CARTEL DETECTION IN TRANSITION ECONOMIES:

DESIGN AND IMPLEMENTATION OF LENEINCY PROGRAM IN UZBEKISTAN

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Abstract

This paper examines legal issues related to the implementation of a leniency program in transition economies on the example of Uzbekistan. The leniency program is the most useful tool to detect cartels in many countries. Cartels constitute a serious threat on the way to transforming to a free market economy in all transitional economies. To detect and prove cartel conduct is not an easy task for competition authorities in transition countries, which lack sufficient experience and resources to combat such conspiracy in a market. In this regard, implementation of a workable leniency program may lower the cost of investigation and alleviate the burden of proving cartel conduct for competition authorities. There is no ideal model of leniency program in the world and each country has its specific leniency program. Therefore, transitional countries should be careful and take into consideration the local conditions in legal transplantation.

Furthermore, the efficiency of the leniency program depends on whether the designed model is structurally correct or not. This work proposes a possible model of leniency program suitable for transitional market conditions in Uzbekistan. In addition, it discusses the best alternatives in its design process based on the experiences of foreign countries with successful leniency regimes and transitional characteristics similar to Uzbekistan. Consequently, this research may serve as an analytical source in designing and implementing a leniency program in other transitional economies as well.

Keywords: transition economies, cartel regulation, leniency program

1. INTRODUCTION

Creating and maintaining a cartel is one of the egregious violations of competition laws.[1] Because cartels through the restricting a competition try to artificially set a price, it breaks out a main engine of the free market economy – to set price freely based on supply and demand mechanism.[2] The effect of this violation results in the burden of additional costs for the consumers. Ultimately, cartels lead to losses in public welfare, inefficient use of resources, and reduce incentives to innovate. Many developed countries have rigorous enforcement policies against cartels.[3] To demonstrate to how strictly developed countries treat cartels is sufficient to look at the following impressive statistics: the amount of fines European Commission imposed between 2012 and 2016 is approximately €6 billion;[4] Japan's Fair Trade Commission issued a surcharge order ¥41 billion against cartelists in 2014.[5]

As for countries in transition, cartels are even more destructive. Competition policy in transition countries is striving to replace monopolistic market by competitive one. Even antimonopoly policies succeeded in reduction of the number of monopolistic enterprise, it does not necessarily imply that a free market achieved. Cartels may destroy all governmental efforts towards developing a free market. Because cartel companies usually create illusion of competition, but actually behave as a monopoly. Therefore, prevention and suppression of cartel activities should be a one of the top priority for competition authorities in transition countries as well. At the same time, the fight against cartels is prohibitively expensive due to the remarkable cost to obtain information about secret agreements between companies. However, despite the social significance of the problem, not only in Central Asia but also in many transitional economies, competition authorities lack sufficient resources and experience to ensure an efficient fight against cartels.[6] Therefore, it is important to find tools that improve efficiency in competition policy.

One of such legal instrument is leniency programs, which are considered to be the most effective tool to combat cartels and actively used by many developed countries today. [7] Among Central Asian countries, Kazakhstan was the first which established a legal basis for the leniency program (2008),[8]and Uzbekistan established it four years later in 2012.[9] However, neither in Kazakhstan nor Uzbekistan have there been any leniency cases yet.

It should be noted that there is no single accepted ideal model or formula for leniency program in the world that could ensure full effectiveness. There is no need to reinvent the wheel

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[1]A cartel is a form of the business combination on a contractual basis, which aims to restrict competition in a market through fixing prices, sharing market, rigging bids and restricting production.

[2] Joji Atsuya, *Dokinho Nyumon* (1986) 14-15 (in Japanese).

[3] U.S, Germany, France, Italy. Sweden, Netherland, Norway Japan, South Korea etc.

[4] See Data provided by the European Commission, http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

[5] Annual Report of the Japan's Fair Trade Commission for 2014, http://www.jftc.go.jp/en/topics/topics151026.files/OECDAnnualReport2014.pdf.pdf.

[6] Kenneth M. Davidson, 'Creating Effective Competition Institutions: Ideas for Transitional Economies' [2005] 6 APLPJ. 71, 74.

[7]OECD, *Leniency for subsequent applicants* (October, 2012) 18.

[8]Article 76 of the Law 'On competition' of the Republic of Kazakhstan [December 25, 2008] No.112-IV.

[9] Part 3 of the Article 27 of the Law 'On competition" of the Republic of Uzbekistan' [January 6, 2012].

when it comes to drafting and designing the leniency program in Uzbekistan. It is possible to select from available alternatives. While each alternative has its advantages and disadvantages, the optimal choice among them depends on the particular conditions and factors (legal, economic and social) of the country when implementing.

Although Uzbekistan introduced a leniency program in 2012, the mere introduction of the program in the competition law is insufficient to make it practically applicable. Competition law in Uzbekistan lacks a clear working mechanism for the content and the way to practically implement the leniency program. Therefore, it is true to say that it is still inoperative in the country. Against this background, the present study intends to analyze the current anti-cartel regulation of Uzbekistan and discuss the reasons along with factors behind the inefficiency of the leniency program. The research stresses that the implementation of a leniency program should be preceded by certain conditions, such as well functioning institutional capacity and a severe sanctions regime against cartel behavior in the market. Otherwise, the leniency program remains incapable of benefitting either the competition authorities or entrepreneurs.

This paper will examine theoretical and practical aspects of how to design and implement a leniency program in order to make it workable and effective in the transitional economic conditions of Uzbekistan, along with their future perspectives. With respect to the comparative analysis, this study will discuss the best experiences of countries such as the United States (hereinafter referred to as the U.S.), European Union (hereinafter referred to as the EU), Japan and Russia because their leniency programs are considered relatively successful and widely discussed in the literature. The originality of the research lies in the issue that considers the design and implementation of a leniency program in the context of countries in economic transition[10], particularly more focusing on Central Asian context. This paper is pretending to be one of the first works devoted to the legal issues of anti-cartel enforcement and leniency program in Uzbekistan. Furthermore, there are plenty of foreign papers on competition law problems in transition countries,[11] but majority of them limited with Central and Eastern European countries[12] and China. [13] Almost none of them focused on issues of implementation of a leniency program in detail. Furthermore, there is a manual published by the Organization for Economic Cooperation and Development (hereinafter referred to as OECD)[14] and International Competition Network (hereinafter referred to as the ICN) regarding the issues of implementation of leniency programs.[15]The manual outlines general questions and offers recommendations on the implementation of a leniency program based on the key practices of

[10] For the definition of transition economies, see Part 3, Section 1.

[11] Maria Vagliasindi , 'Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants'[2002] European Bank for Reconstruction and Development, Working paper No. 68.

[12] Frank Emmert, 'Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice' [2003] Fordham Int'l LJ 27, 642-678.

[13] Andrew Eichner, 'Battling cartels in the new era of Chinese antitrust enforcement' [2011] Tex. Int'l LJ 47, 587-619.

[14]OECD, *Fighting hard-core cartels: Harm, effective sanctions and leniency programmes* (2002).

[15] ICN, *Anti-Cartel Enforcement Manual Chapter 2. Drafting and implementing an effective leniency policy. (*May, 2009). http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf.

countries[16] listed in Appendix 2 of the document. However, this document is a recommendation generally applied regardless whether the countries are transition economies or not, and has failed to take into account characteristics of transition economies.

The paper consists of six parts, including this brief introduction. Part 2 defines the concept and of a leniency program and explores the significance of preconditions to implement effective leniency programs. Part 3 observes anti-cartel regulations and the development of the leniency program in Uzbekistan. Part 4 examines the reasons behind the inefficient leniency program in Uzbekistan. A comparative study the experience of foreign countries is evaluated in Part 5. Following Part 6 will present a desirable model of leniency program for Uzbekistan. Finally, Part 7 will synthesize and conclude the results of the study.

2. THE CONCEPT OF CARTEL CONDUCT AND LENIENCY PROGRAMS

2.1. Concept of cartel conduct

Cartels are in fact grievous violation of competition laws.[17] A cartel is a form of business combination on a contractual basis, which aims to restrict competition in a market. Cartel participants determine the overall pricing policy and distributive spheres of influence in a market while maintaining productive and financial independence. Cartels pose a danger to society and economic development. Their members usually conclude clandestine and anticompetitive agreements, harming the interests of consumers.[18] Even in 18th century, Adam Smith concerned that there was always tend to collude among businesses in order to restrain competition in market.[19]

Basically, there are two types of cartel conduct in a market: horizontal and vertical. A horizontal cartel refers to an agreement concluded among competitors, while a vertical one involves an agreement between non-competitors. The most harmful cartels among them are so-called hard core cartels, which include anticompetitive agreements among competitors to fix prices, restrict production, submit collusive tenders and share markets and therefore considered as *per se* illegal in majority countries. The perilous effects of cartels, which include increasing prices, reducing innovations and investments, destroying other businesses, and locking up resources, is well known and commonly recognized.

Entrepreneurs involved in a cartel are aware of its illegality and, therefore, they try to avoid leaving material evidence that can assist in the discovery of their anticompetitive conduct. Most cartels are veiled in secrecy and made through oral communication. Due to the hidden feature of

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[16] Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

[17] OECD, *Hard Core Cartels—Third Report on the Implementation of the 1998 OECD Recommendation (*Journal of Competition Law & Policy 8, 2006) 1-25.

[18] ICN, *Defining Hard Core Cartel Conduct: Effective institutions, Effective Penalties-Building Blocks for effective anti-cartel regimes* (Vol.1, report at ICN 4th Annual Conference Bonn, Germany 1, 2005). http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf.

[19] Adam Smith, The wealth of nations, (1776) 145.

cartels, detecting and proving them is a huge challenge for competition authorities around the world. According to the international concept of cartels, there are the three following principal legal instruments to combat cartels.[20] The first is a clear legal definition of cartel conduct, meaning that the competition laws should precisely identify the sorts of prohibited cartel behavior. The second involves an effective sanctions regime, which establishes high administrative fines and criminal penalties for cartel conduct. The third instrument is capable institutions that are well equipped to detect and investigate cartels, including the presence of well-qualified and strong competition authorities and anti-cartel mechanisms such as leniency programs to detect cartels.

These three instruments are cumulative requirements and, therefore, inefficiency in one of them may result in the complete inoperability of anti-cartel policy. The first legal instrument, which is a clear legal definition of cartel conduct in Uzbekistan, was the subject of previous research by the author some years ago.[21] The research found that the Uzbek competition law does not differentiate between 'concerted practice' and 'concerted agreement'.[22] Furthermore, a comparative analysis between the old and new competition law enacted showed that the range of subjects liable for cartel conduct expanded by excluding the required 35% of minimum aggregate market share for cartel conduct.[23] The present work will discuss only the third legal instrument and partly touch the second one.

2.2. The concept of leniency program

The leniency program is a system of total exemption or a reduction in penalty of those cartel participants who self-report to the competition authority about illegal cartel conduct and provide active cooperation in the investigation.[24] As mentioned above, due to the fear of being discovered and penalized, cartel behavior is usually secret and therefore in many cases there is an absence of written agreements. Therefore, cartels are often built on trust among its members. However, a leniency program is a way to disclose a cartel through its trust-busting effect. A leniency program is designed to give incentives 'to cheat on' their cartel partners in exchange for receiving an exemption from penalty.[25] In this case, each firm in its decision to join the cartel has to take into account that its counterpart may 'squeal' on it for leniency.[26] Consequently, there is less incentive to maintain actual collusion and the risk of being cheated may prevent some cartels from combining. Besides, these

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[20]ICN, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties (*Working Group on Cartels. Building Blocks for Effective Anti-Cartel Regimes vol. 1, June 2005) 1-6 < http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>.

[21]Husain Radjapov, 'Cartel agreements: legal analysis of competition laws of Uzbekistan and Japan' Society and Governance, No. 3 2014) 82-93. (In Russian).

[22] *See* the definition of cartel conduct in Annex III, Section 2, the Decree of Cabinet Ministers No. 230, [Aug.20, 2013].

[23] Law 'On competition and restriction of monopolistic activity on commodity market', Article 6, No. 355-I, December 27, 1996 (currently invalid).

[24]OECD, *Development Competition Committee, "Fighting hard-core cartels: Harm, effective sanctions and leniency programs,* (2002) 7-8.

[25]Catarina Moura Pinto Marvão, 'The EU Leniency Programme and Recidivism' [2016] Review of Industrial Organization 48. no.1, 1, 21.

[26]Jeffrey M.Perloff, 'Cartels' [2006] Journal of Industrial Organization Education 1, no. 1, 9

cartel reports from informant firms allow to decrease investigation costs for competition authorities as well. Thus, there are two goals of leniency programs: assisting in the detection of existing secret cartels and preventing new cartel formations in the market.

There have been plenty of theoretical and empirical studies conducted regarding the efficacy of leniency programs. Most of them, for example papers by Motta and Polo (2003),[27] Spagnolo (2004),[28] Motchenkova (2004),[29] Chen and Harrington (2007),[30] Hinloopen and Soetevent (2008)[31] and Harrington (2008),[32] prove the benefits of implementing a leniency program. For instance, the benefits of such programs include destabilizing cartels, uncovering conspiracies that would remain undetected, lowering the cost of investigation, assistance in obtaining evidence quickly and decreasing the incentive to form cartels.[33] Because numerous academic papers have already shown the positive effect of leniency programs in the battle against cartels, this study will not discuss this part, but seeks to analyze the issues of designing and implementing an effective leniency program.

Design and implementation of an effective leniency program is a complicated issue and requires the adjustment of other policies as well. There are three essential preconditions for the successful implementation of a leniency program:[34]

a) Powerful competition enforcement agency

This issue covers two important factors: a) independent competition authority with b) the strong investigative powers. An important advantage of an independent competition authority is that the enforcement of competition rules is not influenced by political and volatile considerations. By delegating competition law powers to an independent body, the legislature tries to guarantee that the application and interpretation of competition rules is mainly based upon economic and legal

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[27] Massimo Motta & Michele Polo, 'Leniency programs and cartel prosecution [2003] International journal of industrial organization 21.3, 347.

[28]Giancarlo Spagnolo, 'Divide et impera: Optimal leniency programs'[2004] CEPR Discussion Paper No.4840.

[29]Evgenia Motchenkova, 'Effects of leniency programs on cartel stability'[2004] CentER Discussion Paper No.2004-98

[30]Chen, Joe & Joseph E. Harrington, 'The impact of the corporate leniency program on cartel formation and the cartel price path' [2007] Contributions to Economic Analysis 282, 59-80.

[31]Hinloopen, Jeroen & Adriaan R. Soetevent, 'Laboratory evidence on the effectiveness of corporate leniency programs' [2008] The RAND Journal of Economics 39.2, 607-616.

[32]Harrington, Joseph E*, 'Optimal Corporate Leniency Programs'* [2008] The Journal of Industrial Economics 56.2, 215-246.

[33] On the contrary, just few empirical researches on the EU leniency program done by Brenner in 2009 (Steffen Brenner, 'An empirical study of the European corporate leniency program' [2009] International Journal of Industrial Organization 27.6, 639-645), and De in 2010, (Oindrila De, 'Analysis of cartel duration: Evidence from ec prosecuted cartels' [2010] International Journal of the Economics of Business 17.1, 33-65) here show that leniency program is not so effective to detect cartels.

[34] UN Conference on Trade and Development, 'The use of leniency programs as a tool for the enforcement of competition law against hardcore cartels in developing countries' [2010] 3.

arguments alone, and is not shaped by political pressure.[35] Furthermore, investigative powers are crucial tool in detecting a cartel conduct in the market. It creates a fear of being discovered among cartelists. Vigorous investigative methods such as dawn raids, inspections, interrogations may assist competition authorities to promptly react to the cartel conduct in a market and collect necessary evidence to prove their anticompetitive activity. Furthermore, to prove the existence of a cartel is not an easy job for competition authorities. Competition laws often require the presence of the exchange of information between cartel participants, which is very hard to prove. Therefore, cartel members are less motivated in applying for leniency unless there is a high risk and pressure of being detected by competition authorities.

b) Severe sanctioning regime

The presence of investigative powers might be useless without appropriate sanctions. Penalties such as administrative surcharges imposed on cartel members should be significant and criminal sanctions might also be necessary to increase the preventive effect of sanctions. Without strict sanctions, there is no incentive for cartel members to self-report their anticompetitive action. Cartel participants are willing to apply for leniency only when they are sure that consequences from not using it will be worse. Therefore, severe sanctions are one of the reasons why leniency programs have become more successful in some OECD countries. This work does not aim to analyze the issue to what extent the sanctions against cartel conduct should be severe, but merely emphasizes that they must be with a level of deterrent effect.

c) Clear mechanism of the leniency program

The issue of the clear mechanism is closely related to the structural modelling of the leniency program. The leniency program must be as transparent and certain as possible. That is, an applicant needs to be able to predict how he will be treated and what the consequences will be if he does not apply for leniency. For example, a cartelist applying for leniency should know exactly whether he will get an exemption from penalty or just a reduction of fines, how much of a reduction he will receive, and issues such as these. A general offer for exemption from penalty or reduced sanctions is not sufficient to encourage cartel participants to apply for leniency. It is important that the conditions for using leniency should be as clear as possible. In other words, the following questions should be clarified in leniency program: [36]How many enterprises should be eligible for leniency? Should the leader/initiator of the cartel be eligible? Should the amount of leniency be different depending on the stage of investigation? How much are penalties exempted or reduced? What should be the application procedure? There is no single answer to these questions. Depending on a country's economic, legal and social conditions, the answers might be different. The issue is a subject for discussion within the scope of legal transplantation as well.

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[35] Van de Gronden, Johan W., and Sybe A. De Vries. 'Independent competition authorities in the EU." *Utrecht L. Rev.* 2 [2006] 1.

[36] N.Pavlov, A.Shastiko, 'Leniency Program: problems, structural alternatives and effects' [2015] 8-28 (in Russian).

Frequently, developing countries select one of two scenarios of legal transplant: copy-paste or harmonization approach.[37] The difference between these two approaches is as follows: copy-paste approach implies a blind duplicate of legal rules without their prior assessment; in contrast, the harmonization approach in addition to a simple copy-paste takes into account the interests of recipient country as well.[38]

Thus, in order to achieve a successful implementation of leniency program, it is necessary to take into account whether the necessary preconditions take place in a country and whether the leniency model is well designed.

It should be noted that there is no single model of the leniency program in the world. Uzbekistan may choose from a set of available alternatives and adjust them to its market conditions. None of the leniency programs in the world is flawless; each of them has its advantages and disadvantages. Therefore, the optimal choice in designing a leniency program depends on specific conditions such as legal, economic, and cultural conditions, among others. To design an effective leniency program in Uzbekistan, it is necessary to analyze the experience of successful leniency programs implemented in other countries. This research will take a leniency programs in the United States, the EU, Japan, and Russia as a comparison. The rationale behind these choices is as follows:

Firstly, the U.S. is the earliest country that has implemented the leniency program.[39] Even if economic, legal and social conditions are quite different from Uzbekistan, it will be beneficial to analyze the historical development of the original leniency program. Furthermore, the structure of the current unworkable leniency program in Uzbekistan is similar to the U.S. model. Secondly, the EU leniency program is the most widely used model in the world. Furthermore, Uzbekistan's competition law is based on the EU model. Thirdly, Japan has a hybrid model of leniency program. Japan is the preferred example of successful legal transplantation. Although the Japanese leniency program is a mixed model of the EU and the U.S., it also has its specific features. Moreover, despite the skepticism before the introduction of leniency program that it is not compatible with the Japanese culture, which emphasizes harmony and order, it has turned to be very successful. Similar concern exists also among legal experts in Uzbekistan, and therefore, it will be beneficial to examine the historical background of the Japanese leniency system as well. Fourthly, Russia is one of the first countries which introduced a leniency program among post-Soviet transitional countries and started reaping its fruits. Russia and Uzbekistan have much in common regarding the history and experiences on the same path of economic transition. Therefore, insights from the Russian experience will be beneficial for Uzbek competition authorities in designing their program.

As this paper is dedicated to the legal issues on cartel detection, before going into the discussion of the problem statement, the paper analyzes the anti-cartel regulation policy and issues of implementation of an effective leniency program in Uzbekistan.

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[37] Reyes, Maria Paula, 'The Challenges of Legal Transplants in a Globalized Context: A Case Study on 'Working'Examples'[2014] 12 Available at SSRN 2530811.

[38] See ibid 13.

[39] Aubert, Cécile, Patrick Rey, and William E. Kovacic, 'The impact of leniency and whistle-blowing programs on cartels, [2006] International Journal of Industrial Organization 24, no. 6, 1241-1266.

3. CARTEL REGULATION IN UZBEKISTAN

3.1. Economic background

Uzbekistan is a country in economic transition. It is common knowledge that a transition economy is an economy that is transforming from a centrally-planned economy to a market one.[41]During the Soviet period, the economy of Uzbekistan was based on a central command system, which left no place for competition. The state ownership, absolute state monopoly and price control by the government were the main instruments to regulate the economy. Transition implies the development of market-based institutions, economic liberalization, demonopolization and privatization of state-owned enterprises. Economic theory differentiates two strategies of transition depending on the speed of transformation: shock therapy and the gradual approach.[42]

After independence in 1991, Uzbekistan has chosen a market-oriented economy with a gradual transformation strategy.[43] Within 25 years of implementation of transitional regulatory policies, Uzbekistan has achieved a certain level of market economy. For instance, as an example of the successful achievements of Uzbekistan in building a market economy can be listed the following accomplishments such as: the significant reduction of monopolistic enterprises, the creation of a financial market, the declaration of private ownership and freedom of entrepreneurship activity, the enactment of regulative market laws including competition laws, and the establishment of the Uzbek Competition Committee (hereafter, UzCC) among others.

In the early years of transition, the priority task for the government was regulation of monopolies.[44] Monopolization of many markets was due to objective economic reasons such as high barriers to entry, limited resources, and low demand, as well as the private sector was only a small fraction of the economy in first decades of independence. As positive consequences of successful state policies on demonopolization, the number of monopolies significantly reduced, which led to the creation of numerous new enterprises.[45] (Figure 3.1)

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[41]Edgar L.Feige, 'The transition to a market economy in Russia: property rights, mass privatization and stabilization' [1994] A fourth way, 57.

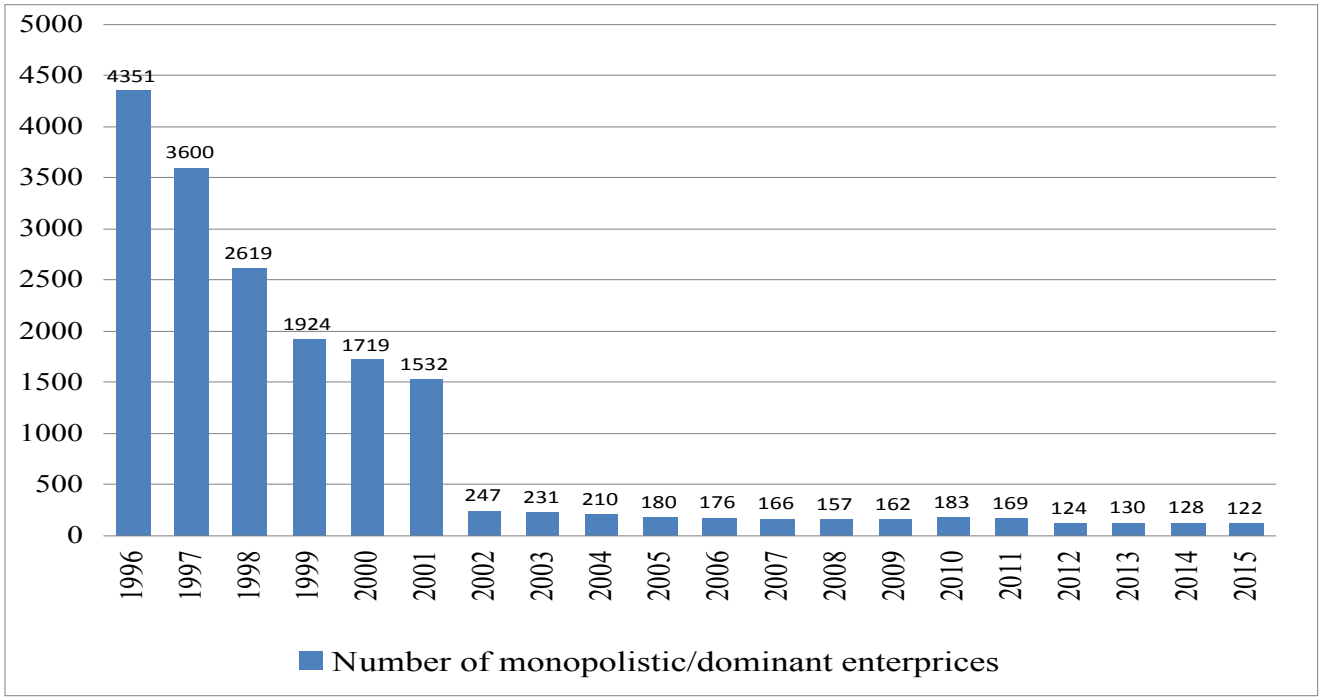
[42] Popov, Vladimir, 'Shock therapy versus gradualism: the end of the debate' (explaining the magnitude of transformational recession) [2000] Comparative economic studies 42, no. 1, 1-57.

[43] Ruziev, Kobil, Dipak Ghosh, and Sheila C. Dow, 'The Uzbek puzzle revisited: an analysis of economic performance in Uzbekistan since 1991' [2007] Central Asian Survey 26, no. 1, 7-30.

[44] The Center for Improvement of Antimonopoly Policy's Report, describes *Competition policy and anti-monopoly regulation in Uzbekistan: Analytical report on the development, status, trends and issues of antimonopoly and competition policy in Uzbekistan in 2000-2009*, (2009) 29 (hereinafter Analytical Report 2009).

[45]See ibid 29.

Figure 3.1. Dynamic change in the number of monopolistic enterprises in Uzbekistan (1996-2015)



Source: Analytical report on the development, status, trends, and issues of antimonopoly and competition policy in Uzbekistan in 2000-2009 by Center for Improvement of Antimonopoly Policy, and author's calculation based on annual reports of the Competition Committee.

Gradually, a monopolistic environment has been replaced by the oligopolistic and competitive market, and therefore, the competition policy has started focusing more on ensuring competition.[46]

With regard to the competition policy in Uzbekistan, it would be better to outline briefly some of its characteristics as a transition economy with respect to cartel regulation:

First, a crucial role of big SOEs as the main stay of state industrial policy. SOEs are under the direct or indirect state control, which means high intervention by state agencies into the economic operation of SOEs. This is causing an elimination of actual competition among them and conditions for creation of 'state cartels'. For competition authorities is almost impossible task to take on big business. Therefore, most of cartel cases detected by UzCC are small and medium size private enterprises.[47]

[46]Shuya Hayashi & Alisher Umirdinov, *Competition law of Uzbekistan in Transition-current situation and challenges*, in International Enforcement of Antimonopoly law ed., Kazuhiro Tsuchida, 259-302 (Nihonhyoronsha, 2012) (Japanese).

[47] For example, Analytical Report 2009 has mentioned detection of price fixing cartel companies by the Uzbek Competition Committee in 2009 such as 'Yog Moy Savdo' with Serve Electronics", "Trust Broker Servis" "Mariott Uniprom.

Second, competition policy deals primarily with oligopolistic markets. In market economies, there are a variety of different market systems exist: perfect competition,[48] monopoly,[49] oligopoly,[50] monopolistic competition[51] and monopsony.[52] The current Uzbek economy has been far from being perfect competitive market yet. Monopoly was a dominant market structure during the post-Soviet Union administrative economy. Therefore, the present market economy of Uzbekistan is more likely an oligopoly, which dominated by a small number of firms, which is common for transition economies. Each oligopolistic firm is very sensitive to the pricing and marketing strategies of others.[53] Therefore, oligopolistic pricing policy presupposes the existence of incentives for concerted action or collusion in setting prices. If all firms behave independently, not agreeing on a price, then they will receive lower profits, and the market price may fall to the competitive level. When designing the Uzbek leniency model, it is necessary to take into account this characteristic as well.

Third, state economic policies focus essentially on liberalization of entrepreneurship activity. To enhance economic growth, the Uzbek government policies are significantly concentrated in support of a business activity. This is precisely visible in recent seven and eight-year reforms that resulted in ease of starting a business and getting a credit, submitting tax reports electronically, elimination of some small taxes, simplifying property registering procedures, protecting minority investors and so forth.[54] The Uzbek government has even decreased the number of administrative inspections in 2012[55] to prevent abusive and illegal intervention into the economic activity of private companies by state agencies.[56] This amendment resulted in slowing down of active voluntary based anti-cartel investigations by UzCC. In this regard, the implementation of a leniency program motivates entrepreneurs themselves to come to the competition authorities, which is reasonable under the current economic policy towards liberalization of entrepreneurship activity in Uzbekistan.

Fourth, the presence of broad discretionary power of government institutions. It is one of the obstacles in the development of entrepreneurship in Uzbekistan and prevalent in other transitional, and

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[48] Perfect competition is a market system characterized by many different buyers and sellers. With so many market players, it is impossible for any one participant to alter the prevailing price in the market.

[49] In a monopoly, there is only one producer of a particular good or service, and no reasonable substitute. In such a market system, the monopolist is able to charge whatever price they wish due to the absence of competition.

[50] An oligopoly has a handful of producers that make up a dominant majority of the production in the market system. It is possible, without diligent government regulation, that oligopolists will collude with one another to set prices.

[51] In a mmonopolistic competition, there are numerous competitors, but they are sufficiently differentiated from each other that some can charge greater prices (e.g. artists in the market for music).

[52] A monopsony has only one buyer for a particular good or service, giving that buyer significant power in determining the price of the products produced.

[53] For example, if a one producer will reduce prices by 15%, customers immediately will switch to this company. Consequently, other producers will have to react by lowering prices or offering a better sort of services. However, if the oligopolist increases prices, its competitors may not follow him. Then he would have to back to the old prices or have a risk to lose a market share.

[54] This positive change can be observed in Doing Business Ranking in World Bank Group data.

[55]For example, see the Decree of the President of the Republic of Uzbekistan, No. 4455 (2012).

[56]From the conference "On measures to enhance the role and responsibility of law enforcement agencies in the implementation of the program on further reform, structural transformation and diversification of the economy in 2015-2019", which has taken place on September 8, 2015. The summary of the conference is available at www.narodnoeslovo.uz

many developing, countries. The lack of transparency in the public sector is causing the distrust of entrepreneurs towards state administrative bodies and the misapplication of institutional discretion in numerous transition economies.[57] Among other state institutions, the UzCC is not an exception. Therefore, the efficiency of the designed program depends on to what extent leniency procedures are transparent, which will be discussed later on.

Fifth, resource shortage and data shortcomings of competition authorities.[58]The lack of sufficient financial and human resources[59]is a common issue facing competition enforcement authorities in almost all transitional countries. Particularly, due to the secrecy and complexity of detection and proving a cartel conduct, the UzCC needs more resources for investigation and regulation. In this regard, the leniency program can lower the costs in obtaining information and evidence and thus can mitigate the problem of resource shortage.

3.2. Cartel Regulation in Uzbekistan

Among all prohibited anticompetitive conduct, regulation of dominant and monopolistic enterprises in Uzbekistan is well established. According to the state statistics on anticompetitive violations, a majority of cases detected by competition authorities belongs to the category 'abuse of dominant position.'[60] However, in recent years, new threats to the development of the market economy appeared in the Uzbek markets; cartel agreements. On one hand, the appearance of cartels in a market indicates that Uzbekistan has achieved a certain level of market economy. On the other hand, cartels are extremely dangerous for the further development of the free market economy in the country. Despite the enormous harm of cartels, the competition policy of Uzbekistan does not pay sufficient attention to concerted practice in the market.[61]

It will be interesting to describe the development of anti-cartel regulation in Competition law of Uzbekistan. Since independence in 1991, there has been three generations of competition law: in 1992, 1996 and 2012. The first time a legal basis for cartel regulation was established in 1992 (hereafter, 1992 Competition Law) even cartel phenomena was absent at that time. Competition Law 1992[62] stipulated a very simple definition of cartel conduct with a "rule of reason" approach (Article 3). Thus, it was just a blind legal transplantation and nothing to do with economic conditions of that time. The next generation of 1996 Competition law[63] had more developed with respect to the legal

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[57]Jeton Zogjani & Malësor Kelmendi, 'Corruption and Bribery on Transition Economies: Case Study for SEE Countries' [2015] Academic Journal of Interdisciplinary Studies 4.2, 45.

[58]Wiliam E.Kovaic, *Institutional Foundations for Economic Legal Reform Transition Economies: The Case of Competition Policy and Antitrust Enforcement,* Chicago-Kent Law Review 77, 307-308 (2001).

[59]The 'toothless' Competition Committee is not attractive for workers, while a private sector offers more financial and carrier prosperity. Those who joined the Committee usually do not stay for a long time and leave as soon as possible.(The author's interview with the Head of the Department of the Competition Committee of the Republic of Uzbekistan (Sep.16, 2015)).

[60] Analytical Report 2009, at 22.

[61]See ibid 13.

[62] Law 'On restriction of monopolistic activity', No. 623-XII (July 2, 1992).

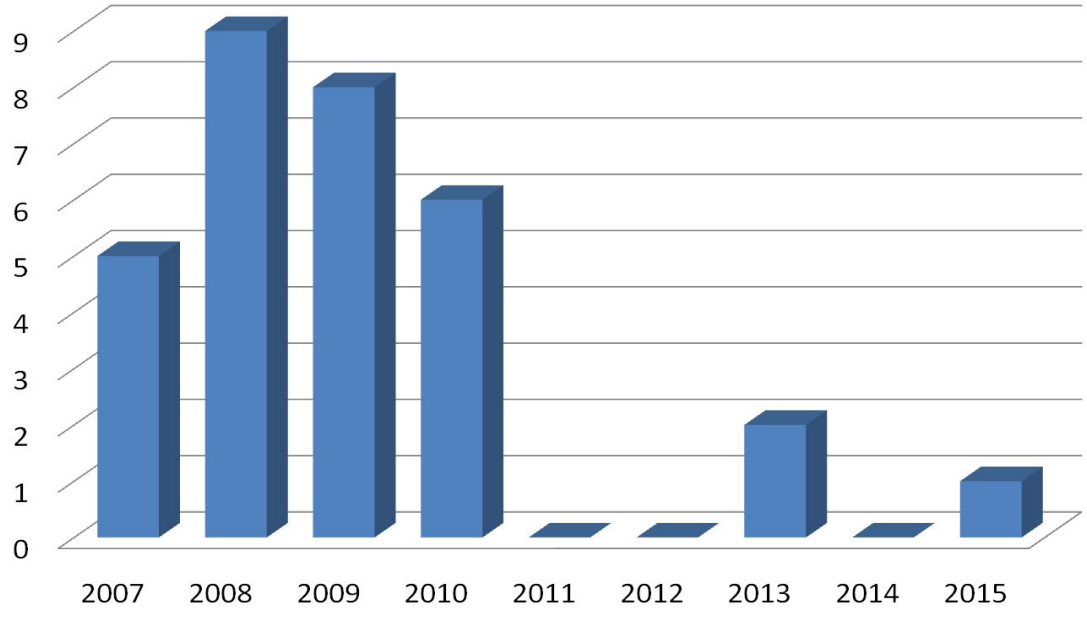
[63] Law 'On competition and restriction of monopolistic activity in commodity market', No. 355-I, (Dec.27,1996).

definition of cartel conduct. For instance, 1996 Competition law limited the scope of cartel participants by requiring the necessity to have more than 35% of cumulative market share in order to classify the conduct as a cartel.[64] Furthermore, unlike the previous law, the 1996 Competition law strictly prohibited concerted agreements of trade associations threatening them with liquidation in case of violation. Nevertheless, the new 2012 Competition law [65] has abolished the *de minims* cumulative market share requirement of 35%. Perhaps, the reason hidden behind this amendment is a hardness that competition authorities faced in calculating a market share.

At present, two legal acts mainly regulate anti-cartel enforcement policy in Uzbekistan: the 2012 Competition Law and the Decree of Cabinet of Ministers in 2013. [66] 2012 Competition law defines a cartel conduct and specifies some anticompetitive market behavior that might be considered as a cartel conduct. The Decree establishes procedural norms regarding the detection a cartel conduct and listed possible signs of cartel practice to warn competition authorities. Moreover, the Decree stipulated possible direct and indirect evidences that may assist to prove cartel activity in a market. In other words, 2012 Competition law sets substantive norms of cartel regulation, while the Decree is more about procedural rules. The Decree became a progressive step in development of anti-cartel policy in Uzbekistan.

Despite the presence of legal basis, the anti-cartel enforcement has not been effective so far. Cartels are still the least detected violations compared to other ones in spite of a vast number of cartels in markets.[67] According to the available statistics, the Competition Committee was the most active in cartel investigation between 2007 and 2010 (Figure 3.2.). As for 2011, 2012 and 2014, the Committee's reports show that there was no a single cartel case and only two cases in 2013 and one in 2015, which shows significant decline in cartel regulation since 2011.

Figure 3.2. Statistics on cartel detection in Uzbekistan (2007-2015)



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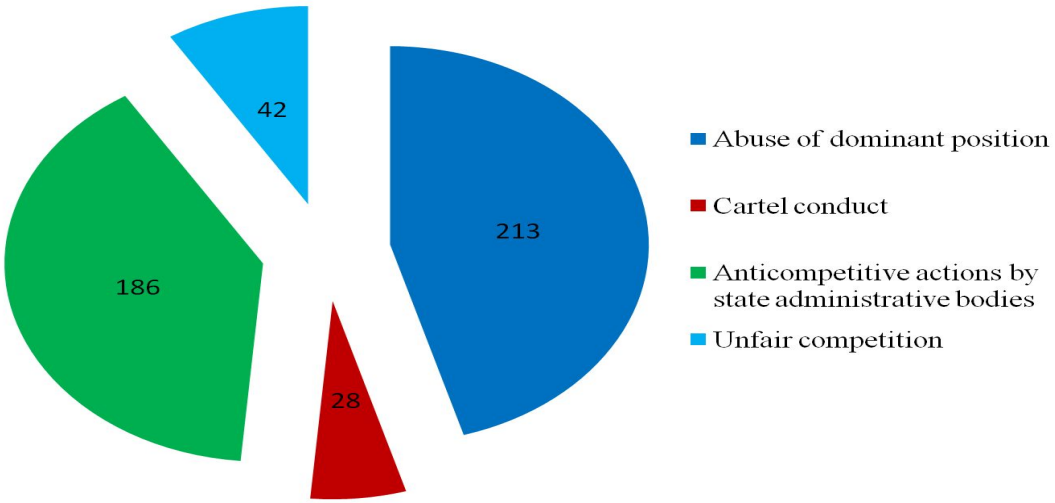
Furthermore, among the rest of anti-competitive violations the number of cartel cases detected by competition authorities was 28 (Figure 3.3.).[68] Since 2011, annual reports of Competition Committee do not provide the data about all anticompetitive cases, which makes impossible to build a whole picture of cartels in comparison with other violations in recent years. Nevertheless, one of successfully detected famous price-fixing cartel cases by UzCC was mobile phone companies' case occurred in April of 2013. According to the UzCC' report,[69] two mobile phone companies 'Unitel' (Beeline) and 'COSCOM' (Ucell) with the largest market share in telecommunication sector have conducted a concerted practice. The companies were accused in simultaneous increase in monthly fees and rates. The Decree defines the sign of 'simultaneous action' as a conduct that was repeated within 30 days.[70] In this case, the concurrent increase of monthly subscription fees by both mobile operators occurred twice within 5-20 days, which was a signal to the UzCC about a market conspiracy of telecommunication sector.

Figure 3.3. Statistics on infringement of competition law in Uzbekistan (2007-2011)



Source: Author's calculation based on annual reports of the Competition Committee.

In addition, after adoption of the new Competition law 2012, there was an expectation that competition policy would draw more attention to cartels. That is to say, the new law established a

[68]See ibid 22. and Annual report of the Competition Committee for 2010 and 2011 years.
[69] The Report to the Chairman of the Uzbek Competition Committee (in Russian) (the file is under the author's private possession).
[70] Annex III, Section 9.

legal basis for the leniency program, which is one of the most effective instruments to combat cartels for competition authorities in the majority of developed and some developing countries.

4. THE LENIENCY PROGRAM IN UZBEKISTAN

The legal basis for the leniency program was established in Article 27 (3) of the competition law in 2012. Article 27 is about liability for all anticompetitive actions in the market. In the last paragraph of Article 27, there is a short statement concerning the leniency program: "An entrepreneur who first applied to the Competition Committee on its anticompetitive agreement will be exempted from administrative liability". From this provision, we can conclude that exemption from the penalty is available only for the first applicant, which is identical to the US model of leniency program. Actually, according to an interview conducted by the author, there has been no cartel investigation launched using the leniency application.[71]Currently, the leniency program is more a formal act than an actual opportunity in Uzbekistan.

4.1. Problems of leniency program in Uzbekistan

The reason why the leniency program is not working in Uzbekistan is as follows: First, the lack of investigative powers of the UzCC that makes it incapable to discover and prove cartel conduct in markets; second, minor sanctions against cartel conduct which limits the preventive function. Actually, these problems cause inefficiency not only in anti-cartel enforcement, but also directly affect the whole enforcement system of competition law in Uzbekistan.

4.1.1. Lack of investigative powers

This problem is relevant to the issue of the institutional weakness of the UzCC among other state jurisdictions. To fully understand the problem, it is necessary to observe the history of the development of competition enforcement authorities in Uzbekistan.

The first state authority dealing with market regulation was established in 1993 as the Chief Department on antimonopoly and price policy in the Ministry of Finance. Afterward, in 1996, due to the adoption of the new competition law, the Chief Department was transformed into the Committee on Demonopoloziation and Competition Promotion under the Ministry of Finance.[72] Four years later in 2000, it was excluded from the jurisdiction of the Ministry of Finance and became an independent committee specialized solely in market regulation.[73]As a result, the number of detected cases of infringement of competition law has significantly increased, and the number of monopolistic

[71]Interview with the Head of the Department of the Competition Committee of the Republic of Uzbekistan in Tashkent. (Sep.16, 2015).

[72]The Decree of the President of the Republic of Uzbekistan, No. 1464, (May 23, 1996).

[73]The Decree of the President of the Republic of Uzbekistan, No.2676 (August 2, 2000) and the Statutory of the Cabinet Ministers, No. 300 (August, 2000).

enterprises decreased by half.[74] For instance, until 2012, there were several cartel cases detected by the UzCC, meaning that competition policy started focusing its attention on the more egregious violation in the market. However, in order to avoid duplication of functions and due to budget constraints in 2012,[75] the State Property Committee combined with the UzCC and transformed into the new hybrid Committee for Privatization, Demonopolization and Development of Competition.[76] Although the newly established committee has been called a Competition Committee, due to this merger, the competition policy has changed dramatically and privatization has become a priority for the UzCC. After the combination of two Committees, the head of the State Property Committee became chairman of the new combined committee, which also shows what the priority of the government was. The reform has negatively affected the whole cartel detection practice in the country (see Figure 3.2). Thus, there is still a lack of understanding of the importance of competition policy in Uzbekistan, as it is the case in the majority of the Commonwealth States[77] and other transitional countries.

With respect to the investigative powers, Article 21 of the law 2012 Competition law stipulates a list of powers given to the Competition Committee. However, the necessary investigative power is not granted to the Uzbek competition authority. Granting explicit power, such as the ability to make dawn raids, examine records and books and request confidential information, is a necessary way to collect evidence about cartel conduct. The problem was also indicated in reports of the Center on Improvement of Antimonopoly Policy[78]and the State Development Conceptions several times.[79] Moreover, due to the state policy of liberalization and support for entrepreneurship, the competition authorities avoid using these powers to conduct a simple inspection of entrepreneurs on a voluntary basis, unless there was an objection from market participants about cartel activity.[80] For instance, as a result of the recent Presidential Decree No. 4848 signed on October 5, 2016, all kinds of unplanned and counter inspections of business entities were abolished by the government. Exception remains only for inspections regarding the liquidation of the legal entity or held exclusively by a decision of the National Council on the Coordination of the activity of Controlling Authorities on the basis of complaints on a violation of the law. This amendment makes more complicated for Competition Committee to utilize investigative powers in practice.

Nevertheless, some competition law experts have a critical viewpoint concerning the granting of investigative powers to the Competition Committee.[81] Their concern is that the Committee might use investigative power unwisely, and entrepreneurs may fall victim to the abuse of their good faith.

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[74]Analytical Report 2009, 29.

[75] Interview with the Head of Department of the Uzbek Competition Committee (Sep. 16, 2015).

[76] The Decree of the President of the Republic of Uzbekistan, No.4483 (November 13, 2012).

[77]Dabbah Maher, International and Comparative Competition Law (2010) 409.

[78] Analytical Report 2009, 84.

[79] State conception of development of competition policy, protection of consumers' rights and advertisement activity in Republic of Uzbekistan in 2004-2006, Chapter 3.

[80]Interview with the lawyer of the antimonopoly body of Tashkent city, (September 2015).

[81]Conclusion from the author's interview with Uzbek visiting professors from Tashkent State University of Law at the Graduate School of Law in Nagoya University conference in (February 8-9, 2015).

To some extent, this is a reasonable concern for countries with a high corruption rate and defective good governance such as Uzbekistan. As one of possible solutions to this issue might be strengthening cooperation between law-enforcement agencies and competition authorities. That is, instead of obtaining investigative powers, the Competition Committee may use them indirectly through the cooperation with police or prosecutor offices. This recommendation seems to be more suitable for the current conditions of Uzbekistan. After all, even though competition authorities may abuse their investigative power to try to make an entrepreneur acting in good faith a scapegoat, the entrepreneur may appeal the decision of the competition authorities to a court. Article 34 of the Uzbek competition law provides legal rights to entrepreneurs to complain about the decision of competition authorities to economic courts if they do not agree with it.

4.1.2. Soft sanctioning regime

The competition authorities may impose only an administrative surcharge, and there is no criminal prosecution[82] for cartel conduct in Uzbekistan.[83] The problem here is the significant amount of current administrative surcharges for cartel conduct. Furthermore, the absence of a criminal penalty for cartel behavior is weakening the preventive and deterrent role of sanctions. The sanctioning regime in Uzbek competition law significantly changed in 2013.[84] Before the amendment of the competition law in August 2013,[85] sanctions against cartel conduct used to be much stricter. For instance, the administrative surcharge for cartel conduct was 1-2% of the total turnover of cartel participants.[86] Moreover, legal entities, as well as individuals, might be subject for liability. However, the amendment changed the calculation basis for the administrative surcharge from the 'turnover' to the 'minimum wage'. In addition, legal entities were excluded from the law as subjects for liability. That is, the company itself became not responsible for the cartel, but individuals such as managers, directors and other officials of companies have become accountable (See Table 4.1 below). In short, sanctions after 2013 softened relatively and lost their effectiveness. This implies that even if the leniency program in Uzbekistan is implemented with a clearer regulation, cartel participants are unlikely to have the incentive to apply for leniency. This is because the profitability of cartel conduct is overwhelmingly in comparison with the administrative fine to be imposed in case of detection by competition authorities.

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[82] Article 183 of the Criminal Code stipulates responsibility for two violations of competition laws and law on natural monopolies: the first criminal violation is refusing to submit information or providing competition authorities deliberately false information; the second is refusing to execute the decisions of competition authorities about reviewing the initial situation executing them in an untimely manner.

[83] Code on administrative liability of the Republic of Uzbekistan, Article 178 (1995).

[84] The Decree of the President of the Republic of Uzbekistan, No.4455 (June 18, 2012).

[85] Article 30 of the Law 'On amending and repeal of certain legislative acts of the republic of Uzbekistan, No.355, (October 7, 2013).

[86] Article 27 of old Law 'On competition' of the Republic of Uzbekistan on the date January 7, 2012 (before amendment).

Table 4.1. Sanctioning regime before and after the amendment in 2013

	Before Amendment	After Amendment
Subject for liability	Companies and Individuals	Individuals
Amount of surcharge	1-2% of total turnover	3-10% of minimum wages

To demonstrate the necessity of higher sanctions against cartel conduct and stronger investigative powers to implement an effective leniency program, the next the author shows a brief comparative study of the positive role of prerequisites in the Japanese and Russian leniency programs.

4.1.3. Absence of a clear mechanism of the leniency program

Even the legal basis for the leniency program was established by the new competition law in 2012, the mechanism to practically implement it has not been yet designed. In other words, none of existing legal acts establishes procedural rules to make a leniency program applicable in reality. As a result, the absence of a clear mechanism regarding the conditions of using the leniency program makes it uncertain and void. Merely offering an exemption from penalties in exchange for confession may not be sufficient to encourage cartel participants to come forward. Therefore, to increase incentives for cartel members to break the silence and apply for the exemption, the leniency program should be as coherent as possible. Thus, this model of leniency program was merely established following the international trend of the legislation in other countries rather than understanding its importance as a weapon against cartels.[87] Therefore, the present leniency model needs to be redesigned taking into consideration the successful experience of foreign countries in order to make it workable in local conditions of Uzbekistan.

[87]Commentary to the Competition law of the Republic of Uzbekistan, [2014] Baktria Press, 169.

5. COMPARATIVE STUDY

This section provides an example of successfully designed leniency programs in the U.S., the EU, Japan and Russia. In particular, the section aims to analyze the impact of some prerequisites for the improvement of the leniency programs on the example of Japan and Russia, whose experience of these countries explains the significance of certain conditions to make leniency program effective. Furthermore, based on the analysis of advantages and disadvantages of leniency programs in those countries, the author proposes a desirable leniency model applicable in Uzbekistan.

5.1. The U.S. leniency program[88]

The U.S. leniency program was originally introduced in 1978.[89] In 1993, the U.S. improved the leniency program, making it more effective and attractive for cartel companies. [90] Along with leniency program for companies, the US introduced also leniency policy for individuals in 1994. As a result, if there was only one leniency application from 1978 to 1993, after 1993 amendment leniency applicants assisted almost 90% of cases detected in 1997.[91] Numerous studies explore the positive effect of leniency program on cartel duration in a market. For instance, the research done by Zimmerman and Connor (2005) concluded that the introduction of the leniency program in the U.S. significantly reduced cartel duration during the period 1990-2004.[92] The distinct characteristic of the U.S. leniency program is that it provides full exemption from criminal penalty only for the first applicant, and there is no reduction available for other applicants, and a full exemption is guaranteed even after the investigation opened.[93]

5.2. The EU leniency program[94]

The leniency program in Europe was introduced in 1996 after witnessing its success in US. The leniency program was modified in 2002, which gave full exemption from fines to the first applicant like in the U.S.[95] However, the EU's leniency program has the following different characteristics. First, unlike the U.S., there is no leniency policy for individuals in the EU and therefore criminal

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[88] Legal basis for the U.S. leniency program is Antitrust Division, U.S. Department of Justice Corporate Leniency Policy (1993) http://www.usdoj.gov/atr/public/guidelines/0091.htm.

[89]Chen Zhijun & Patrick Rey, 'On the design of leniency programs' [2013] Journal of Law and Economics 56.4, 917-957.

[90]Scott D. Hammond, 'Cornerstones of an effective leniency program' [2004] ICN Workshop on Leniency Programs in Sydney, 2-4.

[91] See ibid 1.

[92]Zimmerman Jeffrey & John Connor, 'Determinants of cartel duration: A cross-sectional study of modern private international cartels' [2005] Ava*ilable at SSRN 1158577* .

[93] However, the reduction of administrative surcharge maybe possible through the plea bargaining and highly depends on DOJ's determination on a case by case basis. According to the DOJ's practice, discount range for the second applicant is usually 30-35%.

[94] Legal basis for the EU's leniency program is Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11).

[95] See ibid 8-11.

sanctions are absent.[96] Second, the EU leniency program grants not only exemption but also reduction of fines for further applicants. The maximum number of eligible applicants for reduction is up to four.[97] Third, the EU leniency program does not provide a fixed percentage of fines that should be reduced.[98] Deciding how much reduction the leniency applicant deserves is under the discretion of the European Commission.[99] Fourth, dissimilar to the U.S. model, if a cartelist applies for leniency after the investigation is opened, exemption from fines is not guaranteed even for the first applicant.[100] Despite these differences, the EU leniency policy proves very successful in fighting cartels.

5.3. The Japanese leniency program[101]

In the past, due to the weak enforcement of the Japanese Antimonopoly Act (hereinafter, Antimonopoly Act), Japan had serious problems with cartels.[102] Trying to solve this problem, in 2005 the Japan Fair Trade Commission (hereinafter, JFTC) was granted strong investigative powers, such as conducting dawn raids, interrogation, and orders to parties to submit documents.[103] Former JFTC Commissioner Akira Goto said that powerful weapon, combined with increased penalties, changed the mindset of Japan's business community.[104] Other lawyers even ironically indicated that JFTC had now 'teeth'.[105]

The leniency program has been successfully operating in Japan since the first year of its implementation in 2006. [106] On the very day the leniency program entered into force, the JFTC received an application.[107] It was incompatible with the criticism that predicted the absolute failure of the leniency program in Japan, because it was unacceptable in the Japanese business culture, where companies have a tendency to cooperate rather than compete. As a matter of fact, in the EU, where the leniency program was introduced a decade earlier, Japanese companies had already started to

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[96] Luke Danagher, 'The criminalisation of cartels: a European and trans-Atlantic perspective'[2012] European Competition Law Review 522 <http://ssrn.com/abstract=2546770>.

[97] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006/C 298/11] par. 26.

[98] See ibid 26.
[99] See ibid 30.
[100] See ibid 10.
[101] Legal basis for the Japanese leniency program is the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Section 7-2.
[102]Van Uytsel, *Steven,* 'The hybridization of competition law enforcement: some lessons from Japan's introduction of the leniency program'[2012] Asli Working Press Series, 3 <http://ssrn.com/abstract=2266382>
[103]Aiko Shibata, 'Implementation of Leniency program and its significance', [2006] *19* <http://www.eco.nihon-.ac.jp/center/industry/publication/research/pdf/29/29shibata.pdf> (In Japanese).
[104]Akira Goto, 'Japan's leniency program 'a great success'[October 16, 2007] Global Competition Review.
[105] Casper Lawson et al., Changes to the Anti-Monopoly Law came into effect on 4 January 2006: 'the JFTC now has teeth' (January 2006) <http://www.linklaters.com/pdfs/publications/asia/AntiMonopolyLawNoteEnglish.pdf>
[106] Toshiaki Takigawa, 'Competition law and policy of Japan', *[*2009] Antitrust Bulletin 54, 435-437.
[107] The first company that took advantage of the leniency program in Japan was Mitsubishi Heavy Industries Ltd., <http://www.jftc.go.jp/en/policy_enforcement/speeches/2006.files/061104IBAspeech.pdf>

resort to the EU leniency policy with the hope of reducing or avoiding their expected fines. These firms, and others learning from their experience, had thus already internalized the 'carrot and stick' logic of leniency.[108] Therefore, when the leniency program was introduced in Japan, the majority of Japanese companies were already familiar with the benefits of the leniency. Furthermore, leniency applications tend to reveal the existence of price-fixing cartels, rather than just bid rigging schemes, which is traditionally have been viewed as the principal pattern of collusion in Japan.[109]

The willingness of firms to take advantage of the program is reflected by the fact that, from 2006 to 2013, the JFTC received more than 700 leniency applications.[110] The Antimonopoly Act established both administrative and criminal sanctions for cartel conduct. The effectiveness of the leniency program has significantly increased since the amendment to the Antimonopoly Act in 2009. The amendment has increased the administrative surcharge rate and maximum jail term for cartel conduct. [111] For instance, the statistics shows that in the first year of the leniency program, 26 applications were received by the JFTC. As a result of legal amendments to the law in 2009, the number of leniency applications increased from 85 to 143 cases in 2011. This implies that strict sanctions and active investigative activity by the JFTC resulted in a higher risk of being detected, which ultimately incentivized cartel participants to apply for the leniency program.

The structural characteristic of the Japanese leniency model regarding the eligibility of the first applicant for exemption is identical to the U.S model. Furthermore, similar to the EU leniency program, several applicants are eligible for the reduction of fines. On the other hand, unlike the EU leniency program, the Japanese one stipulates a fixed percentage of fines for reduction, which leaves no discretion for the JFTC. However, recently the JFTC has started doubting about efficiency of the fixed sanctioning system.[112] The JFTC suggests that a leniency applicant should receive a different amount of reduction depending on the significance of submitted added value similar to the EU system.[113] It implies that the JFTC desires a discretionary power to decide the amount of discount a leniency applicant receives.

Thus, in general, these three leniency models differ regarding the number of eligible applicants. The most lenient among the three models is the Japanese one, where the number of qualified applicants to benefit from the program is up to five. The U.S. has the simplest but least lenient model of leniency program, where only one applicant is eligible. The most complicated leniency program

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[108] Etsuko Kameoka, Competition Law and Policy in Japan and the EU, (2014) 145.

[109] See JFTC Guidelines on Criminal Prosecution and Investigation of Criminal Case, 7 October 2005, Point 1 (2)

[110] See JFTC, Press Release, Enforcement Status of the Antimonopoly Act in FY 2010(1 June 2011), <http://www.jftc.go.jp/en/pressreleases/uploads/110613Enforcement%20Status.pdf>; See also Appendix Table I: Total Number of Leniency Applications here.

[111] Administrative surcharge for cartel conduct has been increased by 50%; Maximum jail term increased from 3 to 5 years., http://www.jftc.go.jp/dk/kaisei/h21kaisei/index.files/091203setsumeikaisiryou.pdf.

[112] Record from the meeting of Secretary General in February 24, 2016, <http://www.jftc.go.jp/houdou/teirei/h28/1_3/kaikenkiroku160224.html > (accessed 8 April 2016).

[113] Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11) par. 25. The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel.

belongs to the EU model, because the unfixed percentage of fines may cause uncertainty and unpredictability of possible amount of administrative surcharges for the applicants.

5.4. Time for the leniency application

The moment of application to the leniency program is extremely vital. Depending on when the cartel participant applies for leniency, he or she may get a full or partial exemption or even nothing (see Table 5.4). There are two periods to apply for leniency:

- Before investigation: When the competition authority has no knowledge of the cartel, or it has some knowledge of the cartel but has not started an investigation yet.
- After investigation: When the competition authority has a clear suspicion about the cartel and has already begun an investigation.

Table 5.4. Structural differences in leniency programs of three countries

Before investigation	US	EU	Japan
1st applicant	100%	100%	100%
2nd applicant	0	30-50%	50%
3rd applicant	0	20-30%	30%
4th applicant	0	0-20%	30%
5th applicant	0	0	30%

After investigation	US	EU	Japan
1st applicant	100%	30-100%	30%
2nd applicant	0	20-30%	30%
3rd applicant	0	0-20%	30%
4th applicant	0	0-20%	0
5th applicant	0	0	0

Table 5.4 shows that there is no difference in terms of granting exemption before or after the investigation launched in the U.S. The first applicant will receive full leniency even if the investigation is underway. In the EU, the first applicant will get a full exemption from the penalty if applies before the investigation started. However, full leniency (100%) is not guaranteed even for the first applicant if the investigation has already opened. Depending on certain requirements, the possibility to get the exemption from fines still exists. Moreover, the percentage of reduction is much higher if the applicants apply before the investigation is launched.

Nevertheless, the Japanese case is quite different. First, depending on the stage of investigation, the number of eligible applicants varies. While five applicants are eligible for leniency before the investigation, it is limited to up to three if the investigation has been opened. Second, a full

exemption is available only before investigation. After the investigation begins, no matter whether the applicant was first, second or third, all of them can get the same amount of reduction in fines.

5.5. Advantages and disadvantages of leniency programs

In summary, there is no uniform leniency program in the world, and none of them can be accepted as flawless. Each leniency program has advantages as well as disadvantages. However, this section does not discuss the shortages and privileges of existing leniency programs, but rather analyzes their advantages and disadvantages from the perspective of their applicability to the present conditions of Uzbekistan. Therefore, advantages and disadvantages indicated in Table 5.3 do not necessarily express the reality of leniency programs in those countries. These three countries have designed their leniency program based on the conditions and circumstances of their countries and, consequently, disadvantages pointed out in Table 5.5 should not be necessarily considered as defects.

Table 5.5.Analysis of leniency programs in three countries

Countries	Advantage	Disadvantage
US	- There is a race[114] to be the first applicant - Full leniency is available either before and after investigation started	- Leniency is available only for one applicant - Leaders and organizers are not eligible for leniency - Liability for single damage remains (but not treble damage)
EU	- Cartel leaders are eligible for leniency[115] - Exemption from all sanctions	- Decision on reduction of amount of fine is at the European Commission's discretion - Informal marker system

[114]John Connor, 'A critique of partial leniency for cartels by the US Department of Justice' [2007] 5, .Available at SSRN 977772.

[115]Arp, D. Jarrett & Christof RA Swaak, 'Tempting Offer: Immunity from Fines for Cartel Conduct under the European Commission's New Leniency Notice'[2001] A, Antitrust 16, 62.

Japan	- Fixed amount of fines results in the absence of discretionary power left for JFTC[116] - Easy application procedure (Fax system)	- Many applicants are eligible for leniency - The reduction rate is the same for all applicants after the investigation has started, which may cause a 'waiting game'[117] in practice. - Exemption from criminal accusation is available only for the first applicant[118]

Table 5.3 shows that each country has specific leniency programs with the following characteristics. First, the U.S. leniency program creates an active race among cartelists because only one applicant is able to benefit from the program while in Japan the eligibility of many applicants causes a waiting game in practice, resulting in the possibility that no firm comes forward with information. Next, the EU leniency program offers exemption from all kinds of sanctions, while the U.S. and Japanese programs do not guarantee exemption from all penalties. Third, if U.S. leniency program enables an applicant to be still liable for the single damage, in Japan, the second and third applicant can still be subject to criminal penalties. Then, the EU and U.S. system have a relatively complicated marker system in comparison with the Japanese one. Fifth, the U.S. has deprived cartel leaders from using leniency program, while the EU uses them as a good source of evidence. Finally, the Japanese leniency program sets a fixed amount of fines, while the EU relies more on discretionary power of the European Commission.

Taking into account the advantages and disadvantages of these three models of leniency programs, the author next tries to design the Uzbek model of leniency program not merely by selecting the best alternatives, but also by adjusting them to socio-legal conditions of Uzbekistan. Before starting the discussion of the design of the Uzbek leniency model, it is crucial to observe the Russian background of developing a leniency program as well.

5.6. The Russian leniency program

Russia introduced its first leniency program in 2007.[119] Understanding the threat of cartels to economic development, the Russian government created a Special Department to combat cartels[121]within the Federal Antimonopoly Service (hereinafter, FAS) in 2008, which was given

[116]Van Uytsel, Steven., 'A Comparative US and EU Perspective on the Japanese Antimonopoly Law's Leniency Program'[2008] 28, Available at SSRN 2001901.

[117]See ibid 42-43.

[118] Section 1(2), The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations (October 7, 2005). (Tentative translation).

[119]G. Yusupova, 'Leniency program and cartel deterrence in Russia: effects assessment'[2013] Higher School Of Economics Research Paper No. WP BRP 6, 3.

[121]A. Makarov, 'Transformation of antimonopoly policy in the sphere of combating cartels in countries with transition economy: Russia, Ukraine and Kazakhstan' [2014] LITRES. *47.*

special investigative powers in 2009.[122]As a result, the FAS conducted numerous inspections using investigative powers, which led to the increase of the cartel detection rate between from 359 in 2008 to 607 in 2011.

Despite the being familiar with the U.S. and the EU leniency systems, Russia has selected a gradual approach in implementing the program. That is, Russia has taken two steps in the introduction of a leniency program. The first step was the introduction of a very lenient model in 2007.[123] 2007 model did not limit the number of applicants. As a result, the Russian antimonopoly authority, the FAS, received approximately 500 applications from companies within a year.[124] Even cartel leaders were eligible to get a full exemption from penalty. For instance, the FAS granted full exemption to Rosbank and several insurance companies that clearly confessed their leadership.[125] Nevertheless, the absence of limitations to the number of eligible applicants and opportunity for cartel leaders to avoid penalty caused public criticism. As a result, the leniency program was amended in 2009.[126] The amendment was made so that only the first applicant is eligible for exemption and cartel leaders are excluded from the list of eligible applicants.

Table 5.4. Comparative table of past and present leniency programs in Russia

	Leniency program in 2007-2009	**Leniency program since 2009**
Maximum number of eligible applicants	unlimited	Only one
Exemption or partial reduction	Only exemption	Only exemption
Cartel Leaders	Eligible	Not Eligible

The Russian experience shows that it has chosen a step-by-step approach in the implementation of leniency program. Despite the sharp criticism of the first leniency program, I think it resulted in some benefits: FAS became familiar with hidden cartel situations in the market, became aware of economic sectors where cartels principally exist, types and names of potential cartelists. Furthermore, entrepreneurs have learned the benefits of using the leniency program.

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[122] Federal law of Russia No. 164 (July 17, 2009), See also Article 25 (1) of Law 'On Protection of competition', No.135 (July 26, 2006).

[123]A. Shastitko & S. Avdasheva, 'Introduction of Leniency Programs for Cartel Participants: The Russian Case' [2011] Competition Policy International Antitrust Chronicle 8, 1-11.

[124]A. Shastiko, 'Perspective: Ineffective "ethical whistle blowing"' [2011] Vedomosti http://www.vedomosti.ru/newspaper/articles/2011/11/30/neeffektivnoe_etichnoe_donositelstvo.

[125]Russian Antimonopoly Service's web site, http://www.fas.gov.ru/fas-news/fas-news_14660.html accessed October 13, 2015.

[126] Russian Federal Law "On Amendments to the Federal Law on Protection of Competition" (July 20, 2009).

6. DESIGNING A LENIENCY MODEL FOR UZBEKISTAN

Based on the analysis of the four countries' experience above, the author tries to design the model of the Uzbek leniency program, which would have coherent structural mechanism and more suitable to the local conditions of Uzbekistan. The proposed model of the Uzbek leniency program is summarized in Figure 5.6 below.

Figure 6. Desirable Model of Uzbek Leniency Program

Uzbek leniency model	Administrative fine	Criminal penalty
1st applicant	100%	Exemption
2nd applicant	50%	Exemption

First scenario	**1st applicant**	**2nd applicant**
Before investigation	100%	50%
After investigation	-	-

Second scenario	**1st applicant**	**2nd applicant**
Before investigation	100%	-
After investigation	-	50%

Third scenario	**1st applicant**	**2nd applicant**
Before investigation	-	-
After investigation	100%	50%

First, the number of applicants eligible for leniency should be limited to two. Second, the first applicant should be exempted from the administrative fine, while the second should be eligible for a reduction of 50%.

Depending on the timing a cartel participant applies for leniency, three possible scenarios may take place in practice. *The first scenario* is where two cartel participants apply before the investigation starts, in which both of them can benefit from the program. There is a very small possibility that this might happen in Uzbekistan. Even in countries with successful leniency programs, it is a rare case. *The second scenario* is when one cartelist applies before investigation starts and when the investigation was already initiated based on his leniency application, another cartelist applied for the leniency as a second one. In other words, when one cartelist applies for leniency before an investigation starts, providing necessary information about other cartel participants for an exemption from the penalty, it will give the signal for other cartelist to run to the competition authority in order to qualify for at least the 50% reduction from fines. Ideal leniency program should work in this way. However, applying before an investigation opened is also unexpected case in

Uzbekistan context. *The third scenario* is when both eligible cartel participants apply for leniency after the investigation starts. The proposed Uzbek model provides an exemption for the first applicant despite applying after the investigation opens. In comparison, the Japanese leniency program does not afford exemption for applicants after the investigation starts, and in the EU, it depends on conditions. Nevertheless, designing the leniency program and providing an opportunity to get full leniency (100%) even after the initiated investigation is a necessary step to increase incentives for cartelists to apply for leniency.

The Uzbek leniency model does not pretend to be absolutely successful in practice. Moreover, a proposed leniency model would not necessarily lead to a sharp increase of the number of applicants right after its implementation and may take a longer time than expected. However, to justify the structural design of the desirable model for the Uzbek leniency program, it will be essential to at least provide a rationale behind each alternative selected for the model.

6.1. The rationale behind the proposed Uzbek leniency model

6.1.1. The maximum number of applicants eligible for the leniency program must be two

The reason why the number of eligible applicants should be two at most is as follows:
First, undoubtedly, granting an exemption from the penalty only to the first applicant will create a race among cartelists to apply for leniency as soon as possible to beat other cartel participants. This is also peculiar to the U.S. leniency model.[127] However, other cartel participants should also receive an opportunity to benefit from using a leniency program. Because, their information can assist to prove a cartel and save the limited resources of competition authorities by reducing the duration of the investigation.[128] Thus, the evidence submitted by two applicants instead of a single one will ease proving the existence of the cartel. Nonetheless, formulating certain requirements for information supplied by applicants would be important in order to ensure that the second applicant provides the competition authority with valuable information.

Second, taking into account oligopolistic market conditions of Uzbekistan, it would be better to limit the number of applicant up to two. Since the program may become a convenient loophole for companies in avoiding the deserved punishment. In this regard, the Japanese and European leniency models, which make many applicants eligible to use the program, is not an appropriate alternative for Uzbekistan.[129]

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[127] Joseph Harrington, 'Corporate leniency programs and the role of the antitrust authority in detecting collusion' [2006] Competition Policy Research Center Discussion Paper, CPDP-18-E .

[128] See Part 3, (3.1, point 5).

[129] See Part 3. (3.1, point 2).

6.1.2. The size of administrative fine must be fixed

Unlike developed countries, lack of transparency, abuse of administrative power, lack of good governance and red tape are common institutional weaknesses in many transitional countries. Uzbekistan is also not an exception.[130]Therefore, Uzbekistan desires a leniency program with minimum discretionary power for the competition authorities. Particularly, this is more important in the decision on what percentage of reduction of the administrative surcharge should be given to the leniency applicants. The EU leniency program provides high discretion for the European Commission to decide, which is perhaps an acceptable practice in the EU legal system. With respect to this issue, the Japanese leniency model is more suitable for Uzbekistan. A fixed percentage of fines for each applicant will make the leniency program more certain and reduce the occurrence of unfavorable cases through the misuse of discretionary power by competition authorities.[131]

6.1.3. Leaders and organizers should also be eligible for leniency

The question whether leaders and organizers should be eligible to use a leniency program is controversial among competition law scholars.[132] On one hand, if the cartel organizer or leader is deprived of the opportunity to use the leniency program, it obviously worsens their position compared with other cartel members. It may keep cartelists from being an organizer or a leader, which will prevent new cartel formations in the future. On the other hand, restricting chances to get exemption from the penalty for organizers and leaders may bring negative effects. First, the leader of the cartel is likely to have access to the most incriminating evidence against other cartel participants. However, because of the incapability to use the leniency program, leaders have no incentives to disclose this information to competition authorities. Second, knowing this limitation, other cartel participants will perceive the leader as a reliable partner who is not interested in disclosing information. Experimental studies show that the absence of an exemption for the cartel organizer and leader may increase an average level of prices, which is a sign of cartel stabilization in a market.[133] In addition, it should be noted that the identification of a leader or organizer of the cartel itself is costly work for competition authorities. On the one hand, the U.S. leniency program is very strict towards cartel leaders/organizers and does not grant exemption from the penalty at all. It mostly focuses on decreasing incentives to be a cartel leader/organizer by establishing high sanctions, such as treble damage and criminal accusation against them. On the other hand, the EU leniency program sees cartel leaders as a valuable source of information to prove cartel conduct. Russia adopted this approach in its first leniency program in 2007. Until the amendment to the leniency program in 2009, leaders and organizers of cartels were eligible to get full exemption from penalty.

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[130] H. W. Hoen, 'Institutional Reform in Central Asia: Politico-economic Challenge' [2013] VOL. 27. ROUTLEDGE, 30-35.

[131] See Part 3. (3.1, point 3).

[132] N. Pavlova, & A. Shastitko, 'Leniency program for cartel participants: the problem field, and the effects of structural alternatives' [2015] Moscow, 15-16. (in Russian), ftp://w82.ranepa.ru/rnp/ppaper/mn32.pdf.

[133]Bigoni, Maria, et al. 'Fines, leniency and rewards in antitrust: An experiment' [2008] No. 738. IFN Working Paper.

Thus, it may be beneficial to allow cartel leaders/organizers to apply for leniency at initial stage of implementing a leniency program in Uzbekistan. It may assist to obtain necessary information about a particular cartel, as in EU, and to become familiar with cartel environment, as in Russia.

6.1.4. Exemption should be granted from all penalties (administrative, criminal sanctions and private claims)

Participation in the cartel may entail administrative, civil, and in some countries criminal liability. The issue here is that what kind of penalties from which the applicant needs to be exempted. The presence of criminal sanctions for cartels can significantly alter the incentives of cartel participants. If a leniency program fails to provide an exemption from criminal punishment, the effectiveness of the program might be reduced to zero, even if it ensures full amnesty from administrative sanctions. In international practice, the leniency program usually provides an exemption from both administrative and criminal penalties to cartel participants (if criminal liability exists). The possibility of being liable for private claims after leniency is received may reduce incentives to cooperate with the competition authority. For instance, the applicant remains liable for civil damages despite the U.S. leniency program guarantees exemption from the administrative surcharge and criminal penalty.[134] Unlike the U.S. system, users are granted immunity from administrative as well as civil damages in the EU leniency program (criminal sanction is absent in the EU). Finally, in the Japanese case, there is no criminal accusation to the first applicant, but no limitation on civil damage.

6.1.5. The necessity of a fax system as a kind of 'marker system'

Because the full exemption or reduction depends on the order of application submitted, the following question needs to be answered. How should the order of applicants be decided? In particular, is it lawful to refuse granting an exemption to the company which expressed its intention to participate in the program but could not fulfill all the necessary conditions on time, and to provide an exemption to the company which applied later, but fulfilled the conditions more quickly? Is it possible to 'reserve a place in the queue' to participate in the program?

One of the possible ways to solve this problem is a so-called marker system. Marker system implies that at the initial stage, it is enough for the company to provide minimum information about the cartel, such as the name and address of other cartel members, the product and geographic range of the cartel, the estimated duration of the cartel and the nature of its activities. Here, the competition authority will not accept other applications for full exemption from liability until a decision on this first received application is made. Only if the company is denied a full amnesty may the competition authority consider the application of another participant. Thus, the company does not need to provide

[134] However, the leniency receiver will be liable only for single damage, not for the treble one. (See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108–237, §§ 201–214, 118 Stat. 661 (22 June 2004), 15 U.S.C.).

all the evidence immediately. It has time to collect and prepare all necessary documents. However, amnesty is not granted based on unsubstantiated statements, but evidence needs to be required at least in a hypothetical form.[135]

The marker system is commonly used in the U.S. and the EU leniency programs. The shortcoming of this system is that it leaves room for the discretion of competition authorities, that is undesirable in Uzbekistan. However, this problem finds its solution in the Japanese leniency system. Unlike the U.S. and EU, Japan has introduced a facsimile system (with one fax number only) as a way to apply for leniency.[136] Technically, a leniency application submitted through the fax system has an automatic record of date and time, which is impossible to change. As a result, the possibility to manipulate and abuse the order of applications by competitive authorities would be absent, which will in turn increase the trust of entrepreneurs in the leniency program.

[135] Andreas Stephan, 'An empirical assessment of the European leniency notice' [2009] Journal Of Competition Law and Economics 5(3), 554.

[136] See http://www.jftc.go.jp/dk/seido/genmen/qa.html#cmsQ31.

7. CONCLUSION

The transition from a monopolized economy to the competitive market is a challenging process for Uzbekistan. After successful reforms for the reduction of monopolies, the country achieved a certain level of market economy. However, the new threat of cartels is hindering the further development of the free market in Uzbekistan. In order to protect competition in markets, the Uzbek government adopted competition laws prohibiting cartel agreements. The competition law of Uzbekistan has even established a legal basis for a leniency program, which is the most effective instrument to combat cartels in the world.

This paper attempted to demonstrate the five main elements needed to achieve an effective leniency program in Uzbekistan. *First,* there was a good tendency between 2006 and 2012 towards the recognizing a threat of cartels in Uzbekistan. Unfortunately, Uzbek Competition Committee is currently inactive in detecting cartel conduct in a market. This is due to the following two reasons. First, competition authorities lack practical experience fighting against cartels. Second, the state economic policy to liberalize and support entrepreneurial activity resulted in neglecting the necessity to intervene and suppress a cartel conduct, which in its turn is a danger for the development of a free market. Therefore, the presence of solid competition policy is a crucial factor in building effective and practical the anti-cartel enforcement system in Uzbekistan. *Second,* because of the sluggish attitude toward further development of competition laws, some norms of Competition law remain practically inapplicable. Current inactive leniency program is a good example of the failed legal transplantation in Uzbekistan. Although the legislators inserted a leniency program into competition laws, an appropriate mechanism for its implementation was not established. Subsequently, a leniency program that bears fruits is still a matter for the future in Uzbekistan. *Third,* the experience of countries with successfully-designed leniency programs indicates that implementation of leniency is a complex issue. Well-designed leniency program might prove to be useless if other factors are not taken into account. The case of Uzbekistan shows that lack of some preconditions, such as the powerful competition enforcement authority and absence of strict sanctions, causes inefficiency in leniency programs. *Fourth,* the structure of the leniency program should be designed according to the specific local characteristics of each country. The number of applicants eligible for leniency, the possibility for reduction from fines, and the opportunity for cartel leaders to benefit from the program should have a rationale when it comes to designing a leniency model for a particular country. *Fifth,* as an initial step, the transition countries may choose a gradual approach towards implementing a leniency program by starting with a simple and more tolerate leniency program.

Finally, the work has strived to demonstrate an analytical approach that should be taken as a sample in design and implementation of leniency programs by competition authorities in transition countries. The designed model of the leniency program for Uzbekistan is expected to be applicable in other transition countries as well.