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THE LENIENCY PROCEDURE IN THE SYSTEM OF LIABILITY FOR ECONOMIC COMPETITION LAW INFRINGEMENTS

ПРОЦЕДУРА LENIENCY У СИСТЕМІ ВІДПОВІДАЛЬНОСТІ ЗА ПОРУШЕННЯ ЗАКОНОДАВСТВА ПРО ЗАХИСТ ЕКОНОМІЧНОЇ КОНКУРЕНЦІЇ

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The detection and proof of cartel violations in the field of competition law enforcement are traditionally characterised by a high degree of complexity due to their secret nature, limited availability of evidence, and the participants' vested interest in concealing collusive conduct. Under such circumstances, classical liability mechanisms do not always ensure effective

enforcement, which necessitates the development of instruments capable of stimulating voluntary disclosure of anticompetitive concerted practices.

In this context, the procedure of exemption from liability (hereinafter – “Leniency”) emerges as a special legal mechanism aimed not at establishing liability, but at granting full or partial immunity in exchange for active cooperation with the competent competition authority. While in European Union (hereinafter – “EU”) law Leniency has had a normative foundation and has been applied for more than two decades [5], in Ukraine its practical implementation commenced only in 2024, which explains the growing academic interest in the first results of its full-scale application.

In the United States, the programme was introduced as early as 1978, and in 1993 it was substantially reformed, with the corporate leniency policy being revised for legal entities and, one year later, extended to individuals [3, p. 14]. In EU law, the principal act governing immunity from fines and reduction of fines in cartel cases is the Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11) (hereinafter – “the Notice”) [1]. The Notice provides that an undertaking which is the first to inform the European Commission (hereinafter – “EC”) of the existence of a secret cartel, submits evidence of significant evidentiary value, and terminates its participation in the infringement may be granted full immunity from fines. Other cartel participants may benefit from partial reductions provided that they comply with the established requirements.

Importantly, Leniency does not constitute a separate type of legal liability; rather, it represents an exception from the general liability regime, conditioned upon the procedural conduct of the infringer and its contribution to uncovering the cartel. The evidentiary value of the information submitted is of decisive importance. In the practice of the EC, the key criterion is the concept of “significant added value”, meaning the ability of the evidence provided to substantially strengthen the authority’s capacity to prove the infringement. This approach enables competition authorities to obtain access to internal information that would otherwise remain concealed. According to the EC, the total amount of fines waived or reduced due to Leniency exceeds EUR 16 billion, which demonstrates both the scale of detected infringements and the effectiveness of the cooperation mechanism [4, p. 15].

An essential procedural instrument within the European Leniency model is the marker system, which secures the applicant’s place in the queue for full immunity or fine reduction while the complete application and supporting evidence are being prepared. The system also provides for anonymous preliminary consultations, allowing potential applicants, through legal representatives, to inquire whether specific conduct qualifies as a cartel and whether full immunity remains available. Additionally,

the possibility of submitting a hypothetical application exists, whereby the nature and content of the evidence are described without disclosing the applicant's identity [4].

The amount of fine reduction within the EU framework is characterised by predictability, as clearly defined reduction ranges are established depending on the order of application and the evidentiary value of the information provided. Applicants are therefore aware not only of the maximum but also of the minimum level of potential mitigation.

Despite its proven effectiveness in several jurisdictions, Leniency had not been practically applied in Ukraine until 2024. Various reasons have been identified, including public distrust in state authorities, insufficient explanatory efforts, the absence of effective interaction with applicants, lack of confidentiality guarantees, and psychological factors, as participation in Leniency entails exposing business partners to adverse consequences [9]. These and other factors likely hindered the full functioning of the mechanism.

Following the reform of competition legislation through the adoption of Law No. 3295-IX, which entered into force on 1 January 2024, an approach analogous to the EU model was incorporated into Ukrainian law through the Procedure for Exemption from Liability for Anticompetitive Concerted Actions (hereinafter – “Procedure”) [2], approved by the Antimonopoly Committee of Ukraine (hereinafter – “AMCU”) and implemented in practice in 2024. The regulatory framework generally corresponds to European standards, particularly with regard to the criteria for full and partial immunity, requirements imposed on applicants, and the evidentiary nature of the information submitted. The innovations include confidentiality guarantees, sequencing of partial immunity, preliminary consultations without disclosure of identity, and assessment of evidentiary weight for the purposes of calculating fine reductions. The Ukrainian Procedure also introduces a marker mechanism; however, it is regulated in a less detailed manner, and the assessment of the “significance” of evidence remains largely within the discretion of the AMCU. Unlike the EU system, Ukrainian legislation does not establish guaranteed minimum reduction thresholds, effectively allowing fines to be reduced to a symbolic minimum of one hryvnia.

As of early 2026, the AMCU has applied Leniency three times. The first application occurred in December 2024 in a case concerning bid rigging, where applicants voluntarily provided information and evidence enabling the AMCU to establish collusion among tender participants [6]. Confidentiality was ensured in that case, as the published decision did not disclose the names of the undertakings involved. Subsequent decisions in August and October 2025 differed in that the identities of the parties were disclosed.

In the August case, involving “SIVI SERVICE” LLC and “SIRIUS SENIDA” LLC, the first applicant was granted full immunity according to the order of submission, while the second received a partial reduction [7]. In the decision of 30 October 2025, the AMCU established bid rigging between an individual entrepreneur and PE “ELIT-BUD 2”. The individual entrepreneur, having filed an earlier application, disclosed previously unknown information, ceased participation in the infringement, fully cooperated with the AMCU, and satisfied all statutory requirements, thereby receiving full immunity, whereas the other participant was fined [8].

In interim assessment, the level of confidentiality in Ukrainian practice largely depends on the applicant’s position, particularly whether a request for restricted disclosure was included in the application. The increasing number of Leniency decisions represents a positive development, and significant expectations are associated with the future effectiveness of the mechanism in Ukraine.

Leniency constitutes an effective instrument for detecting and proving cartel violations in circumstances characterised by limited evidence and high secrecy of anticompetitive conduct. The EU experience demonstrates that the success of the procedure depends on clear regulation of evidentiary value, procedural safeguards for applicants, and predictability of legal consequences. The implementation of the updated model in Ukraine has created normative preconditions for the development of practice, and the first decisions indicate gradual convergence with European standards. The further effectiveness of the mechanism will depend on consistency of enforcement, protection of confidentiality, and business trust in Leniency.

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