Research Article

Leniency policy in competition law: Legal issues and socio-cultural implications in Albania

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Abstract

Leniency policy is an essential instrument of public enforcement of competition law, which promotes the detection of economic cartels through cooperation with the offenders, who serve as whistle-blowers. This study analyses the effectiveness and challenges of this policy in the European Union (EU) and Albania. Leniency policy has been one of the main reasons for the success in detecting cartels in the EU. On the other hand, although Albania has approximated the rules on leniency with those of the EU, leniency policy has not been successful. This article focuses on exploring the reasons for this phenomenon. The methodology used to answer the research question combines desk-review of EU legislation, Albanian legislation on competition and leniency, as well as the doctrine regarding the effectiveness of this policy. Another methodology used to address the research question is the comparative one between the reasons for the success of the leniency policy in the EU and the lack of success of the same policy in Albania. This study elaborates three key recommendations to improve Albanian leniency policy: improving the legal certainty and confidentiality of this policy, criminalizing cartels, and improving public awareness.

Keywords: leniency, competition law, legal factors, socio-cultural factors, public policy, awareness.

1. Introduction

The leniency policy has been one of the most successful instruments for the public enforcement of the European Union (EU) competition law. The leniency programmes give reduced fines to firms revealing information to the Antitrust Authority (Polo and Motta, 1999). This scheme helps authorities to uncover secret cartels and creates a deterrent effect on the formation of new cartels (European Commission, 2024). The European Commission emphasizes that the first entity to provide sufficient evidence receives full immunity, while the others receive a significant reduction in the fine (European Commission, 2024).

As a candidate country to access the EU, Albania has approximated *inter alia* competition rules by establishing a leniency programme in Article 77 of the Law 'On the Protection of Competition' (LPC). Subsequently, the Albanian Competition Authority (ACA) has adopted specific regulations for this policy. Although the leniency program in Albania was introduced in 2003, with the adoption of the current Law 'On the Protection of Competition' and elaborated further by the ACA's Regulation on Fines and Leniency in 2009, the CA has not received any applications under this program yet. The lack of practical implementation of leniency policy in Albania is considered one of the most important challenges for the effectiveness of the fight against cartels (UNCTAD, 2015). This issue creates a significant gap between the legal obligation on paper and the implications in practice. The main legal and cultural factors that hinder the effective implementation of the leniency policy in Albania are numerous.

This article argues that one of the legal factors contributing to the failure of the leniency policy in Albania is the lack of legal certainty regarding the procedure of immunity from fines. The issues of transparency in terms of the management of confidential information of the immunity recipients discourages cartels from reporting to the authorities. In addition, serious competition violations in Albania are not prosecuted criminally, but are considered administrative offenses, and are punished only with fines.

One of the socio-cultural reasons for the lack of success of this policy, according to this study, is the prevalence of a 'culture of silence' among business leaders and a lack of trust in the authorities. This problem is also linked to the lack of awareness of the negative effects of anti-competitive actions on the final consumer, as well as the rights and obligations of businesses in terms of competition.

The following article will examine in detail the legal and cultural-social factors that hinder the implementation of the leniency policy in Albania, comparing them with the European experience, with the aim of identifying the reasons for the problems of the leniency policy in Albania, and reaching recommendations for solutions.

2. Analysis

2.1 Leniency Policy for Competition Violations: The Example of the EU and Albania

The leniency policy represents a key instrument of public competition law enforcement and is employed across various jurisdictions worldwide to facilitate the detection of serious infringements, such as cartel arrangements. This policy in the EU consists of removing or reducing the fine for those members of a cartel who disclose the existence of the cartel to public authorities, and cooperate with these authorities by providing new information (European Commission, 2024). Within the EU, the policy is administered by the European Commission, whereas in Albania, its implementation falls under the jurisdiction of the Competition Authority. In Albanian legislation, the leniency policy is governed by the Law on the Protection of Competition, which provides that an undertaking, involved with others in a prohibited agreement, may be granted full or partial leniency from fines, if it assists in the detection and prohibition of the prohibited agreement, as well as in the determination of the persons responsible, by providing data previously unavailable to the Authority (Albanian Law on Protection of Competition, Article 77).

Usually, full immunity from fines is granted to the first cartel member to report the infringement to the authorities, and partial reduction of the fine to all other cartel members who, although not the first reporters, cooperate with the authorities by providing them with new information. As regards the Commission's power to reduce fines under the leniency programme, it is justified where the cooperation of the undertaking makes it easier for the Commission to carry out its task of finding an infringement (ECJ, 2013). Full immunity from fines can only be granted in strictly exceptional situations, such as where the cooperation of an undertaking has been decisive in the detection and punishment of the cartel (ECJ, 2013). The success of the leniency policy is based on *encouraging* cartel members to 'compete' with each other towards cooperation with the competition authority, with the aim of granting immunity from fines. Cartels that cooperate with public authorities are called '*applicants'* in EU terminology, since by cooperating, they have applied to legitimize their immunity, i.e., the reduction of fines against them. To this end, these cartels sign a 'leniency declaration' before cooperating with the authorities, in order to apply for immunity from fines. If the applicant meets the conditions of the leniency policy, he may be granted *full or partial immunity* from fines.

The leniency policy in the EU is regulated by the Notice on Immunity from Fines (European Commission, 2006). This notice has been amended three times in just 10 years (European Commission, 2006), which is an indication of the fragility of the balances that this policy must maintain in order to function properly.

First, the leniency programme introduced by the Commission Notice in 1996 (European Commission, 1996) was featured by a considerable lack of transparency for immunity applicants. This Notice required applicants to provide *decisive evidence* of the existence of the cartel (European Commission, 1996). Applicants were informed of the outcome of their application at the end of the procedure. Furthermore, the Notice did not guarantee the possibility of full immunity (European Commission, 1996). In such a situation, being unable to predict the outcome of their application, and even not knowing whether they would be granted immunity until the adoption of the Commission's final decision, cartel members were not encouraged to initiate the self-incrimination procedure envisaged by the leniency policy.

A new Commission Notice on Immunity was adopted in 2002, with the aim of addressing the problems of the 1996 Notice (European Commission, 2002). In its introductory part, the 2002 Notice stressed the need for "increased transparency and certainty of the conditions under which a reduction of a fine is decided" (European Commission, 2002). The 2002 Notice offered potential applicants the opportunity to submit evidence in a hypothetical form. For the first time, this Notice granted full immunity to *the first cartel member* to submit evidence and cooperate with the authorities (Jones & Sufrin, 2014). Another innovation brought about by this Notice was that the applicant would be informed whether or not they would be found to qualify for "full immunity" (European Commission, 2002). This strategy would allow companies to anonymously check whether they qualified for immunity from the leniency policy (Arbault & Piero, 2002). Although some of the problems of the 1996 Notice were addressed by the 2002 Notice, the level of predictability of the results of applications for immunity from fines remained insufficient.

The third important amendment to the Commission's Immunity Notice took place in 2006. This notice constitutes a 'soft law' in EU legislation. Unlike decisions, directives and regulations, Commission Notices are not binding legal instruments. However, they can have a major weight in the Commission's decision-making. This 'soft law' is considered a form of 'interpretation' to the formal law. For this reason, the Commission *is expected* to act in accordance with it. The authorities are obliged to respect their interpretations and if they were to apply a different interpretation without proper justification for doing so, ...this would affect the legal certainty of undertakings, thus rendering the administrative action potentially invalid (Carames, 2021).

There have been no major changes to the leniency policy since the 2006 notice, which indicates a certain level of progress and effectiveness. However, the latest version of the notice has undergone two minor changes. The first replaced *point 34* of the notice, concerning the use of information obtained through access to a file and fines imposed in certain circumstances, and *point 35a,* concerning the Commission's right not to disclose leniency statements before the courts in damages cases (European Commission, 2015). The second innovation was the inclusion of individual whistle-blowers, announced in March 2017, as part of the changes brought about by the ECN+ Directive (European Union, 2017). However, the leniency notice still faces criticism for the degree of predictability it offers potential applicants for immunity from fines, which may discourage them from applying.

2.2 Leniency policy in Albania: Legal inadequacy or lack of awareness?

While the leniency policy has been the EU Commission's main weapon against cartels and the essence of the success of public enforcement of EU competition law, no case of application for immunity from fines has been registered so far in Albania, according to information obtained from the official website of the Competition Commission. This stark contrast between the success of this policy in the EU and its lethargy in Albania may be related to more than one reason, as will be discussed below.

- *Legal issues*

The leniency policy in Albanian legislation is regulated by Law No. No. 9121, dated 28.7.2003 'On the Protection of Competition' (LPC) and is detailed further by the Competition Authority's Regulation 'On fines and their leniency'. Article 77 of the LPC provides for the possibility of leniency of fines for undertakings that have participated in prohibited agreements, if they cooperate with the CA in detecting and stopping the infringement and identifying those responsible. The Commission may advise applicants for leniency and, in a final decision, apply a reduction of fines in proportion to the level of cooperation.

Despite the transposition of the Commission Notice on Immunity from Fines into the Albanian legislation in 2009, the leniency policy in Albania has faced a number of legal challenges. The European Commission Notice "On Immunity from Fines" (2006) has been transposed together with the Commission's Guideline on the Imposition of Fines into a single instrument in Albania: The Regulation 'on Fines and their Leniency'. Transposing the two instruments (a 'technical' guideline and a 'principle-based' notice) into a single act in Albania does not contribute to increasing predictability and legal certainty for potential applicants for immunity from fines.

Furthermore, the transposition of the Notice on Immunity from Fines does not include the amendments to this Notice of 2015. These amendments are of primary importance for the success of the leniency policy. This issue is also highlighted by the Screening Report for Albania for Cluster II, which highlights that the country has not aligned the 2015 amendments to the above-mentioned Commission Notice (European Commission, 2024). The 2015 amendments to the Notice on Immunity from Fines reinforced the protection of sensitive information during legal proceedings concerning infringements of competition rules. The amended point 34 of this Notice states that access to the Commission file is limited only to the parties involved in the investigation, and any misuse of the information obtained may result in penalties, both legal and administrative (European Commission, 2015). Point 35a, added after point 35, clarifies that the Commission will not share leniency statements with national courts for use in damages actions relating to Articles 101 and 102 of the Treaty (European Commission, 2015). The 2015 amendments aimed to protect the leniency policy from the possibility that confidential and self-incriminating information provided by cartel members applying for immunity could be used by third parties to claim damages in civil proceedings. Such a situation would prevent any cartel member from applying for immunity, knowing that anything self-incriminating that they would declare, would be used by third parties to claim damages. For this reason, the 2015 amendments are essential for the success of the leniency policy.

The Regulation of the Competition Authority of Albania 'On Fines and Leniency' provides for the leniency policy in its Chapter III, regulating full and partial leniency from fines and the relevant procedures (Competition Authority, 2009). However, this regulation does not state anything about the confidentiality of information provided under the leniency policy. This fact increases the unpredictability for cartel members, who, without having the guarantee of confidentiality towards third parties, are discouraged from applying for immunity from fines. In fact, the confidentiality of information disclosed during the leniency application is protected by the Competition Authority's Guidelines on Damages in its Article 6(4). However, two problems arise in this context: first, the lack of mention of the confidentiality obligation in the Regulation on fines and leniency significantly increases the level of unpredictability and legal certainty, discouraging cartels from applying. Second, since the Damages Directive containing the confidentiality obligation has been transposed in the form of an ACA's Guideline in Albania (the Guideline on Damages' - mentioned above), it has no genuine normative force. For this reason, cartels in Albania are not faced with conditions of optimal predictability to sign a self-incriminating statement with the CA, in exchange for full or partial immunity from fines.

Also, many EU member states, such as Germany, France, Croatia, etc., or even Western Balkan countries, such as North Macedonia, Serbia, etc., provide (in addition to fines) criminal penalties for individuals who participate in serious competition violations, such as participation in cartels. Albania has no such provisions, relying only on fines for these violations. The lack of criminalisation for cartel behaviour may render cartelists less inclined to apply for leniency, if the only sanction they can face is a fine.

- *Lack of awareness among businesses about the Leniency Policy in Albania: Socio-cultural elements*

In addition to the legal issues discussed above, the fact that the Facilitation Policy has not been implemented in practice in Albania, despite being in force for years, is an indicator not only of problems of legal certainty, but also of a lack of awareness in society regarding competition rules and the importance of its protection. Being a post-communist country, Albania has witnessed only three decades of development of competition law. Even during this period, competition law has not been at the center of studies, scientific research or judicial practice.

Although changing the legal culture of society or businesses in a certain field does not happen immediately, a promising start would be to increase the number of activities related to raising awareness on the rights and obligations of businesses in the field of competition, as well as the options they have when they are in violation of these rules. In a developing economy and a small state market, business leaders may be inclined to protect their status and mutual relationships rather than cooperate with the authorities. However, viewed from a longer-term perspective, tolerating abusive behavior by businesses harms not only competing businesses, but distorts the market and harms consumer citizens more significantly. For this reason, it is important for businesses to be informed not only about their rights and obligations under free competition, but also to be aware of the medium- and long-term consequences of tolerating competition violations in the market.

Another reason is related to the lack of awareness regarding the importance of prohibiting and punishing cartels, as the most serious violations of competition law. In Albania, a ‘culture of silence’ is often established among businesses, which prevents business leaders from reporting each other’s violations to the authorities. Another reason for the lack of success of the leniency policy in Albania may be the public perception of the integrity of public institutions and the justice system, which makes businesses not trust that the authorities will guarantee protection or justice if they report. On the other hand, many businesses, especially small and medium-sized ones, have insufficient knowledge of competition law and do not realize that they are participating in punishable behavior.

3. Conclusion

This article examined the obstacles that have contributed to the dysfunction of the anti-cartel leniency policy in Albania, comparing this phenomenon with the practices implemented in the EU. While Albanian legislation follows European standards on paper, practice has shown that the lack of legal certainty and updating of these rules, as well as the cultural and social context, have undermined the functionality of the leniency policy.

One legal factor is the lack of procedural tools that guarantee the confidence of participants in the leniency programme, such as guaranteed protection of the confidentiality of the information provided, an element not aligned with EU legislation yet. Without these tools, potential applicants face multiple risks, including exposure to civil lawsuits or other penalties, which affects the reluctance to cooperate with the ACA. Also, the lack of inclusion of participation in cartels in criminal legislation reduces the fear of cartel members of a personal punishment.

At the same time, the social context in Albania does not favor reporting or cooperation with authorities, due to a culture of distrust and lack of awareness of the importance of fair competition for the public interest. This climate makes it difficult to build a functional facilitation policy without deliberate and comprehensive intervention. In this context, it is recommended to strengthen the procedural basis and legal guarantees, as well as to develop legal and cultural awareness campaigns for the public and especially the business community.

In conclusion, the lack of effectiveness of the leniency policy in Albania stems partly from the lack of updating with EU legislation on guaranteeing confidentiality in immunity from fines procedures, but also from a practical failure to implement the standards that make it reliable and functional. Also, raising public awareness, and especially the business community, about the consequences of anti-competitive behavior and their rights and obligations in this area is essential to improving the current situation. Only through well-structured reforms that address the legal, institutional and socio-cultural dimensions can this mechanism be expected to play a real role in the fight against cartels, thus contributing to economic integrity and the fulfillment of EU competition standards.

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