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Adapting EU Leniency Strategies to the Ukrainian Legal Framework: A Path Forward for Cartel Detection and Deterrence

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Summary

This thesis investigates the potential transformation of the approach of Ukraine to detecting and deterring cartels through the integration of the European Union leniency framework. Cartels, characterized by coordinated actions among businesses to control prices, limit production, or divide markets, present a significant threat to competitive markets. These practices lead to higher prices, lower quality, reduced consumer choices, and overall economic harm. Both the EU and Ukraine recognize the severe implications of cartels and have structured their laws to combat them. However, while the EU benefits from an established legal framework and enforcement mechanisms, Ukraine is in the process of aligning its competition law with EU standards.

The primary objective of this thesis is to analyze the extent to which the introduction of the EU leniency framework in Ukraine can improve the detection and deterrence of cartel activities. The research finds that while the EU leniency programme has been effective in uncovering and destabilizing cartels, the Ukrainian has historically faced challenges. These challenges include mistrust towards regulatory bodies, lack of procedural guidance, and inadequate guarantees for applicants. Despite these challenges, recent amendments to Ukrainian competition law in 2023 have aimed to improve the leniency programme by introducing provisions similar to the EU model, including the possibility for multiple applicants to receive reduced fines and the introduction of a marker system.

The implementation of the EU leniency framework in Ukraine aims to enhance cartel detection, foster a business culture that prioritizes compliance with competition laws, and strengthen the relationship between the business community and regulatory authorities. The thesis suggests that the experience of other European competition agencies should be leveraged to fill gaps in regulation and define transparent criteria and rules.

Aligning Ukrainian competition law with EU standards, particularly through the adoption of the leniency framework, presents a significant opportunity for Ukraine. The success of this integration effort will require continuous legal evolution, enhanced cooperation with EU bodies, and a permanent commitment to growing a culture of compliance and transparency. If managed effectively, this integration promises to reshape Ukrainian market dynamics, offering a fairer and more competitive environment conducive to both domestic and international economic activities.

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Abbreviations

AA/DCFTA - Association Agreement/Deep and Comprehensive Free Trade Area

AMCU - Antimonopoly Committee of Ukraine

CJEU - Court of Justice of the European Union

DG COMP - Directorate-General for Competition

EC - European Commission

ECN - European Competition Network

EU - European Union

MS - Member States

NCA - National Competition Authority

OECD - Organisation for Economic Co-operation and Development

TFEU - Treaty on the Functioning of the European Union

TEU - Treaty on European Union

WTO - World Trade Organization

1. Introduction

1.1. Background

Cartels represent a fundamental threat to competitive markets, manipulating market dynamics by fixing prices, limiting production, or dividing markets, thereby stifling competition and innovation. Such activities can lead to higher prices, lower quality, reduced choices for consumers, and an overall detrimental impact on the economic health and growth of nations.[1] The pernicious effect of cartels on global economies is well-documented, highlighting the urgency of effective enforcement mechanisms to combat these illegal practices.

Both the EU and Ukraine recognise the severe implications of cartels and have structured their laws to eradicate such practices. However, while the EU benefits from decades of established jurisprudence and an integrated enforcement mechanism across its member states, Ukraine is still enhancing its regulatory and enforcement frameworks. The harmonisation of Ukrainian competition law with EU standards, particularly through the adoption of practices like the leniency programme, presents an opportunity for Ukraine to leverage proven strategies to enhance its own economic and legal environment.

This thesis sets the stage for understanding how the integration of the EU leniency framework could transform the Ukrainian approach to detecting and deterring cartels, thereby aligning it more closely with European standards and enhancing its overall market efficiency and competitiveness.

Ukraine introduced its competition law framework in 1991, shortly after gaining independence. The primary legislation, the Law of Ukraine on Anti-Monopoly Regulation,[2] was adopted to establish a legal basis for preventing monopolisation and ensuring fair competition. This law marked the beginning of Ukrainian efforts to regulate competitive practices within its market.

Over the years, this framework has evolved significantly. In 2001, the law was effectively replaced by the Law of Ukraine on Protection of Economic Competition, which was more comprehensive and aligned more closely with international standards, including those related to the control of anti-competitive practices such as an abuse of dominance and

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[1] OECD, ‚Hard core cartels — Harm and effective sanctions' (Policy Brief, May 2002) <https://www.oecd.org/competition/cartels/21552797.pdf> accessed 12 April 2024. See also: A.K. Ramaiah, 'Revisiting MSME Cartel Under Competition Act 2010 in Malaysia: The Thin Line Between Collusion and Cooperation' in N. Kaur and M. Ahmad (eds), Charting a Sustainable Future of ASEAN in Business and Social Sciences (Springer, Singapore 2020) 353.

[2] the law is no longer valid, currently competition issues are regulated by the Law of Ukraine ‚On the Protection of Economic Competition'

anti-competitive mergers. The law at that time expanded, refined the regulations and established the Antimonopoly Committee of Ukraine (AMCU) as the primary body responsible for overseeing and enforcing competition law. Further refinements and amendments have been made constantly, as Ukraine has continued to develop its legal and regulatory framework for competition, partly influenced by its ongoing economic and political integration efforts with the European Union.

Even though the path to the EU-Ukraine Association Agreement (AA/DCFTA) was fraught with difficulties,[3] as from the signing of EU-Ukraine AA/DCFTA in 2014 and its becoming fully effective in 2017, Ukraine constantly adopts new laws to comply with EU *acquis communautaire*. The AA/DCFTA is ‚the main tool for bringing Ukraine and the EU closer together: it promotes deeper political ties, stronger economic links and the respect for common values.‘[4] Moreover, on 28 February 2022, Ukraine applied for EU membership meaning an even bigger need for harmonisation of laws.

Article 255 EU-Ukraine AA/DCFTA states that ‚[t]he EU Party and Ukraine shall maintain competition laws which effectively address the practices and transactions referred to in Article 254(a) (b) and (c)‘,[5] namely agreements, concerted practices and decisions of associations of undertakings, which have the object or effect of impeding, restricting, distorting or substantially lessening competition, the abuse by one or more undertakings of a dominant position or concentrations between undertakings, which result in monopolisation or a substantial restriction of competition in the market in the territory of either Party.[6] It stems from the interpretation that both the Union and Ukraine are working towards a consistent implementation of the EU-Ukraine AA/DCFTA competition policy.

Cartels represent a significant concern for economic competition, characterised by coordinated actions by businesses to control prices, limit production, or divide markets, thereby undermining free competition and harming consumers.[7] It is worth noting that effective cartel enforcement is a crucial component of maintaining competitive markets.[8] In practice it is hard to detect and deter them because of the lack of supporting documentary

[3] Guillaume Van der Loo, ‚The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration Without Membership‘ (Brill Nijhoff 2016) 100-129.
[4] European Council, ‚Ukraine: Council adopts EU-Ukraine association agreement‘ (11 July 2017) <https://www.consilium.europa.eu/en/press/press-releases/2017/07/11/ukraine-association-agreement/> accessed 18 April 2024.
[5] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3 (EU-Ukraine AA/DCFTA), Art. 255.
[6] EU-Ukraine AA/DCFTA, Article 254.
[7] Christopher Harding and Julian Joshua, Regulating Cartels in Europe (2nd edn, Oxford University Press 2010) 30.
[8] Catarina Marvão and Giancarlo Spagnolo, ‚What Do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence’ in Caron Beaton-Wells and Christopher Tran (eds), Anti-Cartel Enforcement in a Contemporary Age (Hart Publishing 2015) 57.

evidence,[9] hence competition law of various countries has leniency mechanisms. The key objectives of these programmes are detection and disruption of cartels, deterrence of anti-competitive behaviour, increasing enforcement efficiency and promotion of compliance. Leniency programmes promote compliance by stimulating companies to establish robust internal compliance programmes and encouraging a culture of ethical business practices, knowing that self-reporting can lead to reduced penalties. This creates a deterrent effect within cartels, as the potential for leniency increases the risk of members defecting and reporting anti-competitive behaviour.

OECD defines leniency programmes as *‚mechanisms offering the opportunity to cartel members to self-report their conduct, provide information and evidence and cooperate with an investigation, in exchange for immunity from, or a reduction in, sanctions, and, in some jurisdictions, immunity from proceedings/prosecution.*‘[10] The objective of leniency policies generally serves a dual purpose: i) to dismantle existing cartels by increasing the likelihood of their detection and reporting; and ii) to deter the establishment of new cartels.[11]

Within the Ukrainian legal framework, the leniency programme was introduced since the very emergence of competition law in 1992 but due to different factors, its development and functioning in general have not reached the level of effectiveness[12] to describe the system as successful in achieving the detection and deterrence of cartel activities.

1.2. Purpose and Research Questions

The purpose of this thesis is to analyse whether an approximation and alignment of the Ukrainian cartel enforcement system through a leniency programme to the EU standards is functional.

The central research question of this thesis is *to what extent the introduction of the EU leniency framework in Ukraine is suitable for detecting and deterring cartel activity*.

Answering the main question necessitates addressing the following sub-questions:

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[9] Cristina A Volpin and Peerapat Chokesuwattanaskul, ‚The ‚6Cs Criteria‘ for Successful Implementation of Leniency Programmes‘ (2022) 2. <https://awards.concurrences.com/IMG/pdf/ee_leniency_cav_pc_70_-edited.pdf?105630/f530bf44f1f87dce142c41e4a9a25d407550f4cfbfb7021b1d9bbe446acbde7f> accessed 18 April 2024.

[10] OECD, ‚Recommendation of the Council concerning Effective Action against Hard Core Cartels‘ (2019) OECD/LEGAL/0452, 5 <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452> accessed 15 April 2024.

[11] Cristina A Volpin and Peerapat Chokesuwattanaskul (n 9) 6.

[12] Tetiana Vovk, Oleksandr Voznyuk, ‚Ukraine: Competition Law Overview‘, The European Antitrust Review (Global Competition Review, 2013) 174.

- ➔ What are the similarities and differences in defining cartels and the roles of the leniency programmes under the EU and Ukrainian law?
- ➔ What are the legal obstacles to the effective leniency programme in Ukraine?
- ➔ What are the legal objectives of the implementation of the EU regulatory approach of leniency in Ukraine?

1.3. Methodology and Materials

The thesis mainly employs a doctrinal legal research method. The method includes an analysis of the critical aspects of the legislation and case law while consolidating or synthesising all pertinent components to formulate what can be argued as a correct and comprehensive declaration of the law concerning the issue at hand.[13] The doctrinal research method in this thesis enables an in-depth assessment of different legal frameworks, namely the EU and Ukraine, and the state of development of competition law, particularly cartel enforcement. The doctrinal legal research method is used in the thesis by analysing primary EU law (TFEU) and secondary law, such as ECN+ Directive, and EU Leniency Notice. Additionally, throughout the thesis, OECD policy documents are used, since they provide a comprehensive, credible, and internationally recognized framework for understanding legal issues, and offer best practices and procedural guidelines that are crucial for evaluating and comparing leniency policies. The thesis also revolves around the Ukrainian perspective of detecting and deterring cartels by the assessment of Ukrainian primary and secondary law, as well as, case law of Ukrainian courts. Legal scholars and competition law practitioners from both the EU and Ukraine works are used to relate to the discussions regarding cartel enforcement. Additionally, a descriptive method is employed in the thesis. This method is used to describe the state of affairs and characteristics of the situation.[14]

1.4. Delimitations

The main research question is tested by assessing whether Ukraine achieves its aims of implementing the leniency programme and identifying obstacles to this. The main research question is analysed through the prism of the historical contexts of the existence of the programme.

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[13] Terry Hutchinson, ‚Doctrinal research: researching the jury‘ in D Watkins and M Burton (eds), Research Methods in Law (1st edn, Routledge 2013) 9-10.

[14] Khushal Vibrate and Filipos Avnalem, Legal Research Methods (Justice and Legal System Research Institute 2009).

In the context of this thesis, suitability refers to the appropriateness and effectiveness of a legal framework or policy in achieving its intended objectives. By introducing the EU leniency framework in Ukraine, the thesis examines how this alignment can enhance the suitability of competition law enforcement in Ukraine.

The thesis does not go into details of either EU or Ukrainian competition law but is focused on leniency programmes. The historical context of the development of competition law provided is limited to significant milestones relevant to harmonisation of Ukrainian law with EU standards.

While economic implications are acknowledged, this thesis does not provide an exhaustive analysis of the broader economic impacts of cartel activities on the Ukrainian economy. The primary focus is on legal frameworks and their effectiveness in cartel detection and deterrence. Additionally, the political dimensions and ramifications of adopting EU standards, especially in the context of the ongoing political and economic integration of Ukraine with the EU, are mentioned but not explored in depth.

The territorial scope of the EU-Ukraine AA/DCFTA is excluded from the scope of this thesis. Regions affected by the Russian annexation of Crimea and the occupation of parts of the Donetsk and Luhansk regions are excluded from this analysis due to the complexities and lack of enforcement capabilities in these areas.

By delineating the scope of this research, this thesis aims to provide a focused, clear, and concise analysis of the integration of EU leniency standards into Ukrainian competition law, emphasising legal frameworks and theoretical impacts over broader economic, political, and practical considerations.

1.5. State of the Art

The future relationship between the European Union (EU) and non-EU countries regarding the expansion of the internal market is a central focus of academic attention.[15] Ukrainian competition law, particularly following the EU-Ukraine AA/DCFTA, has been aligning more closely with EU standards. Ukrainian scholars have explored the integration of EU competition principles into the national framework, focusing on the practical challenges and

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[15] Marja-Liisa Öberg, ‚Internal Market Acquis as a Tool in EU External Relations: From Integration to Disintegration, (Legal Issues of Economic Integration 47(2), 2020) 151; Roman Petrov, Guillaume Van Der Loo and Peter Van Elsuwege ‚The EU-Ukraine Association Agreement: A New Legal Instrument of Integration Without Membership?‘ (Kyiv-Mohyla Law&Politics Journal 1, 2015) 2.

benefits.[16] Throughout the thesis the works focused on the evolution of the leniency policy in Ukraine are used.[17]

However, the previous contributors have not analysed the issue of the suitability of implementing the EU leniency standards in Ukraine. This thesis is designed to close this knowledge gap.

1.6. Outline

This thesis starts with Chapter 2, containing an assessment of the correlation between definitions of cartels in two jurisdictions — the EU and Ukraine and an overview of the harmonisation of EU-Ukraine laws on leniency. Chapter 3 delves into the challenges and legal barriers that have historically hindered the effectiveness of the leniency programme in Ukraine explores the state of the law as of now, and suggests future directions for reform to enhance the effectiveness of the leniency mechanism. The last chapter discusses the adoption and adaptation of the EU's leniency framework in the Ukrainian legal system, focusing on how it aims to enhance competition law enforcement against cartels.

[16] See Roman Petrov, ‚The EU-Ukraine Association Agreement as a General Framework of Contemporary EU-Ukraine Relations‘ in Heiko Richter (ed), Competition and Intellectual Property law in Ukraine (2023) 26.

[17] See Igor Svechkar, Oleksandr Voznyuk, ‚Cartel leniency in Ukraine: overview‘ (Thomson Reuters. – Competition and Cartel leniency Global Guide 2016) 1; Tetyana Shvydka, ‚Implementation and application of the program ‚leniency‘ in the Ukrainian legislation for anticompetitive concerted actions‘ (Economic theory and law 2016).

2. Cartel enforcement through leniency programmes in the EU and Ukraine

2.1. Introduction to cartel definitions

2.1.1. EU law

The EU and Ukraine, through their respective legal frameworks, have sought to combat anti-competitive behaviours, especially cartels.

Within the EU, there is no normatively established notion of cartels. However, anti-competitive behaviour is primarily governed by Article 101 TFEU, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.[18] The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors, which may involve price-fixing and/or market sharing.[19] The motivation for such agreements typically stems from the desire of the undertakings to secure higher profits through collusion.[20]

An undertaking must participate in an economic activity, which entails providing goods or services in a specific market.[21] It is not necessary for the undertaking to generate profits to qualify the activity as economic in nature. Additionally, the legal status and the method of financing the entity are irrelevant to this determination. The EU adheres to a functional approach when determining the concept of an ‚undertaking‘, namely that the same legal entity may be acting as an undertaking when it carries on one activity but not when it is carrying on another.[22]

The ECJ has elaborated on its approach to cartels in the *Cement* case, stating that *‚[p]articipation by an undertaking in anticompetitive practices and agreements constitutes an economic infringement designed to maximise its profits, generally by an intentional limitation of supply, an artificial division of the market and an artificial increase in prices. The effect of such agreements or such practices is to restrict free competition and to prevent the attainment of the common market, in particular by hindering intra-Community trade. Such harmful*

[18] Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47 (TFEU), Article 101.
[19] European Commission, ‚Antitrust and Cartels‘ <https://competition-policy.ec.europa.eu/antitrust-and-cartels_en> accessed 11 April 2024.
[20] Moritz Lorenz, ‚Cartels‘ in ‚An Introduction to EU Competition Law‘ (Cambridge University Press 2013) 309. See also: Mette Trier Damgaard, Paula Ramada, Gavan Conlon, and Moritz Godel, ‚The Economics of Cartels: Incentives, Sanctions, Stability, and Effects‘ (Journal of European Competition Law and Practice, 2011) 405.
[21] Case C-41/90, Höfner and Elser v Macrotron GmbH [1991] ECR I-1979, para 21.
[22] Richard Whish and David Bailey, *Competition Law* (Oxford 2021) 86.

effects are passed directly on to consumers in terms of increased prices and reduced diversity of supply. Where an anticompetitive practice or agreement is adopted in the cement sector, the entire construction and housing sector, and the real estate market, suffer such effects.'[23]

Furthermore, a cartel under the EU competition law is recognised not merely as a temporary or incidental agreement but as a systematic attempt to undermine competitive integrity.[24] Cartels are often sophisticated and secretive,[25] making them challenging to detect without specific regulatory efforts, for instance, the deployment of leniency programmes that incentivise whistleblowers to come forward. Under the EU legal framework, the definition of a cartel extends to all concerted practices that have the potential to disrupt the internal market's competitive landscape by affecting cross-border trade, emphasising the EU's commitment to maintaining an integrated and competitive single market.[26] This rigorous stance is crucial for protecting the economic interests of both consumers and fair-operating businesses across the Member States.

The EU's stringent approach to defining and regulating cartels under competition law sets a robust precedent that extends beyond its borders, influencing the policies of other nations, including developing countries like Ukraine. Recognising the sophistication and secrecy of cartels, as well as their significant impact on the market, Ukraine has sought to incorporate similar definitions and legal frameworks into its competition laws. This alignment is driven by the broader objective of harmonising with EU standards as part of Ukrainian economic and regulatory integration efforts with the European Union. By adopting these comprehensive measures, Ukraine not only enhances its capacity to combat anti-competitive practices effectively but also ensures a safer and more competitive market environment that aligns with international standards. Such adaptations are crucial for ongoing reforms in Ukraine and its aspirations for closer economic ties with the EU, ultimately protecting the economic interests of its consumers and businesses while fostering a fair and dynamic competitive landscape.

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[23] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P – Aalborg Portland AS and Others v Commission [2004] ECR I-123, para. 53.

[24] Michael Polemis, ‚Are cartels forever? Global evidence using quantile regression analysis' (MPRA Paper 2024) 7. See also: Rosa M Abrantes-Metz, John M Connor, and Albert Metz, ‚The Determinants of Cartel Duration' (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263782> accessed 13 April 2024.

[25] Ibid.12

[26] TFEU, Article 101.

2.1.2. Ukrainian law

From the first years of independence, competition policy has been considered a priority direction of state-building in Ukraine.[27]

Under Ukrainian law, the definition of a cartel is outlined by the Law of Ukraine ‚On Protection of Economic Competition' (the Law), which broadly mirrors the EU approach yet is distinctly adapted to address the national market context. A cartel is typically defined as an agreement or concerted action between two or more competitors with the intent to coordinate their competitive behaviour on the market.[28] This coordination can manifest in different forms, such as the setting of purchase or sale prices, the allocation of production quotas or sales volumes, the distribution of markets by geographic area, type of goods, or customer group, and any fraudulent actions in bidding processes.[29] These agreements or concerted actions are aimed specifically at influencing the relevant parameters of competition, including: 1) limiting imports or exports (which directly impact market accessibility); 2) establishing restrictions against other competitors to limit their ability to compete effectively; 3) engaging in actions that directly limit competition through unfair or anti-competitive practices.[30]

The Antimonopoly Committee of Ukraine (AMCU) is the key enforcement body responsible for the protection of competition (monitoring and addressing such anti-competitive practices). AMCU in its activity follows the approach adopted by the European Commission (EC) and the Court of Justice of the European Union (CJEU) while defining and prosecuting cartels, emphasising the coordinated nature of the actions rather than merely the formal existence of an agreement. This encompasses both explicit agreements and tacit understandings that result in anti-competitive practices.

Moreover, the definition extends to concerted actions, which under the Law characterise as any form of agreed competitive behaviour between economic entities. This can include the creation of a business entity or association with the purpose or consequence of coordinating competitive behaviour among the business entities involved. The Law makes a clear distinction between competitive coordination that is allowable and that which leads to anti-competitive outcomes, such as: (a) distorting the results of trades, auctions, contests, or tenders; (b) excluding or limiting the market access of other business entities, sellers, or

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[27] Tamila Shcherbakova, ‚A modification of the competition policy under conditions of transformation of economic relations' (2016) 48.
[28] Antimonopoly Committee of Ukraine, ‚Fighting with cartels' (UKR: ‚Боротьба з картелями') (August 2019) <https://amcu.gov.ua/napryami/konkurenciya/derzhavna-polityka-v-sferi-konkurenciyi/borotba-z-kartelyami>
[29] Ibid.
[30] Ibid.

buyers; (c) imposing discriminatory conditions that disadvantage other business entities; (d) making agreements contingent on additional obligations unrelated to the subject of these agreements; (e) restrictively influencing the competitiveness of other entities without objectively justifiable reasons.[31]

Two categories of economic entities can be singled out under Ukrainian law that might be involved in a cartel: 1) economic organisations, state, communal and other enterprises established in accordance with the Commercial Code, and other legal entities that practice economic activity, and are registered under procedure established by law; 2) citizens of Ukraine, foreigners and stateless persons that conduct economic activity and are registered as entrepreneurs under the law.[32]

Anti-competitive concerted actions are the ones that have led or may lead to the prevention, elimination or restriction of competition.[33] Specifically, such actions include: 1) establishing prices or setting other conditions for buying or selling goods; 2) restricting production, market access, technical and technological advancement, investments, or gaining control over these aspects; 3) allocating markets or supply sources based on geographical areas, types of goods, sales volumes, or categories of sellers, buyers, or consumers, among other criteria; 4) manipulating the outcomes of trades, auctions, competitions, or tenders; 5) excluding other business entities from the market or limiting their market access; 6) imposing different terms on comparable contracts with other businesses, thereby placing them at a competitive disadvantage; 7) requiring other businesses to undertake additional obligations in agreements that are unrelated to the transaction or inconsistent with customary fair trading practices; 8) significantly impairing the ability of other business entities to compete in the market without any objective justification.[34]

Anti-competitive concerted actions are also considered to be similar actions (or inactions) by business entities on the product market, which have led or may lead to the prevention, elimination or restriction of competition if the analysis of the situation on the product market refutes the existence of objective reasons for such actions (or inactivity).[35]

Moreover, EU-Ukraine AA/DCFTA requires not only an approximation of the national laws of Ukraine to the EU *acquis* but also the application of the CJEU case law by Ukrainian

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[31] Law of Ukraine no 2210-II ‚On the Protection of Economic Competition' (UKR: Закон України "Про захист економічної конкуренції") (01 January 2024), Article 5.
[32] Ibid. Article 55.
[33] Ibid. Article 6(1).
[34] Ibid. Article 6(2).
[35] Ibid. Article 6(3).

courts and state bodies.[36] There are progressively more occasions when Ukrainian courts use CJEU practice, especially in the field of competition law. For instance, the Supreme Commercial Court of Ukraine[37] and Appellate Commercial Courts[38] referred to the case C-8/08 *T-Mobile Netherlands BV and Others v Raad*[39] while interpreting and applying the concept of concerted practice.[40]

The Ukrainian approach mirrors the EU's broad prohibitive stance but is tailored to the nuances of the Ukrainian market environment and legal tradition, particularly as in any other EU Member State.

Under Ukrainian law, a cartel is defined not just by the explicit actions taken by businesses to restrict competition, but also by the outcome of such actions, particularly when they lead to the prevention, elimination, or restriction of competition. This approach ensures a dynamic and responsive legal framework that can address both overt and covert forms of anti-competitive behaviour, reflecting a tailored adaptation to both the specific challenges of the Ukrainian market and the broader principles of competitive fairness prevalent in the EU law.

2.2. Role of leniency programmes

Article 3(3) of the Treaty on European Union (TEU) establishes that the Union shall ensure a highly competitive internal market.[41] Additionally, under Article 3(1)(b) TFEU, it is the Union that has exclusive competence in establishing the competition rules necessary for the functioning of the internal market.[42] Competition in the market fosters innovation, while also compels inefficient businesses to either improve or leave the market.

According to Komninos, competition law enforcement aims to achieve three objectives:[43]

1) to bring the infringement of law to an end and ensure that conduct ceases in the future;
2) to remedy the harm caused by the anti-competitive conduct;
3) to punish the infringer and to deter him and others from future infringements.[44]

[36] Roman Petrov, ‚The EU-Ukraine Association Agreement as a General Framework of Contemporary EU-Ukraine Relations‘ in Heiko Richter (ed), *Competition and Intellectual Property law in Ukraine* (2023) 26.
[37] in case № 9901/460/18 (18 September 2018).
[38] in case № 810/1685/18 (27 February 2019).
[39] Case C-8/08 T-Mobile Netherlands BV and Others v Raad [2009] ECR I-4529.
[40] Roman Petrov (n 36) 31.
[41] Consolidated version of the Treaty on European Union (2012) OJ C 326/13, Article 3.
[42] TFEU (no 19) Article 3(1)(b)
[43] Assimakis Komninos, 'EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts' (Bloomsbury Publishing, 2008) 7. See also: Christopher Harding and Julian Joshua (no 7) 229.
[44] Ibid.

Leniency is an important mechanism considering the first and the third objectives of competition law enforcement. Leniency programmes incentivise cartel members to come forward and disclose their involvement in anti-competitive conduct. As part of the leniency application, these companies must cease their illegal activities immediately. This helps competition authorities to promptly put an end to the infringement. By providing detailed insider information about the cartel, leniency applicants enable competition authorities to take swift and effective action against other cartel members. This ensures that the anti-competitive conduct is fully uncovered and brought to an end.

The third objective is achieved through leniency by offering immunity or reduced fines to the first applicant, while still imposing penalties on other cartel members. This ensures a punitive element to enforcement, maintaining the integrity of the punishment system and incentives for being the first one to report anticompetitive actions.

The main goal of the leniency policy within the EU is to achieve undistorted competition within the internal market. Leniency is one of the enforcement instruments, however instead of the competition authorities actively pursuing potential infringers, the programme encourages them to approach the authorities on their own.[45] The aim is to destabilise cartels from the beginning, deterring their formation by deciding to avoid participating in a cartel more appealing than engaging in a serious violation.[46]

2.2.1. Deterrence

The primary and most apparent goal of leniency programmes is to deter entities from forming or participating in cartels. By offering the potential for immunity or reduced penalties, these policies heighten the perceived risks for both potential and current cartel members. Moreover, the threat of a cartel member turning whistleblower introduces a level of uncertainty within the cartel structure, acting as a deterrent to both the formation and its further operation. The possibility that any member could report to the authorities not only destabilises trust within the group but also amplifies the perceived risk of participating in such illegal agreements. This uncertainty is crucial as it makes the cost of being in a cartel potentially outweigh the benefits, thus discouraging involvement from the outset.

Deterrence is one of the goals of leniency policies because it preserves significant resources for both the authorities and society, including the costs associated with prosecution and

[45] Ingrid Margrethe Halvorsen Barlund, ‚Leniency in EU Competition Law‘ (Kluwer Law International 2020) 3.
[46] Ibid. 4.

litigation, as well as preventing the societal harm that would occur if potential violations were not deterred. In competition enforcement, particularly in addressing cartels, achieving general deterrence has been crucial and impactful, as it supports the aim of fostering undistorted competition which is foundational to competition regulations, such as Article 101 TFEU.[47] A primary role of leniency programmes is to destroy the trust among cartel members.[48]

2.2.2. Detection

Leniency policies play a crucial role in the detection of cartels, as they typically operate under a veil of secrecy. These policies incentivise cartel members to come forward and disclose their illicit activities, providing competition authorities with vital insights that might otherwise remain hidden.

Detection of cartels is definitely the hardest step in fighting against them. Haucap and Heldman found in their study on 15 German cartels that individuals in cartels show a high level of homogeneity in terms of age, gender, geographic origins, and experience in the industry.[49] These factors create a sense of group affiliation thereby stabilising cartels and complicating the decision to breach that trust and report.[50]

Cartel members who apply for leniency provide authorities with insider insights that are often impossible to obtain through external investigations. This includes details on the cartel's formation, pricing strategies, meetings, and communications. Leniency applications often lead to a domino effect, where the initial information provided leads to further evidence collection and additional members coming forward. This enhances the overall scope and depth of the investigation.

With direct information from insiders, competition authorities can significantly reduce the time and resources needed to detect and prove cartel activities.

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[47] Paolo Buccirossi, Lorenzo Ciari, Tomas Duso, G Spagnolo, Cristiana Vitale, ‚Deterrence in Competition Law‘, Discussion Paper No 285, Governance and the efficiency of economic systems, (2009) 5-6.
[48] Massimo Motta, ‚Competition Policy: Theory and Practice‘ (Cambridge University Press 2004), 193-202.
[49] Justus Haucap and Christina Heldman, ‚The Sociology of Cartels‘ (CESifo Working Papers 2022). See also: OECD ‚The future of effective leniency programmes. Advancing detection and deterrence of cartels' (OECD Competition Policy Roundtable Background Note 2023) 29.
[50] Ibid.

2.2.3. Destabilisation

Leniency policies are not only instrumental in detecting cartels but also play a crucial role in destabilising them once they are uncovered. By incentivising cartel members to report anti-competitive activities, these policies introduce a significant level of distrust among members, undermining the cohesion and operational integrity of the cartel.

The introduction of leniency options arises a ‚prisoner's dilemma' scenario, where each member faces the temptation to defect and cooperate with enforcement authorities in exchange for immunity or reduced penalties, at the expense of other members. The key point, however, is that cartel members will not receive identical treatment upon confession, as leniency mechanisms do not operate under the assumption that all cartel participants will confess simultaneously.[51] Instead, the goal is to instigate a race among cartel members to approach the competition authorities for leniency, thereby facilitating the cartel's detection.[52] Consequently, each cartel member continues to confront a dilemma, where they must consider whether and when any of their co-cartelists will seek leniency.[53]

The possibility of leniency increases suspicion among cartel members. This psychological warfare can lead to the rapid disintegration of trust, as members are aware that any co-conspirator could potentially turn into an informant to escape sanctions.

From a strategic standpoint, leniency policies make the cost of staying in a cartel outweigh the benefits as members calculate the risk of being reported by others. This disrupts the coordination and communication essential for the cartel's survival, leading to its eventual collapse.

Leniency policies effectively destabilise cartels by eroding trust among members and incentivising defection. The strategic use of leniency by competition authorities not only enhances the detection of cartels but also accelerates their disintegration, ultimately restoring competitive conditions in the market. The ongoing development and refinement of these policies are vital for maintaining their effectiveness as deterrent and destabilising tools in competition enforcement.

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[51] Ingrid Margrethe Halvorsen Barlund (no 45) 37.
[52] Ibid.
[53] Ibid.

3. Legal Objectives of Implementing the EU Regulatory Approach of Leniency in Ukraine

3.1. Legal objectives of leniency in Ukraine

As a result of integration efforts Ukraine, including joining the WTO in 2008,[54] entering into force the free trade agreement with EFTA countries in 2012,[55] and signing and ratification of the Association Agreement with the EU,[56] free trade areas have become accessible to Ukraine.[57] Consequently, competition rules, essential for liberalised trade, are becoming increasingly critical for the country.[58]

Ukrainian law includes the basic principles of fair competition and explicitly prohibits certain actions as outlined in Article 42(3) of the Constitution of Ukraine, which guarantees the protection of competition in business activities.[59]

The Law of Ukraine ‚On the Protection of Economic Competition', which entered into force in 2002, already at that time was based on the principles of competition law, established in the EU. Especially, provisions regarding leniency policy[60] and liability[61] were taken from the EU law.[62] The Law has been constantly amended to enhance the system that oversees the adherence to competition regulations, all these modifications were implemented to align with the European model, incorporating practices from EU institutions.[63] Besides the Law of Ukraine ‚On the Protection of Economic Competition', leniency policy in Ukraine is also regulated by the Procedure for submission of applications to the Antimonopoly Committee of Ukraine for exemption from liability for violation of legislation on economic competition protection, issued by AMCU.[64]

[54] The Law of Ukraine no 250-VI On the Ratification of the Protocol of Ukraine's Accession to the World Trade Organisation 2008.
[55] The Law of Ukraine no 4091-VI On Ratification of the Agreement on free trade between Ukraine and Member States of EFTA 2011.
[56] EU-Ukraine AA/DCFTA (no 5).
[57] Kseniia Smyrnova, ‚The ‚Europeanization' of Competition Law in Ukraine' in Heiko Richter (ed), *Competition and Intellectual Property law in Ukraine* (2023) 105.
[58] Ibid.
[59] Ibid.
[60] Law of Ukraine no 2210-II ‚On the Protection of Economic Competition' (no 31), Article 6(5).
[61] Ibid. Article 52.
[62] Kseniia Smyrnova (no 57) 105.
[63] Ibid.
[64] Procedure for submission of applications to the Antimonopoly Committee of Ukraine for exemption from liability for violation of legislation on economic competition protection, as provided for in Article 50, Paragraph 1, of the Law of Ukraine ‚On Protection of Economic Competition' (Procedure for exemption from liability) (UKR: Порядок подання заяв до Антимонопольного комітету України про звільнення від відповідальності за вчинення порушення законодавства про захист економічної конкуренції, передбаченого пунктом 1 статті 50 Закону України «Про захист економічної конкуренції» (Порядок звільнення від відповідальності) (2012) <https://zakon.rada.gov.ua/laws/show/z1553-12#Text> accessed 20 April 2024.

The first objective of implementing the EU leniency framework in Ukraine is the enhanced detection of cartels. The leniency framework incentivises cartel participants to disclose information about anti-competitive activities in exchange for immunity or reduced penalties. By providing a clear incentive for whistleblowers, the framework is likely to lead to an increase in the number of cartel activities being reported to the authorities. With insiders willing to cooperate, Ukrainian authorities can expedite investigations, reducing the time and resources typically required to uncover and prosecute cartels.

Fostering a business culture is one more objective that prioritises compliance with competition laws over the perceived benefits of cartel participation. This shift involves moving from a possibly collusion-tolerant environment to a culture where compliance with competition laws is prioritised and valued above the short-term gains from cartel participation. Effective leniency policies can also strengthen the relationship between the business community and regulatory authorities. Trust is built when companies see consistent, fair application of the law and witness that competitors who violate competition laws are liable. For the cultural shift to be effective, the enforcement of leniency policies must be transparent and consistent. Businesses need to see that the rules apply equally to all, which reinforces the value of compliance. Establishing regular channels of communication between businesses and competition authorities can help in clarifying the rules and procedures, further embedding a culture of compliance.

The cultural shift towards compliance fostered by the leniency framework has the potential to reshape the business landscape in Ukraine significantly. By prioritising legal compliance and ethical business practices, companies can mitigate risks, build trust with regulatory bodies, and contribute to a fair market environment. This transformation will not only reduce the prevalence of cartels but will also enhance the overall business climate, making Ukraine more attractive to both domestic and international investors.

3.1.1. Challenges of integration of the EU-like leniency system into the Ukrainian legal framework

Nevertheless, the implementation of the EU-like leniency framework in Ukraine presents several challenges that must be addressed to maximise its efficiency and ensure its successful integration into the national legal system.

One of the primary concerns associated with leniency programmes is the confidentiality and protection of whistleblowers. Without guarantees of safety and anonymity, potential

informants may hesitate to come forward due to fear of revenge from other cartel members or even from within their own organisations. Ukraine will need to enact strong legal protections that safeguard whistleblowers from retaliation. This includes both legal immunity from prosecution and protection against unjust dismissal or discrimination in the workplace. Establish secure and confidential channels for reporting cartel activities. These channels must ensure that the identities of informants are shielded from public disclosure and only accessible to authorised personnel within the competition authority. In extreme cases, where whistleblowers face significant personal risks, consider the implementation of witness protection programs to provide physical safety and security.

The suitability of the leniency programme is also dependent on the capacity of the competition authority to handle applications efficiently and enforce competition laws effectively. The state should ensure that staff members of the competition authority are well-trained in handling leniency applications, which includes training in investigative techniques, legal analysis, and confidentiality protocols. The NCA needs to be provided with sufficient resources, including funding and technology, to manage leniency applications and conduct thorough investigations. Engage in international cooperation with other competition authorities to share best practices, resources, and information that can enhance the level of suitability of the leniency programme in Ukraine.

Ukrainian legislator among goals of competition law determines the prevention and stopping of actions that can harm the freedom of trade and competition among companies, including a prohibition on cartels.[65] Ukraine is constantly trying to develop and improve its legal system in different areas and these competition law goals might be effectively achieved after the adoption of the best practices of cartel fighting in the EU.

3.2. Harmonisation of the Ukrainian leniency programme to the EU

The legal frameworks of both the EU and Ukraine share a common goal of preventing anti-competitive behaviour. However, the EU legal provisions are embedded within a larger, supranational regulatory structure designed to maintain competition across a diverse economic union. This structure is supported by the European Commission's Directorate-General for Competition (DG COMP), which has substantial authority and resources for enforcement, including a sophisticated leniency program encouraging whistleblowing.

[65] Law of Ukraine no 2210-II ‚On the Protection of Economic Competition‘ (no 31), Article 4.

Conversely, the Ukrainian legal framework operates within a national context, with the AMCU overseeing enforcement. While Ukraine has been aligning its competition laws with EU standards, particularly since the EU-Ukraine AA/DCFTA, any existing differences in enforcement mechanisms and resources impact the direct applicability of EU-style leniency programmes.

The level of suitability of leniency programmes, which offer immunity or reduced penalties to reporting participants in cartel activities, hinges on the legal definition of what constitutes a cartel. The broader and more encompassing the definition, the more effectively a leniency program can be applied, as it covers a wider array of anti-competitive practices.

In the EU, the comprehensive definition of cartels under Article 101 TFEU allows for a wide application of its leniency programme, enabling it to tackle a variety of anti-competitive practices. Ukrainian definition, while also broad, requires further refinement and clarification to ensure that the leniency program can be as effective. The specificity and clarity of legal definitions directly impact the willingness of participants to come forward and the ability of authorities to prosecute infringements effectively.

Harmonising Ukrainian definitions of cartels with those of the EU presents an opportunity to enhance the effectiveness of the leniency programme in Ukraine. Such alignment would not only facilitate a clearer understanding and identification of cartel behaviours but also bolster Ukrainian efforts to deter and detect anti-competitive practices more efficiently. The process of harmonisation, however, must consider the unique aspects of the economic and legal landscape, ensuring that any adapted definitions remain relevant and enforceable within its national context.

Furthermore, harmonisation could pave the way for more robust cooperation between the AMCU and the EC, fostering cross-border efforts to combat cartels and enhancing the overall effectiveness of competition law enforcement in the broader European area.

Since Ukraine actively works in the direction of harmonisation of laws according to the EU-Ukraine AA/DCFTA, the main aims of establishing the leniency programme were detection, deterrence and destabilising of cartels, as this is in the EU, US and other developed countries. Leniency programmes are actively used by competition authorities as an effective legal tool for investigating cartel activities.[66]

[66] Tetyana Shvydka, ‚Implementation and application of the program ‚leniency‘ in the Ukrainian legislation for anticompetitive concerted actions‘ UKR: ‘Впровадження та застосування програми “leniency” в законодавство України за антиконкурентні узгоджені дії’ (Економічна теорія та право 2016) 171.

4. Legal Obstacles to the Effective Leniency Programme in Ukraine

4.1. Leniency programme in the EU

The leniency framework within the EU represents a cornerstone of its regulatory strategy to combat cartels, a major form of anti-competitive behaviour. This framework is designed to uncover and dismantle cartels by incentivising their participants to self-report to the EC or national competition authorities (NCAs). The rationale behind the leniency policy is grounded in the difficulty of detecting secretive and collusive agreements that significantly harm economic competition across the Member States. The framework operates under well-established guidelines that clarify the eligibility criteria, procedural steps, and benefits of disclosure, ensuring that potential whistleblowers fully understand the implications and benefits of their cooperation.

In the EU, the leniency programme was introduced in 1996, and since 2006 it has been normatively regulated in the Commission Notice On Immunity from fines and reduction of fines in cartel cases.[67] The main principles of the programme are the full exemption from liability of the first applicant and partial exemption of the second, third and subsequent applicants, provided they come up with evidence that has a significant added value compared to the evidence that the EC already has at its disposal.[68]

Undertakings that participate in cartels are usually fully aware that their behaviour is unlawful and try their best to maintain secrecy and avoid detection.[69] That is the reason why it is enormously difficult for competition authorities to firstly, detect and, secondly, deter cartels. The leniency programme[70] worked out for years in the EU, under the programme a participant of the cartels or a third person reports to the competition authority about the existence of a cartel and, therefore, reveals the activity of such cartel. Normally, these are the participants of the cartel who ‚blow the whistle‘, so the Commission’s policy is to allow total immunity — a fine of zero — to the first undertaking in a cartel to report, and to impose lower fines to the undertakings which provide further evidence.[71]

[67] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17.
[68] Tetyana Shvydka, ‚Implementation and application of the program ‚leniency‘ in the Ukrainian legislation for anticompetitive concerted actions‘ (no 66) 173.
[69] European Commission, ‘DG Competition Antitrust Manual of Procedures‘, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (2019), <https://competition-policy.ec.europa.eu/document/download/4dece098-82fb-4cdd-bd5c-1176c52e4531_en?filename=antitrust_manproc_11_2019_en.pdf> accessed 29 April 2024
[70] sometimes informally in the EU it is called a ‚whistleblowing‘ programme
[71] Richard Whish and David Bailey (no 22), 293.

Moreover, the EC has developed an ‚Anonymous Whistleblower Tool‘ for individuals (mostly for third parties) who are willing to provide information about a cartel on the condition of anonymity: contact is made with the Commission through the encryption tool of an external intermediary.[72]

Within the EU the first applicant to refer via leniency can benefit from full immunity when such an application makes a decisive contribution to the opening of an investigation or the finding of an infringement.[73] The notion of ‚decisive contribution‘ includes information and evidence that enable the EC to carry out a focused inspection or identify a violation related to the cartel.[74]

If the EC has not initiated an investigation yet, it is typically sufficient to specify the product impacted by the cartel, its geographic scope, duration, and the involved parties. However, if an investigation is already underway, the first applicant needs to supply supporting statements or proof confirming the cartel's existence, as well as its extent and duration. To qualify for immunity, the leniency applicant must also cooperate completely, cease their participation in the cartel, and safeguard the evidence pertaining to the cartel.[75]

Requirements to evidence that add significant value to qualify for leniency are significantly stricter for subsequent applicants.[76] Companies are usually expected to submit corporate statements or present contemporaneous evidence to the EC detailing the operation of the cartel, identifying the participants in the cartel meetings, and specifying where and when these meetings occurred, as well as the nature of the information that was exchanged.[77] In case the evidence helps the EC, subsequent applicants may be granted a reduction in fines to up to 50%.[78] Such a system operates not only at the Union level but also in the EU Member States, for instance in Austria, France and Germany.[79]

The predictability of the leniency programme in the EU is also ensured by the marker system. The marker reserves the company's position in the queue, granting it time to gather evidence to support and refine its application.[80] To qualify for a marker, the applicant must supply the

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[72] Ibid. 294.
[73] Commission Notice on Immunity from fines and reduction of fines in cartel cases (no 67), para 4.
[74] Ibid. para. 8
[75] Cristina A Volpin and Peerapat Chokesuwattanaskul (n 9) 7.
[76] Ian S. Forrester and Pascal Berghe, ‚Leniency: The Poisoned Chalice or the Pot at the End of the Rainbow‘, in Caron Beaton-Wells and Christopher Trans (eds), *Anti-Cartel Enforcement in a Contemporary Age* (Hart Publishing 2015) 160.
[77] Ibid. 162.
[78] Commission Notice on Immunity from fines and reduction of fines in cartel cases (no 67), paras 5 and 26.
[79] Peerapat Chokesuwattanaskul, 'Transition from domestic competition to strategic choice and its cultural effects as an ex-ante process toward international competitiveness of Thai firms: a laboratory experiments study' (Chulalongkorn University 2011).
[80] Commission Notice on Immunity from fines and reduction of fines in cartel cases (no 67), para. 15

EC with details including its name and address, the identities of the parties involved in the supposed cartel, the products and territories affected, the estimated duration of the alleged cartel, and the characteristics of the purported cartel behaviour.[81] The marker system ensures that the urgency and speed of the decision to self-report do not compromise the quality of evidence submitted with the leniency application. The evidentiary standard to obtain a marker is generally quite low, typically necessitating that the company demonstrate a reasonable basis for suspecting cartel activity and confirm its intention to report.[82]

In the EU not only cartel participants can report about the cartel activity but also third parties who are not complicit in misconduct. Third parties whistleblowing practices were established in various EU Member States such as Romania, Denmark, Germany and Hungary. In systems that feature a whistleblowing mechanism for third parties, such reporting can create a sense of urgency among cartel participants.[83] While the possibility of a financial reward may boost third-party reporting, the absence of such incentives does not inherently weaken the system's effectiveness.[84] It has been noted that financial incentives are not the primary motivator for whistleblowers; rather, the key driving force behind whistleblowing is typically an individual's sense of ethical duty.[85]

As the EU does not have criminal powers, it relies on the threat of heavy fines for deterring cartels.[86] The Union is a model of success for jurisdictions that do not have criminal sanctions and rely exclusively on civil or administrative penalties.[87] However, for the effectiveness of the system fines should be sufficiently punitive.[88]

Leniency programmes are regulated both at the Union and national levels. National legislation of Member States in the field of competition law should be harmonised with the minimum standards set by the Union, however, each country might have its own features of legislation.

The European Competition Network (ECN) plays a pivotal role in fostering cooperation and coordination among the NCAs of the EU Member States. This cooperation is crucial given the cross-border nature of many cartels and the necessity for a unified approach in competition law enforcement within the single market. Through the ECN, NCAs share information and

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[81] Ibid.
[82] Ian S. Forrester and Pascal Berghe (no 76) 161.
[83] Cristina A Volpin and Peerapat Chokesuwattanaskul (no 9) 16.
[84] Ibid.
[85] Alisa Brink, Jordan Lowe, and Lisa Victoravich, ‚The Effect of Evidence Strength and Internal Rewards on Intentions to Report Fraud in the Dodd-Frank Regulatory Environment‘ (32(3) Auditing: A Journal of Practice & Theory, 2013) 89.
[86] Scott D Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (Competition Law International 4, 2008) 6.
[87] Ibid.
[88] Ibid.

best practices and coordinate their enforcement actions to ensure consistency and effectiveness across the EU. This collaboration is further strengthened by the ECN+ Directive, which enhances the capabilities of NCAs, ensuring they possess the necessary independence, resources, and enforcement powers.

The Commission and the NCAs together operate within the framework of the European Competition Network (ECN), a manifestation of the duty of sincere cooperation required by Article 4(3) TEU.[89] The ECN has produced a Model Leniency Programme aimed at achieving soft harmonisation through convergence.[90] This initiative encouraged all members to implement leniency programs and standardise certain ‚key elements‘ of these programs across the network. Leniency programmes currently are available in all EU MS. These programs are part of the national competition laws and are harmonised to some extent with the framework provided by the EC to ensure effectiveness across the EU in detecting and dismantling cartels. It should be noted that the Model Leniency Programme of the ECN is not binding on national competition authorities (NCA's), though most MS have aligned their leniency programmes with its key features.[91] Each EU MS has adapted its leniency programmes to fit within the broader framework of EU competition law while addressing specific national legal and economic contexts.

The Model Leniency Programme by the ECN illustrates an effort towards soft harmonisation among EU Member States. While not legally binding, this model serves as a guideline that encourages Member States to align their national leniency programs with established best practices. Most Member States have adopted key aspects of this model, enhancing the uniformity and predictability of leniency applications across the EU. This alignment is crucial for maintaining the integrity of the internal market and ensuring that anti-competitive practices are addressed effectively.

Moreover, the ECN+ Directive[92], whose purpose is to set out certain rules to ensure that national competition authorities have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU so that competition in the internal market is not distorted and that consumers and undertakings are not put at a disadvantage by national laws and measures which prevent national competition authorities from being effective enforcers,[93] requires each Member State to put in

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[89] Richard Whish and David Bailey (no 22) 302.
[90] Ibid. 304.
[91] Ibid.
[92] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2018] OJ L 11/3.
[93] Ibid., Article 1(1).

place a leniency programme specifically with respect to the detection of ‚secret cartels‘, and dictates the broad outline of what this must entail.[94]

Each national leniency programme must provide for full immunity from fines for undertakings which disclose their participation in a secret cartel and provide information sufficient to enable the NCA to carry out dawn raids or find an infringement[95] and a reduction of fines for undertakings which disclose their participation and provide evidence of ‚significant added value‘ to the investigation.[96] It must be possible for leniency statements to be provided in a variety of forms, including orally;[97] and national leniency programmes must encompass both a marker system[98] and the possibility of submitting summary applications.[99]

Three general criteria must be met for companies to receive immunity or a reduction in penalties under the leniency programme:[100] 1) the applicant must immediately end its involvement in the cartel, ‘‘at the latest immediately following its leniency application’’;[101] 2) an applicant has to ‚genuinely, fully, on a continuous basis and expeditiously’ cooperate with the NCA;[102] 3) an applicant must not have destroyed, falsified or concealed evidence and disclose its intention to make a request.[103]

Regarding the first criterion, an exception exists to this basic rule: stopping participation might alert other members of the secret cartel. Moreover, to maintain the integrity of the evidence and the effectiveness of the procedure, the applicant may continue its involvement in the cartel if the NCA deems such involvement essential for upholding the thoroughness of the investigation.[104]

The EU leniency framework, supported by the ECN and enhanced by directives like ECN+, represents a sophisticated and multi-faceted approach to combat cartels. The integration of national programs with EU-wide policies, the employment of advanced technological tools, and the emphasis on cooperation and soft harmonisation across Member States underscore a comprehensive strategy designed to maintain robust competition and protect consumer

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[94] Alison Jones, Brenda Sufrin and Niamn Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th ed) (Oxford Competition Law 2019) 1009. See also: Directive (EU) 2019/1 (no 92) Chapter VI.
[95] Directive (EU) 2019/1 (no 92), Article 17.
[96] Ibid. Article 18.
[97] Ibid. Article 20.
[98] Ibid. Article 21.
[99] Alison Jones, Brenda Sufrin and Niamn Dunne (no 94) 1009. See also: Directive (EU) 2019/1 (no 92), Article 22.
[100] Directive (EU) 2019/1 (no 92), Article 19.
[101] Ibid. Article 19(a).
[102] Ibid. Article 19(b).
[103] Ibid. Article 19(c).
[104] Paulina Korycińska-Rządca and Alexandra Mendoza-Caminade, ‚Harmonisation of National Leniency Programmes in the EU: Is This Mission Accomplished? Remarks on the Case of France and Poland Compared with Other EU Member States‘ (IIC 53, 2022) 1519.

interests throughout the EU. The success of this framework serves as a compelling model for Ukraine, suggesting that similar benefits could be realised through the adoption of this proven approach to leniency and anti-cartel enforcement.

4.2. Identification of specific legal barriers to leniency programme suitability in Ukraine

4.2.1. Historical context

Within the Ukrainian legal framework, the leniency programme emerged in 2002 with the adoption of the Law of Ukraine ‚On Protection of Economic Competition'[105] and initially covered not only cartels but also any other types of anti-competitive arrangements, including anti-competitive agreements between suppliers and buyers, such as not buying a competitor's goods from a supplier, maintaining resale prices, or acting only on certain territories.[106] The first edition of the Law[107] had a provision in Article 6(4) that *‚[a] person who has engaged in anti-competitive concerted actions but has voluntarily informed the Antimonopoly Committee of Ukraine or its territorial branch about these actions before other participants, and provided information that is of significant importance for making a decision in the case, is exempted from liability for committing anti-competitive concerted actions. A person defined cannot be exempted from liability if they: did not take effective measures to stop their involvement in the anti-competitive concerted actions after reporting them to the AMCU; were the initiator or provided leadership for the anti-competitive concerted actions; did not provide all the evidence or information regarding the violations they committed, which they knew about and could obtain without obstruction.'*[108]

The introduction of the leniency programme in Ukraine at that time was not been successful because of the absence of procedural guidance and satisfactory guarantees for applicants,[109] hence for a long period of time it has never been fully tested in practice.

Even though, in 2012, AMCU further regulated the leniency procedure, it has been underused, because only the first applicant could benefit from it.[110] At that time, a person who was

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[105] already in 2002 the Law was based on the principles of EU competition law, especially provisions regarding leniency policy and liability.
[106] Anastasia Pozhar, ‚The leniency program in Ukraine: will it work after a reboot' (Liga Zakon 2023) <https://www.asterslaw.com/press_center/publications/the_leniency_program_in_ukraine_will_it_work_after_a_reboot/> accessed 14 April 2024.
[107] Law of Ukraine no 2210-II ‚On the Protection of Economic Competition' (edition from 2001)
[108] Ibid. Article 6(4)
[109] Igor Svechkar, Oleksandr Voznyuk, ‚Cartel leniency in Ukraine: overview' (Thomson Reuters. – Competition and Cartel leniency Global Guide 2016) 1.
[110] Kseniia Smyrnova (no 57) 115.

involved in concerted anti-competitive actions was released from liability if all of the following conditions were met:

1) a person voluntarily reported participation in anticompetitive concerted actions earlier than other participants in such actions; and

2) provided information that is essential for making a decision in the case.[111]

For the purposes of the first criterion, a person is considered to have voluntarily reported his/her participation in anti-competitive concerted actions, if he/she, on his/her own initiative, applied to the AMCU before the date of drawing up a submission with preliminary conclusions in the case in the manner prescribed by the ‚Procedure for Submitting Applications to the AMCU for Exemption from Liability for Violations of the Legislation on the Protection of Economic Competition‘ with a statement on exemption from responsibility for committing anti-competitive concerted actions.[112]

For the purposes of the second criterion, information that is of significant importance for making a decision in a case is considered to be the one, scope and content of which makes it possible to prove a violation of the legislation on the protection of economic competition in the form of anti-competitive concerted actions, in particular, information about: the composition of participants in anti-competitive activities; the presence and content of agreements, notes, memoranda, correspondence, minutes of joint meetings, which confirm the agreed competitive behaviour, with the provision of relevant supporting documents, evidence on paper or other media.[113]

An important factor is that an exemption from responsibility for committing anti-competitive concerted actions is not granted if the applicant has not taken effective measures to terminate his participation in anti-competitive concerted actions after reporting them to the AMCU.[114]

It should be noted that in the period between 2013 and 2021, only 3 persons referred to AMCU according to the leniency programme and voluntarily revealed their participation in cartels with the aim of being exempted from fines.[115] This is reported to be the lowest indicator among the European countries. In the period between 2021 and 2023, there are no known cases of uncovered cartels under the leniency programme.

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[111] Procedure for exemption from liability (no 64).
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] however, due to shortcomings in the legislation and various ways of circumventing punishment (sometimes even investigation opening) for other participants of a cartel, these cases were not successful for the AMCU.

Considering the inevitability of punishment for cartel conspiracies and significant sanctions that can be imposed for such violations, the appeal for ‚confession in wrongdoing‘ justifies itself and businesses in developed countries often use it.

Considering all the points mentioned above, the leniency programme established in Ukraine before the 2023 amendments has not been effective. One of the main reasons for this is the widespread mistrust among society and businesses towards state bodies, particularly regulatory and controlling bodies like the AMCU. The lengthy duration of AMCU investigations, along with perceived corruption and political dependence, raised doubts about the body's ability to effectively conclude cases. Mistrust is also bolstered by inconsistent management changes, as for instance, from July 2019 to October 2020 — a period of 15 months — there was no information on the AMCU website about the appointment of a new State Commissioner[116] to oversee its operations.

A key element for the effective implementation of the leniency policy is the promotion and explanation of different aspects of the programme and guarantees for applicants by the national competition authority. Taking into consideration the number of leniency applications to the AMCU, the apparent reason for this is the lack of adequate explanation of all the peculiarities and guarantees, and promotion of the leniency programme, thus limiting its visibility and understanding among businesses.

Furthermore, scepticism about the AMCU's ability to maintain the confidentiality of submissions discourages potential applicants from coming forward. The business culture in Ukraine also discourages reporting on 'partners in violation' significantly undermining the willingness to participate in the programme.[117]

The failure to ensure the inevitability of punishment, characterised by insignificant fines, lengthy fine collection processes, and the potential to overturn penalties in court, reduces the deterrent effect on cartel participants and diminishes their motivation to self-report. Notably, the law only stipulated the maximum size of the fine,[118] without defining the algorithm for calculating the fine amount. In practice, fines of varying sizes are imposed for similar violations, and it is rare to see the maximum fine being imposed on cartel participants. Most

[116] according to Art. 1.2 of the Procedure for Exemption from Liability for Violation of legislation of Protection of Economic Competition in the Form of Anti-competitive Concerted Actions, the powers of the state commissioner include consideration of the case on violation of legislation on protection of economic competition in the form of anticompetitive concerted actions, in respect of which applications for a marker or applications for exemption of liability have been submitted.

[117] Vyacheslav Korchev, ‚Competition and Laws and Regulations in Ukraine‘ (CEELM Legal Comparative Guide Competition in Ukraine, 2024) <https://ceelegalmatters.com/competition-2024/26172-competition-and-laws-and-regulations-in-ukraine> accessed 08 May 2024.

[118] up to 10% according to the Law of Ukraine ‚On Protection of Economic Competition‘ Article 52(2)

often, fines range from 1% to 5%. Considering the level of black accounting and the shadow economy in the country, these fines do not seem significant to enterprises, leading to an increase in anti-competitive conspiracies among businesses.[119]

It was the common practice before to challenge the AMCU's decisions in courts, particularly regarding the imposition of fines.[120] In practice, the AMCU issued decisions with certain shortcomings, such as failing to conduct a thorough analysis of the market and the commercial practices of the economic entities involved.[121] Frequently, AMCU's decisions were based on assumptions and their own interpretations rather than established facts. Additionally, the AMCU did not always fully and thoroughly evaluate situations, often making decisions justified solely on the identification of actions containing certain formal signs of violations.[122] These approaches led to a lack of proof of the violations and the AMCU's conclusions often did not correspond to the actual circumstances of the case.[123]

Overall, this shows the lack of transparency and clarity of the leniency programme. Addressing these issues is crucial for enhancing the effectiveness of leniency and ensuring that it serves its intended purpose of uncovering and dismantling anti-competitive practices. The experience of applying leniency in other countries shows that the success of this program depends not only on the presence of internal motives for companies to contact the competition agency (and such motives often arise objectively due to the internal instability of anti-competitive agreements due to differences in the interests and expectations of their participants), but also from the transparency and predictability of all steps within the framework of such a program and sufficient confidence of the companies in obtaining the promised exemption from the fine (immunity) or reduction of its size.[124] The lack of transparency, predictability and any guarantees in the previous version of the leniency programme in Ukraine may have become the reason that the corresponding aims did not become practical steps.[125]

Already at that time, it was understandable that a leniency programme could be effective only if it is implemented in a way that provides mitigation of punishment not only to the first person who reported involvement in a cartel but also to other participants who provide

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[119] Tetyana Shvydka, ‚Anti-competitive concerted actions or cartel conspiracies (dangerous consequences and problems of prosecution)' UKR: 'Антиконкурентні узгоджені дії, або картельні змови (небезпечні наслідки та проблеми притягнення до відповідальності)' (Економічна теорія і право 2018) 121.
[120] Maksym Nazarenko, Mykhailo Sus, ‚A Fine is Not a Verdict: Is it Possible to Challenge an AMCU Fine?' (Sayenko Kharenko, 2020) (UKR: ‚Штраф не вирок: чи реально оскаржити штраф АМКУ?') <https://sk.ua/uk/shtraf-ne-virok-chi-realno-oskarzhiti-sht/> accessed 08 May 2024.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Anastasia Pozhar (no 106)
[125] Ibid.

sufficient evidence. Ukrainian competition law practitioners expressed thoughts for following the EU approach of reduction of fines for the second, third and subsequent applicants.[126] This will incentivise other participants to provide additional evidence in exchange for reduced fines.[127]

4.2.2. The contemporary state of law

Regulation of leniency programmes in Ukraine was significantly updated and expanded after the adoption of the Law of Ukraine ‚On Amendments to Some Legislative Acts of Ukraine Regarding the Improvement of the Activities of the Antimonopoly Committee of Ukraine' in 2023.[128] Like the previous version of the leniency regulation, initiating the leniency process requires companies to submit a formal application to the AMCU.[129]

Ukraine followed the EU practice and implemented provisions that the second, third and subsequent applicants can also receive a reduction in fines provided they too submit evidence of the infringement to the AMCU.[130] Such a system enables competition authorities to gather more comprehensive and higher-quality evidence with fewer resources.[131]

According to the previous versions of the Law, for an applicant to receive immunity the evidence they provided must be of significant importance to the case outcome, which is a fairly high standard. The updated version already provides for two possible scenarios with different requirements for evidence.[132] In the first scenario, when AMCU does not yet know about the existence of a violation, in order to receive immunity, a participant in anticompetitive concerted actions must submit evidence that will be sufficient to open a case, and this is at least such evidence that will expose all participants in the violation, the markets involved, the content of the violation and will allow the investigation and search for other evidence to begin.[133] In the second scenario, when AMCU already knows about the existence of a violation and has already started an investigation it is necessary to provide more weighty evidence,[134] such evidence should be enough for making a decision in the case. Such requirements regarding evidence are established for the second and other subsequent applicants who want to receive a reduction of the fine — the evidence provided by them must

[126] Oleksandr Vozniuk, ‚The Settlement procedure is applied only in cartel cases' (UKR: ‚Процедура Settlement застосовується лише у справах про картелі' (2016).
[127] Ibid.
[128] These amendments came into force on January, 1 2024.
[129] Anastasia Pozhar (no 106).
[130] it is a standard practice also in the USA, Japan, Singapore and other developed countries.
[131] Oleksandr Vozniuk (no 126).
[132] Anastasia Pozhar (no 106).
[133] Law of Ukraine no 2210-II ‚On the Protection of Economic Competition' (no 31), Article 52-1(3).
[134] Ibid. Article 52-1(4).

significantly increase the quality of the evidence base on which the decision of the relevant authority will be based.[135]

The rationale is that anticompetitive concerted actions, particularly cartels, are notoriously difficult to detect and even more challenging to substantiate with solid evidence. Therefore, the mere act of uncovering such actions is already a considerable achievement, meriting leniency in fines for the company that facilitated this discovery. Although the evidence provided at this stage might not be sufficient to conclusively demonstrate all aspects of the violation or involve all participants and periods, the opportunity for other violators to reduce their fines in exchange for additional evidence, coupled with the enhanced investigative capabilities of the AMCU, should lead to more successful proofs of violations.[136] This could also shorten investigation durations, decrease the volume and extent of subsequent legal challenges, and release AMCU resources for other priorities. Collectively, these improvements would enhance the effectiveness of the system for protecting economic competition.[137]

Another situation is when AMCU already knows about the violation. In such a case, the value of the evidence for obtaining immunity or reducing the amount of the fine should be higher.[138]

A notable move towards efficiency of leniency in Ukraine is the introduction of a marker system, which fully corresponds to the EU law.[139] If the applicant does not have sufficient information on the date of application to the AMCU for exemption from liability but can provide such information later, in order to ensure priority in reporting participation in anti-competitive concerted actions, they may approach the authorised representative of the AMCU with an application to receive a marker.[140]

The novelty is also that the AMCU provides for the procedure of preliminary consultations.[141] The procedure presupposes that a cartelist before submitting an application for exemption from liability or an application to receive a marker, has the right to approach the AMCU to obtain preliminary consultation regarding the information and documents necessary for the submission and consideration of the relevant application.[142] Under the Procedure, the

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[135] Oleksandr Vozniuk (no 126).
[136] Anastasia Pozhar (no 106).
[137] Ibid.
[138] Ibid.
[139] Directive (EU) 2019/1 (no 92), Article 21; Commission Notice on Immunity from fines and reduction of fines in cartel cases (no 67), recitals 14-15.
[140] Procedure for exemption from liability for violation of legislation on economic competition protection in the form of anticompetitive concerted actions (UKR: Порядок звільнення від відповідальності за вчинення порушення законодавства про захист економічної конкуренції у вигляді антиконкурентних узгоджених дій) (2023) 6 <https://zakon.rada.gov.ua/laws/show/z0002-24#top> accessed 20 April 2024.
[141] Ibid. 8.
[142] Ibid.

consultation is held without disclosing details about the identity of the participant in anti-competitive concerted actions or their representative. However, even in this case, there are limitations concerning the guarantees for the protection of whistleblowers, as para. 8(2) of the Procedure provides for informing about the date and time of consultations on the official website of the AMCU.[143] In such a case, when a notification is made public, it is important to clearly understand how the full confidentiality of the consultation participant will be ensured.[144]

It is worth noting that according to the Law, an applicant might withdraw their leniency application but the provision has a note that the withdrawal of the application does not prevent the AMCU from exercising its powers regarding obtaining the relevant information.[145] The right of withdrawal requires certain guarantees that are not provided for the Law, hence there is a probability that the AMCU will use the evidence provided by such business and use it to substantiate violation.[146] Considering this, any essence of the right to withdraw the leniency application is lost, as rather than reducing risks, it significantly escalates them and effectively makes them unavoidable.[147]

From the company's perspective, before submitting a leniency application, it must thoroughly assess whether the submission of an application to the AMCU will yield the expected benefits without introducing unmanageable risks. This consideration leads to several practical inquiries, such as, for instance, whether the evidence it possesses is adequate for securing immunity.[148] Additionally, they need to assess what strategies or mechanisms exist to reduce the risk that the competition authority might deem the provided evidence inadequate.

New provisions to the law enhance transparency, and legal certainty of the leniency procedure, however still there is the lack of clear and definitive answers to many questions, which hinders the ability to predict the success of submitting an application. Given these uncertainties, engaging in the leniency program can appear to be a highly precarious move, and companies might be reluctant to proceed.[149]

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[143] Ibid. 8(2)
[144] Oleksandr Fefelov, ‚Antimonopoly reform in action: changes in the procedure for exemption from liability for anticompetitive concerted actions' (UKR: Антимонопольна реформа в дії: зміни у процедурі звільнення від відповідальності за антиконкурентні узгоджені дії) (2023) <https://yur-gazeta.com/dumka-eksperta/antimonopolna-reforma-v-diyi-zmini-u-proceduri-zvilnennya-vid-vidpovidalnosti-za-antikonkurentni-uzg.html> accessed 26 April 2024.
[145] Law of Ukraine no 2210-II ‚On the Protection of Economic Competition' (no 27), Article 52-1(5).
[146] Anastasia Pozhar (no 106).
[147] Ibid.
[148] Ibid.
[149] Ibid

The new law has its flaws and information provided for the possible applicants about the whole procedure is too vague and does not provide the necessary predictability and confidence in the ability to successful usage of leniency. The main function of the leniency programme is to destabilise the activities of existing cartels and prevent other potential offenders from resorting to cartel agreements.[150] To provide an effective leniency programme AMCU has to rely on the experience of other European competition agencies to fill the gaps in regulation and define transparent criteria and rules in the relevant procedural documents that will give viability to the leniency program in Ukraine.[151]

Legislators were guided by the fact that in practice it is very difficult to detect secret anti-competitive concerted actions and prove their existence. By resorting to mitigation of responsibility, it is possible to obtain confessions, direct evidence about other participants and the possibility of obtaining other additional evidence.[152]

Leniency ensures that evidence can be obtained faster and with lower costs compared to traditional investigative methods and ensures prompt and effective disclosure of cases. For providing such information, its owners are promised reduced fines, fewer restrictions and even complete exemption from punishment. The purpose of the mitigation program is to prevent violations of competition rules by increasing the degree of detection and termination of cartels.[153]

4.3. Recommendations for legal reforms to enhance the leniency programme impact

The EU is one of the early adopters of the leniency programme, thus Ukraine while aligning with the Union legislation and standards, especially in the area of cartels enforcement and leniency programmes has a possibility to learn from their experience, avoid predictable issues and implement programmes that are more appropriately tailored to its jurisdiction.

Volpin and Chokesuwattanaskul defined in their work that the adoption of an effective leniency programme includes internal factors (namely, adequate incentives for businesses to refer to leniency programme) and external factors (the overall efficiency of the enforcement system).[154]

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[150] Tetyana Shvydka, ‚Implementation and application of the program ‚leniency' in the Ukrainian legislation for anticompetitive concerted actions' (Economic theory and law 2016) 172.
[151] Ibid
[152] Ibid. 172.
[153] Sargan, ‚The control of concerted practices in the competition law of the European Union and Ukraine' (UKR: ‚Здійснення контролю за узгодженими діями в конкурентному законодавстві Європейського Союзу та України') (2011) 1-7.
[154] Cristina A Volpin and Peerapat Chokesuwattanaskul (n 9) 6.

Leniency programme should be predictable, thus the system must entail a high level of legal certainty and procedural fairness.[155] In Ukraine, the essential aspect of leniency, such as publicity, has improved, especially after the introduction of new amendments in 2023, since the AMCU actively promotes the programme and tries to ensure awareness of its features. However, taking into account all the drawbacks the leniency programme had in the past, the lack of information and incentives to participate from the side of the national competition authority, there is no information on whether the popularity of the programme has increased and whether the authority got new applications since new laws started to function. This might be the reason for the ‚fear of the unknown‘ as the cartel participants are still not fully aware of what to expect in return for the leniency application. OECD in such situations advises competition authorities to engage in wide advertisement campaigns of the recent reforms,[156] which might become a good practice within the Ukrainian competition law framework.

Moreover, transparency is inherent to the effective application of leniency programme, meaning that competition authorities shall maintain a certain level of disclosure of what companies receive from their submission.[157] Leaving some uncertainty is inevitable because businesses cannot calculate the exact sum of fine and the sanction discount they will be able to obtain, as well as, having confidence that the evidence they provide will meet the needed threshold.[158] A sufficient degree of uncertainty motivates cartel members to come forward promptly and disclose as much information as they can.[159]

Transparency of a leniency programme, which includes clear guidelines on eligibility, the application process, the benefits of participation and outcomes of such participation, encourages potential breachers to apply. When companies and individuals clearly understand the rules and the potential outcomes of reporting cartel activities, they are more likely to cooperate with competition authorities. Moreover, trust is essential for the programme's success, as applicants need to feel confident that the authority will handle their information sensitively and that the authority will honour its commitments, such as protecting a whistleblower's identity or reducing penalties. Additionally, competition authorities must enhance fairness and legal certainty to ensure that all applicants are treated fairly.

Deterrence of the enforcement system refers to external factors needed for the effectiveness of leniency programme. The deterrent effects of well-designed and effectively managed leniency

[155] Ibid.
[156] OECD, ‚Roundtable on challenges and co-ordination of leniency programmes – Note by the United Kingdom' (2018) 3 <https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)38/en/pdf> accessed 10 April 2024.
[157] Cristina A Volpin and Peerapat Chokesuwattanaskul (n 9) 7.
[158] Ibid.
[159] Ian S. Forrester and Pascal Berghe (no 76) 163.

policies are generally positive but tend to be limited unless the sanctions for non-applicants are particularly harsh or monetary incentives are offered.[160] The severity of sanctions provided for cartels is one of the elements to take into account while adapting leniency programmes and assessing their effectiveness.[161] Within Ukrainian competition law fines for cartels remain incredibly low even after the implementation of new amendments to the Law. This is the reason why there is no fear from the side of cartelists of being caught and paying a great amount of money, which is an obstacle to the workability and value of the leniency programme.

Successful implementation of a leniency programme depends on three factors. First, the competition laws in a country must pose the threat of severe penalties for those who engage in hardcore cartel activities and do not self-report.[162] Second, businesses must believe there is a significant likelihood of being detected by competition authorities if they fail to self-report.[163] Third, a cartel enforcement program must be as transparent and predictable as possible, enabling companies to accurately anticipate how they will be treated if they apply for leniency and understand the potential consequences of failing to do so.[164]

The main elements of the external system for the efficient functioning of leniency policies include: (i) the fear of detection and the severity of penalties; (ii) coordination within the same enforcement framework, specifically through coordination with settlements, private enforcement actions, criminal enforcement; 3) possibility for individuals to make reports; and 4) collaboration among various leniency programs to address cross-border cartels.[165]

Moreover, cultural factors could significantly affect the incentive to report.[166] For instance, some academics have established that leniency programmes tend to be less effective in more collectivist societies compared to individualistic ones.[167]

A right move to make the leniency programme work is to adopt rules that in the case of withdrawal of an application, the evidence submitted by the applicant cannot be used against

[160] Catarina Marvão and Giancarlo Spagnolo (no 8) 80.
[161] ICN, ‚Anti-Cartel Enforcement Manual, Drafting and Implementing an Effective Leniency Policy‘ (2014) 5 <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf> accessed 24 April 2024 .
[162] Scott D. Hammond, ‚Cornerstones of an Effective Leniency Program‘ (ICN Workshop on Leniency Programs 2004) <https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program> accessed 27 April 2024.
[163] Ibid.
[164] Ibid.
[165] Cristina A Volpin and Peerapat Chokesuwattanaskul (n 9) 10.
[166] Ibid.
[167] Peerapat Chokesuwattanaskul, ‘Transition from domestic competition to strategic choice and its cultural effects as an ex-ante process toward international competitiveness of Thai firms: a laboratory experiments study’ (no 79).

them in the future, since currently there are no prescribed guarantees in Ukraine for leniency applicants.

Transparent processes and predictable outcomes enable more efficient management of leniency applications. This efficiency is crucial for swiftly dismantling cartels and minimising their economic damage. Moreover, clear procedures reduce the administrative burden on competition authorities, allowing them to allocate resources more effectively and focus on investigating and prosecuting complex cases.

5. Conclusion

The combined analyses of cartel definitions under Ukrainian and EU law and the implementation of the EU-like leniency framework in Ukraine highlight significant steps towards harmonisation of anti-competitive legislation and enhancing competition law enforcement in Ukraine.

Ukraine's adaptation of its legal system to integrate EU standards demonstrates a commitment to refining its approach to competition law, especially in handling cartels. This adaptation, while aligning with the EU broad definitions, is tailored to the local context, maintaining the core objectives of maintaining a fair competitive market.

Moreover, the implementation of the EU leniency framework in Ukraine marks a pivotal development in competition law enforcement. By encouraging self-disclosure among infringers through potential immunity or reduced penalties, Ukraine aims to enhance cartel detection and its destabilisation. This approach is expected to lead to a cultural shift towards compliance, promoting a legal environment where ethical business practices are valued over the illicit gains from cartel participation.

Yet, the effectiveness of these reforms hinges on overcoming inherent challenges such as mistrust towards regulatory bodies, the need for clearer procedural guidelines, and the establishment of a reliable protection system for applicants. The low uptake of the leniency programme historically points to a critical need for further comprehensive reforms that include not only legislative amendments but also improvements in the transparency and operational efficiency of the AMCU.

While the alignment with EU standards presents a substantial opportunity for Ukraine to strengthen its competition law framework, the success of this endeavour will require continuous legal evolution, enhanced cooperation with EU bodies, and a permanent commitment to growing a culture of compliance and transparency. This integration effort, if sustained and effectively managed, promises to reshape Ukrainian market dynamics, offering a fairer and more competitive environment conducive to both domestic and international economic activities, as well as contributes to its broader economic and regulatory integration with the European Union.

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