commission with regard to several of the above mentioned cartels prove the efficiency of this institution and fully reflect its significance for the proper functioning of the EU internal market.

The origin of the Polish leniency program was not promising for that institution. New regulations of 2004 were supposed to bring revolutionary changes as

far as cartel fighting is concerned; unfortunately it did not happen immediately after their introduction. In the period 2004–2006 the President of the Office for the Protection of Competition and Consumers issued 53 decisions regarding the anticompetitive agreements none of which however was supported by evidence materials collected within the leniency program. The Polish program did not live up to expectations, contrary to the system of sanction mitigation of the European Commission whose success was spectacular. It is a meaningful fact that during the first two years the Office received applications for the remission or reduction of fines from four entrepreneurs. Moreover, the materials they provided did not contribute to any fine to be imposed on any enterprise. According to former President of Antimonopoly Office, prof. Anna Fornalczyk, such a state of things was caused by several factors such as reluctance towards any payable denunciations, low fines for cartel activities and inefficiency of the Office for the Protection of Competition and Consumers. In general opinion of the specialists the main reason of the failure were the gaps in the law. Any benefits offered to an entrepreneur depended on the good will of the officials which made him uncertain of the benefits to be enjoyed after acceding to leniency program. According to many experts, another reason of a low number of program participants was a poor general knowledge of Polish entrepreneurs and a short time of binding force of the law [5]. However, in the course of time these circumstances have changed.

Next years brought a greater interest in the institution of penalty mitigation. In 2007 the Office received 7 applications and 5 applications in 2008. Another step ahead were the leniency regulations which came in force at the beginning of 2009 in the form of a governmental decree, and the guidelines issued by the President of the Office constituting a kind of manual for entrepreneurs, which were worked out for one year (2008) [23]. They have introduced some significant simplifications and caused an increase of the number of the received applications [17, 8]. A promotion campaign was also carried out. According to the data as for 11 January 2011 the contact points received in total 43 entrepreneurs 15 of whom submitted the shortened applications as they had already notified the European Commission before (they acted in a cartel covering at least three member states) [18].

The “Cement cartel” was the best known example of collusion the Office managed to break up using the institution of leniency [2]. Simultaneously, it was the largest anticompetitive agreement detected in the twenty year history of the Polish antimonopoly body. It was formed by the following enterprises: Lafarge Cement, Górażdże Cement, Grupa Ożarów, Cemex Polska, Dyckerhoff Polska, Cementownia Warta and Cementownia Odra, whose total market shares amounted to nearly 100 per cent. Seven of the above mentioned companies divided the market among themselves for a period of 11 years, establishing the among of shares for

each of the cartel participants. Minimum prices, amounts of price surges as well as the dates and order of their introduction. In order to coordinate their activities confidential trade information was exchanged concerning inter alia the volume of production and sales [24]. As a result of the cartel activities the prices were kept at an inflated level ranging from 4 to 13 per cent per annum at Polskie Składy Budowlane company [32].

A further development of the leniency program aimed at improving its results belongs to the most important priorities of the Office planned for the period 2011–2013. It is the explicit evidence that the correct functioning of this institution is in the interest of the Office and of the Polish market. In order to ensure it, it is necessary to match a number of elements to one another which constitute the basis of the program and influence its results. These elements are especially the conditions and amount of reduction of the fine in view of the entrepreneur's co-operation with the Office. In light of the above-said the Office has found it desirable to analyze the experience gained up to the present concerning the application of leniency institution in the context of its legal construction, and, if necessary, to prepare its appropriate modification [15].

7. Summary

Fighting cartels is one of the most difficult tasks for antimonopoly bodies. Fifteen years of applying leniency program within the European Union has made this process easier, cheaper and faster. Statistics univocally show the number of the detected and broken anticompetitive agreements to grow. Thus, the “active regret” institution is the undertaking which has brought and will bring great successes. However, keeping a high level of its results will depend on matching the regulations comprised by it to the changing market conditions which may make it necessary to introduce a modification of its legal construction.

Leniency is a tool which enables both detection of a violation which has been unknown so far and fast completion of proceedings with a high probability of giving the correct jurisdiction. It is possible due to the domino effect frequently occurring in the program where one entrepreneur's anonymous denunciation makes the remaining partners submit applications hastily which contributes to the collection of a rich evidence material concerning the matter and to imposing the fines which are adequate to the grade of violation. Implementation of leniency regulations on the grounds of Polish competition related policy will only bring the desirable effect when the entrepreneurs are guaranteed the legal certainty which is expressed by the transparency of the regulations, procedures and a strictly determined percentage of reduction of the imposed fine.

References

- [1] Barcz J., Kawecka-Wyrzykowska E., Michałowska-Gorywoda K., *Integracja europejska*, Wydawnictwo Wolters Kluwer, Warszawa 2007.
- [2] *Decyzja z dnia 8 grudnia 2009 w sprawie uznania za praktykę ograniczającą konkurencję niedozwolonego porozumienia zawartego pomiędzy Lafarge Cement S.A. w Małogoszczy i innych przedsiębiorców (nr DOK-7/2009)*, Dz. Urz. UOKiK z dnia 31.03.2010 r., nr 1.
- [3] European Commission – Competition, *Cartels statistics*, <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (28.03.2012).
- [4] Justyński J., *Podstawy prawne polityk gospodarczych Unii Europejskiej*, Wydawnictwo TNOiK, Toruń 2001.
- [5] Kruczek M., *Świadek koronny zawodzi w polskim biznesie*, “Rzeczpospolita” nr 3920 z dnia 21 sierpnia 2006 r.
- [6] *Leniency – program łagodzenia kar*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2009.
- [7] *Leniency*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2004.
- [8] LEX a Wolters Kluwer business, Polski Serwer Prawa, *Leniency – sposób na uniknięcie kary za zakazane porozumienie*, <http://lex.pl/?cmd=artykul,2281> (20.04.2012).
- [9] LEX a Wolters Kluwer business, Polski Serwer Prawa, *Firmy opowiedzą o zmowie by uniknąć milionowych kar za naruszenie konkurencji*, <http://lex.pl/?cmd=artykul,7339> (05.03.2012).
- [10] Modzelewska De Raad M., *Bardzo srogie kary*, “Rzeczpospolita” nr 3354 z dnia 12 października 2004 r.
- [11] *Niedozwolone porozumienia zawierane przez przedsiębiorców – skutki dla konsumentów*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2007.
- [12] NVISION.pl, *Komisja Europejska wyznacza 649 milionów kary dla kartelu producentów LCD*, <http://nvision.pl/Komisja-Europejska-wyznacza-649-milionow-kary-dla-kartelu-producentow-LCD--News-18537-ndetails.html>, (20.04.2012).
- [13] *Obwieszczenie Komisji w sprawie darowania i obniżania kar pieniężnych w sprawach kartelowych*, Dz. Urz. WE z 13 lutego 2002r., C 45.
- [14] *Obwieszczenie Komisji w sprawie zwalniania z grzywien i zmniejszania grzywien w sprawach kartelowych*, Dz. Urz. UE z 8 grudnia 2006 r., C 298.
- [15] *Polityka konkurencji na lata 2011–2013*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2011 r.
- [16] *Program leniency – zmiany przepisów*, eGospodarka.pl, Poradnik Internetu dla Twojej Firmy, <http://www.egospodarka.pl/37813,Program-leniency-zmiany-przepisow,1,11,1.html>, (20.04.2012).

- [17] Roszak M., *Niższe kary dla karteli*, "Dziennik – Gazeta Prawna" nr 48 z dnia 10 marca 2009 r.
- [18] Roszak M., *Przedsiębiorca, który zawiadomi UOKiK o zмовie cenowej, może uniknąć kary*, "Dziennik – Gazeta Prawna" nr 6 z dnia 11 stycznia 2011 r.
- [19] *Rozporządzenie z dnia 26 stycznia 2009r. w sprawie trybu postępowania w przypadku wystąpienia przedsiębiorców do Urzędu Ochrony Konkurencji i Konsumentów o odstąpienie od wymierzania kary pieniężnej lub jej obniżenie*, Dz. U. Z 2009 r. Nr 20, Poz. 109.
- [20] Skoczny T., *Podstawy i zakres wspólnotowego prawa konkurencji*, in: *Prawo Unii Europejskiej, prawo materialne i polityki*, praca zbiorowa pod red. J. Barcza, Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa 2003.
- [21] Skubisz R., Skrzydło-Tefelska E., *Prawo europejskie – zarys wykładu*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, Lublin 2003.
- [22] *Sprawozdanie Komisji dotyczące polityki konkurencji za rok 2008 z dnia 23 lipca 2009 r.* (COM (2009) 374 wersja ostateczna).
- [23] *Sprawozdanie z działalności 2008*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2009.
- [24] *Sprawozdanie z działalności 2009*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2010.
- [25] Traktat o funkcjonowaniu Unii Europejskiej, Dz. Urz. C 115 z 9 maja 2008.
- [26] *Traktat ustanawiający Wspólnotę Europejską (wersja skonsolidowana)*, Dz. Urz. C 340 z 10 listopada 1997 r.
- [27] US Department of Justice, www.justice.gov.
- [28] Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, Dz. U. z 2007 r. Nr 50, poz. 331, ze zm.
- [29] *Wyjaśnienia w sprawie ustalania wysokości kar pieniężnych za stosowanie praktyk ograniczających konkurencję*, Dz. Urz. UOKiK nr 4 z dnia 29 grudnia 2008 r.
- [30] *Wyrok Sądu Ochrony Konkurencji i Konsumentów z 22 grudnia 2004 r.*, XVII Ama 50/04, Dz. Urz. Urzędu Ochrony Konkurencji i Konsumentów nr 1/2005.
- [31] *Wyrok Europejskiego Trybunału Sprawiedliwości z dnia 29 czerwca 2006 w sprawie C-301/04 Komisja przeciwko SGL Carbon AG, pkt 68*, Dz.U. C 224 z dnia 16.09.2006.
- [32] *Zmowa cementowa*, portal internetowy tygodnika Polityka, <http://www.polityka.pl/rynek/gospodarka/1504828,1,zmowa-cenowa-polskich-cementowni.read>, (28.03.2012).