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The Failure of Leniency as a Regulatory Transplant in Hungary

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Abstract

While leniency has become the main pillar of EU cartel enforcement, its expediency can be questioned, particularly if we consider that the vast majority of leniency applications arrive after the first dawn raids or failed cartels. Leniency can be criticized not only for uncovering only cartels that are already doomed, but also for its cartel-inducing effect, where periodic whistle blowing or the mutual threat of disclosure stabilizes anti-competitive agreements. The effectiveness of leniency policy is strongly influenced by the regulatory mix of incentives (immunity from or reduction in fines, anonymity), sanctions (criminal sentences, disqualification from public procurement), and compensatory measures (private enforcement) introduced in the given jurisdiction. However, certain extra-legal factors may also play a key role: the success of leniency policies differs across company size, whistle-blowing cultures, and awareness of leniency throughout the Member States. In our paper, we analyse Hungarian leniency policy as a legal transplant, describing its design and comparing it to the ECN Model Leniency Programme. We arrive at the conclusion that its failure in Hungary can be explained by extra-legal factors, such as market structure, leniency awareness, company culture, and ingrained attitudes towards competitors and the state.

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1. Introduction

Leniency policy is an instrument designed to enhance the effectiveness of competition law enforcement. The common EU approach to leniency is laid down in the European Competition Network (ECN) Model Programme which, whilst being a soft law measure, is meant to bring about some convergence across Member States to ensure transparency for undertakings and more effective enforcement of anti-trust law.

Like other Member States, Hungary implemented a national leniency policy based on the ECN Model Programme in 2003. The Hungarian competition authority (Gazdasági Versenyhivatal, GVH) issued the leniency rules applicable in Hungary in its Notice No. 3/2003, later amended by notices No. 1/2006 and 2/2009. Leniency was also statutorily enshrined in Act No. LVII of 1996 on the prohibition of unfair and restrictive market practices (Competition Act) in June 2009[1] with the regulation taking its current form in 2013. While Hungarian leniency regulation essentially follows the best practice – allowing for conditional leniency and the application of a marker system, and even introducing the innovative tool of 'Cartel chat' to leniency conditions and benefits[2] – the legal transplanting of leniency may be considered a relative failure, since whistle blowing is rare in Hungary.[3] The reasons for such a failure of leniency policy are manifold, and relate to the Hungarian business structure and culture. In particular, Hungary is a small market where business owners and managers of undertakings know each other personally. Knowing that they will have to continue to operate in the same market with those on whom they blew the whistle is a deterrent. Further reasons include the socialist history of the country where 'spying' and 'snitching' were shunned. As a result, a culture of whistle blowing has not developed.

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1 Act No XIV of 2009 on the amendment of the Competition Act amended the Competition Act, supplementing it with rules on leniency (hereinafter Competition Act).

2 'Cartel Chat' is described as a 'closed and protected system that assures persons (individuals and undertakings) who have information about secret cartels by a simple, anonymous registration that they can share their special knowledge with the employees of the Cartel Detection Section of the GVH, in full anonymity and without fear of negative consequences or retaliation. (...) They can also ask questions about cartels, the leniency policy and the procedure of the policy and about the informant reward. In every case, they will receive answers from the same employee of the GVH who they have previously dealt with in the event that they have further questions.': 'Cartel chat and leniency campaign' (*European Commission*) <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/cartel-chat-and-leniency-campaign> accessed at 11 November 2020. See, for similar tools, J Ysewyn and J Boudet, 'Leniency and competition law: An overview of EU and national case law' (*e-Competitions Special Issue Leniency*, 2 August 2018) 5 <www.concurrences.com/en/bulletin/special-issues/leniency/leniency-and-competition-law-an-overview-of-eu-and-national-case-law-72355> accessed 14 February 2021.

3 Z Bara, 'A kartellek szerepe a verseny alakulásában (2006-2007)' (2009) 5 Vezetéstudomány 11.

In the following sections, we expound generally on legal transplants, and on their role in Hungary in more detail. Next, we describe the rules governing leniency as implemented in Hungarian competition law, including the upcoming amendments to the system which are to take effect in 2021. Finally, we elaborate on the relative failure of leniency in Hungary and the possible geo-cultural reasons behind it.

2. Regulatory transplants in Hungary

2.1. Why do states rely on legal transplants?

In a broad sense, legal transplants[4] date back to the emergence of legal systems. It suffices to think of the many elements of Roman law that have survived the fall of the Empire and that continue to affect the development of our legal systems. Jonathan M. Miller distinguishes between four categories of legal transplants based on their purpose: (i) the cost-saving transplant; (ii) the externally dictated transplant; (iii) the entrepreneurial transplant; and (iv) the legitimacy-generating transplant.[5]

A cost-saving transplant is introduced in the hopes of achieving an economic advantage. It is expected that – in the medium or long term – the transplant will generate budgetary revenue through an increase in taxable entities and employment. Examples of cost-saving transplants typically include environmental and health care policy solutions, and even the 1941 introduction of right-hand traffic in Hungary.

While cost-saving transplants are introduced voluntarily by the state, externally-dictated transplants are the exact opposite, and in fact a traditional, centuries-old form of legal transplant. A prominent example of such an externally-dictated transplant is the 1949 Hungarian constitution, modelled upon the 1936 'Stalinist' Soviet constitution.[6] Today, externally-dictated transplants mainly ensue in the form of economic and budgetary restructuring set forth as a precondition for loans granted by international financial institutions. However, the line between cost-saving and externally-dictated transplants is not always obvious: the intro-

4 According to Professor Alan Watson, legal transplantation is the 'moving of a rule (...) from one country to another, or from one people to another': A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 21.

5 JM Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 4 The American Journal of Comparative Law 842.

6 This, however, affected almost the entire Hungarian legal system at the time: see, for instance, J Verebics, 'A szovjet polgári jog és hatása az alakulóban levő magyar civilisztikára 1948-1951' (2017) 3 Állam- és Jogtudomány 45.

duction of legal institutions foreseen under EU law by Member States and, in particular, candidate countries, is both an obligation and a convenience.[7]

Entrepreneurial transplants are promoted by independent, non-state private entities (e.g. experts, NGOs and lobbyists participating in the preparation of draft bills). These transplants are typically introduced to fill a regulatory gap in the domestic legal system, with the expectation that it will yield professional benefits or a competitive advantage. One example of entrepreneurial transplants in Hungarian law is the institution of trust, introduced by the new Civil Code of 2013.[8]

No individual or public benefits are expected from legitimacy-generating transplants, nor is there an obligation to implement them in the domestic system. These transplants are introduced primarily because they have been implemented and applied by other countries, and are considered to be a model for the transplanting state due to their development or affiliation with an international organization. As such, the transplant stands for adherence to values proclaimed by the model states. Such legitimacy-generating transplants are the findings of 'European consensus' in the jurisprudence of the ECtHR,[9] as a result of which states applying a different regulatory model are induced to implement the majority (consensual) regulatory solution. However, such legitimacy-generating transplants often fail to bring about veritable change in the domestic legal system, not least because the implementing state only attaches symbolic relevance to the transplant.

When looking to analyse a legal transplant implemented by an EU Member State (in particular, by a former socialist state), reaching for a legal institution related to competition law seems an obvious choice.[10] Competition law is fundamental in developing the conditions of a market economy, and the EU enjoys particularly strong powers in this field. Competition was unknown to the socialist economy: former socialist states followed the model of a centrally planned economy. This was the case for Hungary, too, which later sought both to develop market economy conditions and to join the EU, a situation which made the implementation of EU competition law solutions expedient and necessary.[11] As

7 When Hungary acquired candidate country status, the implementation of the institution of EU law was primarily externally-dictated, while in the period preceding the application for membership the state transplanted legal solutions mostly for cost-saving or to generate legitimacy.

8 See I Sándor, *A bizalmi vagyonkezelés és a trust. Jogtörténeti és összehasonlító jogi elemzés* (HVG ORAC 2014).

9 See, for instance, P Kapotas and V P Tzevelekos (eds), *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019).

10 For a general approach, see W Twinning, 'Diffusion of Law: A Global Perspective' (2004) 49 Journal of Legal Pluralism 5-6, 9.

11 It should be noted that Hungary had implemented modern and fully functioning anti-trust regulation in the 1930s: Act No. XX of 1931, provided that, owing to the principle of contractual freedom, undertakings were free to cooperate. However, in order to guarantee that such forms of cooperation could be monitored in the public interest, cartels had to be registered. Cartels

such, from a different point of view, the same institution may be considered a different model of legal transplant.

2.2. The introduction of leniency in Hungarian law

Leniency was introduced in Hungary in 2003, directly preceding the country's accession to the EU in 2004. What is interesting about leniency is that it became part of Union law as a regulatory transplant itself, since leniency in fact stems from US antitrust law. The Hungarian regulation of leniency was, however, clearly based on the EU, and not on the original US model of leniency. The idea behind leniency programmes is that it is worth incentivizing perpetrating cartels to assist authorities by providing information which facilitates prosecution. In exchange, the leniency applicant can expect favourable treatment (e.g. a reduction in fines),[12] rendering leniency a special version of plea bargaining in the field of antitrust law.[13]

Leniency appeared in US law in 1978, when the Department of Justice implemented an Amnesty Program with the purpose of 'rewarding' perpetrating companies voluntarily cooperating with the authorities. The original version of the programme, however, suffered from several deficiencies: the rules were difficult to interpret, and receiving favourable treatment was not automatic but always dependent upon the discretion of the Department of Justice. Seeing as the program was merely a mild success, it was revised by the Department of Justice in 1993. Since then, 'amnesty is automatic if there is no pre-existing investigation, amnesty may still available even if cooperation begins after the investigation is underway, and all officers, directors, and employees who cooperate get complete protection".[14] This has become the foundation of leniency as we know it today.

Encouraged by the success of leniency in the US, the European Commission set out to design its own leniency programme in 1996, clearly aspiring to a cost-saving transplant. Not unlike its US counterpart, the first version of the EU le-

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were monitored by the Cartel Commission which, along with other applicants, could bring a case before the Cartel Court that a specific cartel violated the public good. See, in detail, I Szabó, 'A kartellfelügyelet szervezete és hatásköre az 1931. XX. törvénycikk nyomán' (2016) II Versenytükör 64.

12 L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 193.

13 See, for instance, AW Alschuler, 'Plea Bargaining and Its History' (1979) 1 Columbia Law Review 1.

14 GR Spratling, 'Making Companies an Offer They Shouldn't Refuse: The Antitrust Divisions's Corporate Leniency Policy -- An Update' (*United States Department of Justice*, 16 February 1999) <www.justice.gov/atr/speech/making-companies-offer-they-shouldnt-refuse-antitrust-divisions-corporate-leniency-policy> accessed 11 November 2020.

niency programme was not a complete success: between 1996[15] and 2002 (when the Commission revised its Communication on leniency),[16] only 188 applications were submitted. Moreover, the majority of these leniency applications were submitted in ongoing cases following dawn raids or in derivative cases where the cartel had already been detected in the US.[17]

When the GVH introduced leniency one year before Hungary joined the EU,[18] there were ample experiences available relating to the operation of this legal institution.[19] The Hungarian implementation of leniency can be considered a legitimacy-generating transplant (and, in part, a cost-saving transplant) since Member States and, in particular, candidate countries, were not obliged to introduce this policy in their domestic systems.[20] According to Tihamér Tóth – former President of the GVH Competition Council at the time of Hungary's accession to the EU – while there was no obligation or pressure on Member State NCAs to introduce leniency programmes, the European Competition Network is a professional framework inducing like-minded national officials to seek and implement common solutions to problems of competition law and enforcement. The GVH considered leniency to be a useful addition to its investigative efforts, with the ECN Model Programme exerting a reputational pull on the design of national leniency notices. Moreover, it was the GVH – not the European Commission – who lobbied for the codification of leniency rules into the Hungarian Competition Act, reproducing rules already implemented from the ECN Model Programme.

Since there was no external (legal) pressure to implement leniency in Hungarian competition law, one could legitimately expect that this legal transplant – based on the lessons learned from the operation of leniency in other jurisdictions – and its adaptation to domestic circumstances would be a real success story in Hungary.

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15 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4.

16 Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.

17 See 'Joint answer given by Ms Kroes on behalf of the Commission to Written questions: E-0890/09, E-0891/09, E-0892/09' (*European Parliament*, 2 April 2009) <www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-0892&language=DA> accessed 11 November 2020.

18 See (in Hungarian) Notice No. 3/2003 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on the application of a leniency policy to promote the detection of cartels.

19 ÁR Kaszás, 'A kartellezők "jussa" hazánkban és az Európai Unióban' (2010) 11 Jogtudományi Közlöny 560.

20 According to the website of the European Commission, Malta does not even have a leniency program: see Commission, 'Authorities in EU Member States which operate a leniency programme' (*EuropeanCommission*, 22 November 2012) <https://ec.europa.eu/competition/ecn/leniency_programme_nca.pdf> accessed 11 November 2020.

3. Leniency in Hungary: regulatory design and comparison with the ECN model leniency programme

Leniency was incorporated into Chapter XI of the Competition Act with Section 66 of Act No. CCI of 2013. Prior to that, leniency was governed by notices issued by the GVH.[21] Finally, the statutory rules governing leniency are laid down in sections 78/A to 79, which regulate the conditions for applying leniency and the procedure followed by the Competition Council. In 2009, the domestic rules governing leniency were fine-tuned to harmonize with the ECN's Model Leniency Programme. Amendments were further made to the statutory rules on leniency in 2013 to reconcile the system with the criminal sanctions applicable to hard-core cartels and bid rigging; applying for leniency lost its appeal with the 2005 introduction of criminal sanctions for these types of anti-competitive conduct. As will be demonstrated below, the Hungarian legislator took pains to design domestic leniency rules providing an attractive regulatory context for whistle-blowing undertakings, and the Hungarian Competition Authority was instrumental in advising the legislator on designing an optimal regulatory mix.

3.1. Conditions for applying leniency

According to Section 78/A (1) of the Competition Act, if an undertaking discloses its participation in a cartel or other agreement or concerted action in relation to price fixing, the GVH may grant it immunity from – or a reduction in – fines if it makes a leniency application to the GVH and ceases its participation in the anti-competitive scheme. It must further fully and continuously cooperate with the GVH in good will until the cartel proceedings are closed.

Immunity from fines may only be granted to those undertakings that have not coerced another undertaking into participating in the anti-competitive scheme,[22] and only if the following two cumulative conditions are met: (i) the undertaking must be the first to submit the leniency application, and (ii) it must provide evidence to the GVH which suffices for the court to grant a search warrant or sufficient evidence to prove the infringement. The latter also implies that immunity will not be granted if the GVH is already in possession of information that would suffice for a search warrant or for proving the infringement. The Competition Act even allows for immunity applications in cases where a

21 For instance, Notices No 3/2003, 2/2009 and 1/2006 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority.

22 Section 78/A. (2) and (8) Competition Act.

'formal investigation' has already been launched and communicated to the undertaking, provided that the applicant delivers evidence to prove the infringement. However, owing to the changes brought about by the ECN+ Directive, the Competition Act has been amended to exclude this possibility as of 1 January 2021.

Where the conditions for immunity are not met, a reduction in fines may still be granted upon the leniency application of the undertaking if the undertaking provides the GVH with evidence on the infringement which represents significant added value with respect to the evidence already held by the GVH. The reduction in fines for the first undertaking to make an application with evidence representing significant added value may range from 30-50%; for the second, 20-30%. All subsequent undertakings may receive a reduction of up to 20% of the fine. Should the applicant undertaking provide evidence with significant added value which may lead to an increase in the fine, the GVH will not take such additional facts into account when setting the fine for the relevant undertaking.[23]

Finally, the possibility of settlement must also be mentioned. Should an undertaking applying for leniency acknowledge its liability for the infringement and waive all its rights – to further access to its file, making a formal statement, holding a hearing and filing for appeal – the GVH will grant a further 10-30% reduction in fines.[24] Settlements render leniency applications more appealing to undertakings not eligible for immunity, while at the same time saving time and costs for the GVH's and the domestic courts' proceedings.

3.2. Leniency applications

The Competition Act expressly provides for the possibility of a group of undertakings submitting joint leniency applications, or for the controlling undertaking to submit a leniency application also covering the controlled undertakings.[25] Section 78/B (1) of the Competition Act follows the Model Leniency Programme in determining the minimum content of leniency applications (name and address of the applicant, the nature of the cartel conduct, duration, affected products and territories, other parties to the cartel, EEA states where the evidence is likely to be located, NCAs, where the undertaking has submitted or is considering submitting a leniency application).[26] All available evidence must be enclosed with the application.

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23 Section 78/A. (3)-(6) Competition Act.
24 Section 73/A. Competition Act.
25 Section 78/A. (9) Competition Act.
26 ECN Model Leniency Programme, para 24.

So-called marker applications are, since 2009, also possible under the Act in Type 1A cases:[27] that is, where the Competition Authority does not yet have enough evidence to seek a court warrant or has not yet carried out an inspection. In these cases, the application is made as a sort of place-holder to secure immunity, with a commitment to providing the necessary evidence at a later time when the information is available, and sufficient reasons are given for the delay in providing the evidence. Finally, non-definitive preliminary applications (summary application markers) may be submitted to the GVH contemporaneously with an application to the European Commission.[28]

3.3. Leniency procedure and confidentiality

The proceeding Competition Council considers leniency applications in the order of their arrival and decides, based on the fulfilment of immunity and leniency requirements, on granting immunity or a reduction in fines.[29] In line with the ECN Resolution on the Protection of leniency material in the context of civil damages actions,[30] and to instil confidence in potential applicants, access to files made available to the GVH is restricted. In fact, leniency applications and statements made by applicant undertakings or settlement statements can only be disclosed to other applicants to the extent necessary for exercising their right of defence. Until the application for immunity is decided upon, access to the application and the evidence enclosed is restricted to the official investigating the case, the proceeding Competition Council and the court. Should the application be withdrawn, the application and evidence must be returned to the applicant.[31]

4. A failed transplant: geo-cultural considerations

In the framework of harmonization of Hungarian laws with those of the EU, the Hungarian leniency programme was designed according to European best practices, which in theory should ensure the effective operation of the programme.[32] In fact, according to Transparency International, the

27 ECN Model Leniency Programme, para 16 et seq.
28 Section 78/B. (4) Competition Act.
29 Section 78/C. Competition Act.
30 ECN, 'Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012: Protection of leniency material in the context of civil damages actions' (*European Commission*, 23 May 2012) < ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf > accessed 14 February 2021.
31 Section 78/D. (1) Competition Act.
32 L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 222.

Hungarian policy is among the most favourable for a leniency applicant:[33] criminal penalties may be reduced without limitation,[34] no disqualification from public procurements (safe harbour), deficiency suretyship for damages claims[35] which will be supplemented by a marker regulation, non-disclosure of data to other NCAs beginning in 2021.[36] According to the research done by Csongor István Nagy into the GVH's reports to the Parliament, between 2006 and 2011 only five leniency applications were accepted by the GVH, meaning an average of 0.8 applications annually.[37] By comparison, in the 10-year period between 2000 and 2010, the German NCA received a total of 288 leniency applications, amounting to an average of 28.8 applications per annum.[38] Márk points out that, while it is difficult to conclude from the mere number of applications whether leniency policy has been a success – and in every country it took a few years for the number of applications to pick up after leniency was introduced – it is nevertheless the case that, subsequently, 'in the US and the European Union, applications preceding detection by the authorities became widespread, which is something that we are not witnessing in Hungary'.[39]

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33 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 18 and CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 184.

34 For details, see B Páhi, 'A versenyjogi engedékenységi politika büntetőjogi mengjelenése' in Miskolci Doktorandusz Konferencia Tanulmánykötet (Miskolc 2017) 189-190 and CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 181-182.

35 See the section on Hungary in OECD, 'Policy Roundtables. Leniency for Subsequent Applicants. 2012' (*OECD*, October 2012) 65-66 <www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf> accessed 14 February 2021; C Bán, 'Hungary' in J Buhart (ed), *Leniency Regimes* (4th edn, European Lawyer Reference 2012) 192-194 and A Jádi Németh, 'Hungary: A Long Desired Step in the Right Direction – Leniency Policy' (*Kluwer Competition Law Blog*, 19 July 2012) <http://competitionlawblog.kluwercompetitionlaw.com/2012/07/19/hungary-a-long-desired-step-in-the-right-direction-leniency-policy/?doing_wp_cron=1590564303.5075469017028808593750> accessed 11 November 2020.

36 A Turi and M Kovács, 'Hungary Update: Upcoming Amendments to the Competition Act' (*CEE Legal Matters*, 6 May 2020) <https://ceelegalmatters.com/hungary/13474-hungary-update-upcoming-amendments-to-the-competition-act#/ref/h9S5F4m6EeBqqJ7n> accessed 11 November 2020 and Z Székely, 'A magánjogi jogérvényesítés néhány aktuális kérdése a 2014/104/EU irányelv tükrében' (2017) 1 Miskolci Jogi Szemle 159, 159-160.

37 CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 174.

38 Concerning Germany, see Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 16.

39 L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 221 and Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 18.

It is worth noting that, while on an EU level the Hungarian leniency programme cannot be considered a success, there are jurisdictions with even fewer leniency applications in the region: in the span of a decade, Romania saw merely two cartel cases sanctioned by the Romanian NCA based on leniency.[40] This seems to be a general trend in Eastern Europe. Twinning quotes the USAID C-LIR, which reported in 1999 with respect to commercial legal and institutional reform in Eastern Europe and Eurasia that, while laws were often copied verbatim, these efforts failed to yield lasting change. This was followed by a strong emphasis on the reinforcement of the institutional context of commercial law. While advances were made in certain areas of commercial law, the C-LIR expressly mentioned that little progress was made in, for example, antitrust law.

While measuring the 'success' or 'failure' of legal transplants is highly criticized in comparative law literature, it is now recognized that, in order to refine regulation and improve enforcement, analysing the workability of legal transplants is indispensable.[41] Literature and the GVH's own trends suggest that applications for leniency have remained scarce – in Eastern Europe in general, and in Hungary in particular – and trends over the past fifteen years show strong volatility.

In the past few years, two important studies have been commissioned by the GVH to take stock of the possible legal and extra-legal factors that have led to the relative failure of the Hungarian leniency programme. The TNS Hoffman survey[42] and the Transparency International study – quoted in this paper – surveyed hundreds of CEOs of SMEs active in Hungary, as well as lawyers working with Hungarian companies on their leniency applications. They sought to identify and quantify these factors and to make suggestions regarding the regulatory design of leniency policy in Hungary. These studies and the scholarly literature agree that it is primarily extra-legal factors, and not the design of leniency rules, that compromise the operation of Hungarian leniency policy.

Below, we describe the extra-legal factors contributing to the geo-cultural landscape which have doomed the favourable Hungarian leniency policy to failure. We depart from the findings of the studies cited above. We further supplement their data with our own in-person interviews, conducted with attor-

40 A-F Fora and others, 'The knowledge of the leniency policy at the level of the management of companies operating in Romania' (Proceedings of the 13th International Management Conference 'Management Strategies for High Performance', Bucharest, Romania, 31 October-1 November 2019) 410. See also D Jalba and others, 'Romania's leniency programme: critical overview' (*Thomson Reuters Practical Law*, 1 June 2013) <https://uk.practicallaw.thomsonreuters.com/4-532-4276?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 14 February 2021 and CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 173.

41 ibid, 33-35.

42 The TNS Hoffman survey was commissioned by the GVH in 2016.

neys of leading Hungarian law offices representing Hungarian businesses in their proceedings before the GVH.

4.1. Awareness and perception of cartels and leniency policy among Hungarian market participants

Based on a survey carried out among 350 CEOs of small and medium-sized businesses active on the Hungarian market in 2016,[43] we may conclude that market participants are aware that cartels are formed in the segment they are competing in. They report that market sharing, the disclosure of sales data, and price fixing are the most widespread forms of anti-competitive agreements. However, the level of acceptance of the different types of cartels among the market participants varies, with only 6% finding bid-rigging cartels acceptable, yet as many as 34% accepting the disclosure of sales data. Businesses qualified the communication of prices and coordination on the opening of stores as fairly acceptable, and information sharing within the framework of professional organizations as typical and acceptable. Meanwhile, the vast majority of businesses on the Hungarian market know that cartels are prohibited by law and may result in fines, damages claims, disqualification from public procurement, and even criminal penalties.

Based on this data, we may conclude that businesses operating in Hungary are aware that certain forms of cooperation between competitors are illegal and will draw sanctions if detected.[44] It is surprising, in this light, that business owners and managers are unaware that disclosure of sales data – even if done under the umbrella of a professional organization – is illegal. Acceptance of certain forms of cooperation is higher, with others, particularly bid-rigging cartels, being the least accepted. As the TNS Hoffman survey concluded, while CEOs 'are aware of the statutory consequences, the perception of certain events depends much more on market practice, custom, than the knowledge of the law'.[45]

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43 For the sake of simplicity we refer to these as Hungarian businesses and companies, as well as Hungarian CEOs. This reference is not meant to indicate the origin of the company or the nationality of its CEO, although to a large extent these will be Hungarian, but much rather the fact that they operate on the Hungarian market, and shall accordingly include Hungarian subsidiaries of multinational or foreign companies and CEOs of Hungarian or foreign companies operating in Hungary.

44 Law faculties in Hungary feature competition law in their curricula. As such, Hungarian lawyers are trained to identify cartels and other anti-competitive conduct. While business schools also include industrial organization studies (as a mandatory or optional course) in their curricula, this does not necessarily mean that competition law is also taught to students aspiring to a business degree.

45 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 3.

Finally, the survey also included questions related to the awareness and perception of leniency policy among Hungarian business operators. While the majority of Hungarian CEOs are aware of the fact that cartels are prohibited under the law, only 27% of small businesses and 43% of medium-sized companies are aware that the GVH operates a leniency policy.[46] After learning about the purpose and design of the leniency policy, 46% of respondents concluded that they did not agree with the leniency policy.[47]

In light of the awareness among Hungarian business operators of the illegality and sanctions on cartels, the question that arises is the following: what could be the reason for the indifference, or outright resistance, towards leniency policy that leads to the relative failure of this transplant in Hungarian competition policy?

4.2. Structure of the Hungarian market

In our research, we hypothesized that the specific ratio of SMEs to large corporations on the Hungarian market might render domestic companies more prone to cooperation. We departed from an overview of the Hungarian corporate landscape to unpack this assumption.

An analysis of the structure of Hungarian businesses shows that, while the proportion of medium-sized companies has declined over the past decade, the total proportion of SMEs in the Hungarian economy has not changed, amounting to 99.8% of the companies operating on the Hungarian market.[48] Literature shows that, while financial backing of companies by family and friends is important in all countries, in Hungary the amount of such support is ten times the amount of venture capital flowing into companies.[49] Nevertheless, a brief look at the average proportion of SMEs in EU Member States reveals that the Hungarian data completely corresponds to the EU average of 99.8%. This means that there is nothing extraordinary or different in the Hungarian

46 Transparency International concluded that the majority of CEOs and legal representatives of Hungarian owned companies had scarce knowledge of leniency policy: Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 35.

47 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 25.

48 cfr L Szerb and others, 'Kompetencia-alapú versenyképesség-mérés és -elemzés a magyar kisvállalati (mKKV) szektorban' in L Szerb and others (eds) *Kompetencia-alapú versenyképesség-mérés és -elemzés a magyar kisvállalati (mKKV) szektorban. Kutatási beszámolók* (RIERC 2019) 12; L Szerb and others, 'Mennyire versenyképesek a magyar kisvállalatok? A magyar kisvállalatok (MKKV szektor) versenyképességének egyéni-vállalati szintű mérése és komplex vizsgálata' (2014) special issue Marketing és menedzsment 10 and L Szerb, 'A magyar mikro-, kis- és középvállalatok versenyképességének mérése és vizsgálata' (2010) 12 Vezetéstudomány 26, 31.

49 L Szerb and A Petheő, 'Globális Vállalkozói Monitor kutatás adatfelvételei' (1992) 1 Statisztikai Szemle 27.

corporate landscape that would set it apart from other Member States' systems and explain divergencies in the functioning of anti-cartel rules.

We do not exclude the possibility that the dominant company size in Hungary may have explanatory force for the failure of leniency in certain sectors. Still, due to the similarity of company size ratios across the EU we maintain that, at best, it is the size of the Hungarian market in terms of the number of companies active in the given sector that may contribute to rejecting leniency.[50] This may be down to the fact that the relatively smaller number of companies inhabiting specific sectors within Hungary possibly allows for familiarity between business operators, and hence reduces the inclination to blow the whistle. Aversion towards whistle blowing, however, can be more persuasively explained by other contributing factors, as discussed below.

4.3. Cultural considerations

According to the surveys mentioned above, companies active in Hungary are reluctant to apply for leniency, and assume that other companies on the Hungarian market would also be unwilling to report a cartel.[51] In fact, according to the data of the GVH, 65% of leniency applicants in Hungary are partly or fully foreign-owned undertakings, with only 35% of applicants being Hungarian-owned.

Since the vast majority of companies assume that they would not apply for leniency, most of them accordingly have no policy in place for how to deal with a situation where suspicion of the existence of a cartel arises.[52] Market participants are so confident that cartel members will not blow the whistle that the main goal of leniency – to plant the seed of distrust among cooperating competitors – misses its mark, and, if made at all, leniency applications are generally made to mitigate the effects of detection only after the GVH has already detected the cartel.[53] This mutual confidence of market participants that others will also refrain from whistle blowing becomes a self-fulfilling prophecy, thus sealing the fate of leniency policy. However, what are the individual, culturally ingrained elements holding back Hungarian business operators from reporting a cartel and applying for leniency?

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50 See Eurostat, 'Business demography by size class (from 2004 onwards, NACE Rev. 2)' (*Eurostat,* 8 February 2021) <https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=bd_9bd_sz_cl_r2&lang=en> accessed 14 February 2021.

51 Only 1% think that everyone would report a cartel they gained knowledge of. See TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 27.

52 ibid, 3.

53 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 39.

4.4. Lack of trust in the authorities

Respondents in our interview emphasized Hungarian business operators' deep-seated lack of trust in the authorities.[54] This may be traced back, among other things, to Hungary's socialist past, where the single-party state upheld the socialist system through authorities relying on a mix of snitches and force. According to the survey of Transparency International, a further cause for reluctance is that CEOs and business owners are uncertain about the fate of the information provided to the GVH, and fear that the data surrendered to the authority will later be used against them.[55] As a result of this distrust, no routine of cooperation has emerged between authorities and business operators. Finally, some CEOs report that there is such a saturation of cartels in their segment that they feel participating in leniency will have no positive effect, and that the authorities are helpless in this respect. By blowing the whistle, these operators feel they will only harm themselves, which leads us on to the next issue: the fear of repercussions.

4.5. Fear of repercussions

As indicated above, the size of the Hungarian market may mean that small and medium-sized companies' CEOs know each other and their clients personally, so that their business dealings involve trust and personal attention.[56] This is all the more the reason why operators assume that cooperation with the GVH would damage their reputation and partnerships and undermine their position on the market.[57] Fear of economic repercussions fuels businesses' resistance towards leniency options.

In the interviews conducted by Transparency International, several of the subjects indicated that 'snitching' is culturally unacceptable in Hungary,[58] and that it is generally frowned upon.[59] In fact, it is considered to ruin the reputation and prestige of the company in question, with 84% of respondents fearing they

54 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 3.

55 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 5.

56 ibid, 36.

57 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 3.

58 International Competition Network, 'Good practices for incentivising leniency applications. Subgroup 1 of the Cartel WG' (*International Competition Network*, 30 April 2019) 35 <www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf> accessed 14 February 2021.

59 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 39.

would be 'shunned' by the sector.[60] In our interviews one of the lawyers representing Hungarian companies explained that, before the change of political system, the planned economy relied on huge state-owned companies where bright Hungarian engineers, lawyers, and economists (among others) worked side by side.[61] Later, in the 1990s, these erstwhile state companies were privatised and the very same staff now competed on the Hungarian market. The routine of cooperation they had been socialized in – and the growing pains of early competition law enforcement in the context of the budding social market economy – meant that the former colleagues-cum-new entrepreneurs had their own understanding of 'market rivalry'. Not only were these strong personal relationships a breeding ground for anti-competitive agreements, but they were also a strong deterrent for whistle blowing.

Thirty years following the change of political system, reluctance to turn on competitors still remains. Not only has the new generation of CEOs and business owners been trained in the same atmosphere of non-snitching, but the Hungarian market remains small: informing on former classmates and business partners is still inconceivable, especially where criminal prosecution is a possibility. Respondents feel that applying for leniency would mean their business relationships, future partnerships, reliability, and business credibility and reputation would suffer to such a degree that this would outmatch the disadvantages incurred by being detected by the GVH as having participated in a cartel.[62] This is particularly the case for Hungarian-owned companies, where the decision to apply for leniency and disclose evidence to the GVH is directly associated with the CEO of the company. The same is less true for multinational companies active on the Hungarian market, where decisions are considered to have been made at headquarters and not by those managing the Hungarian branch.[63]

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60 ibid, 53.

61 As Tóth puts it in T Tóth, 'The reception and application of EU competition rules in Hungary: an organic evolution' (2013) Pázmány Law Working Papers 2013/17, 24 <https://plwp.eu/evfolyamok/2013/40-2013-17> accessed 14 February 2021: 'Leniency was never a success story in Hungary. That was neither because of the wording of the rules nor due to the unreliable practice of the GVH. On the contrary, the Competition Council always respected the investigators` preliminary decision as regards zero or reduced fines, even in cases where it was not sure whether the undertaking really deserved the lenient treatment. A possible explanation is that sanctions affecting only undertakings did not prove to have a sufficient deterrent effect on the individuals operating that undertaking, or at least not sufficient enough to override decade long friendly relationships existing between competitors in the same sector of the economy. Most leniency applications were handed in by foreign companies, usually as an afterthought to their identical application in Brussels.' T Tóth, 'The reception and application of EU competition rules in Hungary: an organic evolution' (2013) 7 Pázmány Law Working Papers 24.

62 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 5.

63 ibid, 40 and 51-52.

However, while the decision to apply for leniency is made by multinational corporations implementing a zero-tolerance cartel-policy, managers of Hungarian subsidiaries still fear personal accountability for their participation in a cartel. Thus, although most multinational companies have a reporting policy for cartels,[64] Hungarian branches exhibit a strong resistance towards complying and/or providing the necessary evidence, for fear that they will personally suffer the consequences by being made an example of and laid off from the company.[65] Several lawyers indicated that managers will only be swayed to cooperate by 'smoking gun' evidence, and will otherwise try to deny involvement. Moreover, not only do managers fear being dismissed from their company, but they also suspect that having blown the whistle may adversely affect their future career in business as a whole.[66] It is consequently often the case that, even where the headquarters of multinational corporations decide that leniency should be sought, managers at the Hungarian branch deny the availability of evidence to substantiate the application.[67] Evidence of anti-competitive conduct often comes to light in a due diligence procedure when the Hungarian subsidiary is purchased by a new owner, who may then apply for leniency to ensure a clean slate. All these factors combined have induced certain companies to launch a sort of in-house leniency, promising better outcomes for those employees who are willing to come forward.

4.6. Costs of leniency

Finally, there is another point that business operators consider when deciding whether or not to apply for leniency: the costs of leniency (and private enforcement) versus the fine imposed by the GVH (and private enforcement). A leniency application potentially involves several years of cooperation with the GVH – including screening, the use of forensic IT tools, and several rounds of interviews by consulting firms and law firms – and may thus clock up a hefty bill for companies.

Leniency also means exposure to private enforcement which, whilst only gaining ground slowly in Hungary, still poses a real financial threat to companies.[68] Thus, Cauffman makes the case that the risk of follow-on damages ac-

64 ibid, 37: Respondents to the survey stated that while British and US-owned corporations are open to cooperating with the GVH in leniency, continental corporations are less willing, while in the case of Asian-owned companies applying for leniency is completely rejected.

65 ibid, 44.

66 ibid, 5.

67 ibid, 37.

68 T Tóth, 'The Interaction of Public and Private Enforcement of Competition Law Before and After the EU Directive – a Hungarian Perspective' (2016) 14 Yearbook of Antitrust and Regulatory Issues 65 and P Szilágyi, 'Private Enforcement of Competition Law and Stand-alone Actions in Hungary' (2013) 3 Global Competition Litigation Review 141.

tions has a deterrent effect on leniency applicants.[69] The Competition Act provides for a *popularis actio* of the GVH against the infringing undertaking, as well as the possibility of private enforcement of damages claims for consumers harmed by hard-core cartel conduct.[70] Since courts may oblige persons to disclose evidence in relation to the enforcement of damages – and since, if the violation is established, there is a rebuttable presumption of a 10% damage caused by the cartel – parties seeking compensation have a real chance of judicial award. The risks involved in the unpredictable costs of private enforcement are a strong deterrent for undertakings to refrain from applying for leniency, and not only in Hungary.[71]

Since most Hungarian businesses will only consider leniency when a competition authority investigation is already underway, they can only attain a lower reduction of fines. Therefore, depending on the situation, the optimal strategy could be to refrain from leniency, and instead focus on the defence in the cartel proceedings to avoid or reduce the fine imposed.

5. Conclusion

The Hungarian legislator introduced leniency as a legal transplant into domestic competition law early on, and has since taken pains to design a regulatory framework which renders leniency applications attractive to perpetrating companies. A comparison with the model rules shows that Hungarian leniency conditions are particularly favourable. Nevertheless, based on the past one and a half decades of experience with leniency, we can say that in Hungary this transplant is a relative failure, with businesses exhibiting strong resistance towards cooperation with the GVH. Based on scholarly literature, available surveys, and interviews we have carried out with leading law firms specializing in competition law, the main reasons for Hungarian companies' lax interest in leniency are primarily of an extra-legal nature. While CEOs of companies must consider the criminal, damages claims, competition law, and public procurement consequences of cartels, the level of trust that they will not

69 C Cauffman, 'The Interaction of Lenience Programmes and Actions for Damages' (2011) 2 The Competition Law Review 182; and L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds.) *Verseny és szabályozás* (Budapest 2017) 207.

70 Sections 85/A.-88/T. Competition Act.

71 OECD Directorate for Financial and Enterprise Affairs Competition Committee. Working Party No. 3 on Co-operation and Enforcement. Summary of Discussion of the Roundtable on Challenges and Co-ordination of Leniency Programmes DAF/COMP/WP3/M(2018)1/ANN1. 3-4. Moreover, according to the relevant Hungarian regulation, the undertaking receiving immunity under leniency has the privilege of only having to shoulder damages to the extent of the damages caused directly or indirectly to its own customers or suppliers, with the exception that the remaining damages cannot be reimbursed from any other jointly and severally liable members of the cartel. Section 88/I. (1)-(2) Competition Act.

be detected and that other companies will not whistle blow is key. Factors undermining the operability of the leniency policy in Hungary include the business culture, the strong reliance on personal relationships when doing business, the routine of cooperation and lack of competition-mindedness, and strong aversion to and distrust of the authorities. These considerations substantiate that, in the case of legal transplants, even optimal regulatory design cannot ensure success without the appropriate socio-cultural context.