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### Working Party No. 3 on Co-operation and Enforcement

#### USE OF MARKERS IN LENIENCY PROGRAMS

-- European Union --

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*This document reproduces a written contribution from the European Union submitted for Item III of the 120th meeting of the Working Party No. 3 on Co-operation and Enforcement on 16 December 2014.*

*More documents related to this discussion can be found at:  
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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## **1. Introduction**

1. In the European Commission leniency programme a marker system was introduced in 2006 for the current Notice on immunity from fines and reduction of fines in cartel cases (the "2006 Leniency Notice")<sup>1</sup>. Before 2006 no marker option was available under the European Commission leniency programme.

2. The introduction of the marker system followed more than ten years of practice in the implementation of the leniency programme under the previous 1996 and 2002 Leniency Notices and reflects practical experience gained during that period. It aims at increasing the effectiveness of the European Commission leniency programme, providing certain flexibility to the procedure and encouraging quick reporting of cartels with ultimately better quality leniency applications.

## **2. Purpose and characteristics**

3. The European Commission leniency programme foresees a discretionary marker system, which is designed to preserve and protect the applicant's place in a leniency queue for a definite period of time.

4. The reason why the Commission opted for a discretionary marker system is that, above all, it is in the public interest to maintain the race between companies to provide the information and evidence required to meet the conditions for immunity and thereby to facilitate the detection and termination of infringements. The interest is not in the race to simply get a place in the queue. If a company does not provide to the Commission enough information, its application will be rejected and it would need to apply again. In between, another applicant would then have a possibility to qualify for immunity.

5. Nevertheless, there can be various circumstances that would justify giving the first applicant time to complete its application and protecting its place in the queue by granting a marker. Therefore, the decision to grant a marker is made on a case by case basis, taking into account the specificities of each situation and the justifications that the applicant presents for its request.

6. The EU marker system caters for the needs of those immunity applicants who, for legitimate reasons are not in the position to submit all necessary evidence and information at a given time, but are able to perfect their application within a certain specific time span. Such a situation may arise, for example, when a new management realised upon its appointment that the company was involved in a cartel or when following internal compliance training an employee reports on cartel conduct. Hence the system encourages "the race to the door" by enabling those applicants to gather the necessary information and evidence required to complete their immunity application.

## **3. Who can ask for a marker?**

7. The Leniency Notice provides for immunity for the first applicant that meets the threshold and for each subsequent successful applicant a reduction of fines. Nevertheless, pursuant to paragraph 15 of the 2006 Leniency Notice markers are only reserved for the first immunity applicant. Markers for the subsequent reduction of fines applicants, which might exist in some national legal systems (so called "type 2 markers"<sup>2</sup>), do not exist under the 2006 Leniency Notice.

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<sup>1</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17–22. [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN)

<sup>2</sup> See Section IV of the ECN Model Leniency Programme, which can be found at [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf).

8. This choice has been made first and foremost because the rationale behind the marker system is to increase incentives to bring a suspected cartel conduct to the Commission's attention allowing detection and investigation of a cartel. Marker for the first applicant enables it to report the cartel conduct to the Commission immediately upon internal detection at the company even before it would be fully ready to lodge a complete immunity application. Therefore, it can be justified to grant an immunity applicant, which reports on a previously unknown cartel, some time to complete its application. However, this does not apply when the Commission has already engaged in an investigation of the cartel.

9. In addition, practical experience shows that following or even during the Commission inspections, there may be several reductions of fines applications in a short interval. Thus it seems that when the companies compete on the reduction of fines, this creates incentives for the companies not only to come forward quickly but also to provide the best possible evidence. This is likely due to the fact that the key element to assess these applications is that they provide the Commission with evidence of the alleged cartel which represents significant added value with respect to the evidence already in the Commission's possession.

#### **4. Granting and perfection of a marker**

10. The conditions for eligibility to secure a marker are set out in point 15 of the 2006 Leniency Notice. The applicant is required to provide a limited amount of information that would allow the Commission to identify the alleged conduct which is the object of the marker application, to confirm that immunity is still available and to verify that the Commission is likely to be well placed to deal with the case instead of EU national competition authorities. In particular the applicant should:

- provide its name and address;
- identify the parties to the alleged cartel;
- describe the affected products and territories;
- describe the estimated duration of the alleged cartel;
- describe the nature of cartel conduct;
- provide information on other past/future leniency applications to other authorities (relating to the same conduct);
- provide a justification for the marker request.

11. This information is the minimum standard which allows the European Commission to ensure that the application concerns a secret cartel affecting the EU and to verify whether immunity is still available for such conduct.

12. If the Commission is satisfied that the conditions for a marker are met, the marker is typically granted within a couple of hours and is valid from that moment. Contrary to the decision of granting a conditional immunity to a company, granting a marker is an administrative act carried out by the European Commission services ("DG Competition") and takes the form of a letter signed by the Director for cartels.

13. A marker is granted when it appears that an applicant is in a position to perfect it so that inspection under article 20 of Council Regulation No. 1/2003<sup>3</sup> can be carried out within a short time period, which is essential in order to ensure that evidence remains intact at any premises to be inspected.

14. For this purpose the applicant is requested to explain in the first meeting (usually orally) what kind of internal investigatory measures it has already taken, the result thereof and what other measures it would intend to take during the marker period. The applicant is also requested to provide detailed information and reasoning for time needed for such measures. This would allow the Commission to make an informed decision on the time granted to perfect a marker.

15. Moreover, the applicant is expected to cooperate fully, genuinely and continuously throughout the procedure (point 12 of the Leniency Notice). Therefore, when making the application, the marker applicant should submit immediately information and evidence it has already on the alleged cartel, if requested by the Commission. Also, if the Commission asks, it should provide supplementary information and evidence as soon as available to it. In addition, following from the spirit of genuine leniency cooperation, the applicant must take all the necessary steps to protect confidentiality and to avoid that, even inadvertently, evidence is destroyed (point 12 c) of the Leniency Notice).

16. The time period for the perfection of the marker is set on a case-by-case basis and may vary due to the circumstances of each case. However, due to the need to carry out inspections in a timely manner and not to disadvantage other potential applicants, the marker period is necessarily limited. Generally, it is not more than three weeks, but where justified, this time period may be extended. Longer marker periods will also mean in parallel more contacts between the applicant and the Commission as the applicant would be requested to keep the Commission services informed of its progress more recurrently.

17. The conduct for which the marker is granted (the scope of the marker) is based on the description of the cartel by the applicant. This does not mean that the scope of the conditional immunity that is granted if the marker is perfected is exactly the same. The scope of the conditional immunity is reassessed on the basis of the evidence that is submitted by the applicant.

18. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

## **5. Oral procedure for applications**

19. An undertaking wishing to apply for immunity from fine can submit its marker application either in writing or as an oral statement that is recorded at the European Commission premises<sup>4</sup>. Already the marker application is regarded as a voluntary presentation of the undertaking's knowledge of a cartel and their role in it. In the European Commission leniency policy such corporate statements can be made under an oral procedure (points 31-35 of the Leniency Notice).<sup>5</sup>

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<sup>3</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty in Official Journal of the European Union, L 1, 4.1.2003, p. 1–25.

<sup>4</sup> The legal basis for the Commission to take statement is Article 19 of Council Regulation 1/2003 and Articles 3 and 17 of Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 of the TFEU, Official Journal L 123, 27.04.2004, p. 18-24.

<sup>5</sup> A practical guidance for companies on oral statements is published on the European Commission web-site (<http://ec.europa.eu/competition/cartels/leniency/leniency.html>) and provides the parties with necessary

20. This oral procedure provides a particular protection from discovery in national courts to the information submitted orally by immunity or leniency applicants.

21. Access to corporate statements is only granted at the European Commission premises to the addressees of a statement of objections, provided that they commit (together with the legal counsels getting access on their behalf) not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted, and to ensure that the information obtained from the corporate statement will solely be used for the purposes for which it was acquired<sup>6</sup>. Other parties such as complainants will not be granted access to corporate statements.

22. This protection of corporate statements is also taken into account in the new Commission's Directive on antitrust damages actions (adopted by the EU Council of Ministers on 10 November 2014).<sup>7</sup>

## 6. Confidentiality waiver

23. The Commission Leniency Notice sets a requirement for a leniency applicant to inform the Commission about any other applications it has filed or intends to file with other competition authorities concerning the cartel it has reported. The purpose of this information is to enable the Commission to start coordinating its investigation with other competition authorities as early as possible. However, the Commission will only discuss information received under the Leniency Notice with other competition authorities pursuant to a confidentiality waiver provided by the leniency applicant.

24. In order to facilitate the provision of waivers and to increase their uniformity worldwide, the International Competition Network (ICN) has adopted Waiver Templates and an Explanatory Note (2014). DG Competition has fully endorsed this guidance and accordingly requests that leniency applicants provide it with a full waiver of confidentiality using the ICN template.<sup>8</sup> The applicants are requested for the full waiver immediately when making their first submission under the Commission Leniency Notice and before the perfection of the marker.

25. The ICN waiver template does not preclude exchange of documents received from leniency applicants between the competition authorities. However, the European Commission will generally not exchange such documents with the competition authorities listed in the waiver. It is only exceptionally, and pursuant to the applicant's prior consent, that such exchanges could take place.

26. For the purposes of application of the EU competition rules, the Commission does not need a waiver to discuss information received under the Leniency Notice with competition authorities that are part of the European Competition Network (ECN). In the ECN the Commission and the national authorities are applying EU competition rules with parallel competences and in a system of flexible work sharing<sup>9</sup>. This includes assistance in inspections and exchange of confidential information<sup>10</sup>.

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information so that they can better plan and prepare their statements and appointments with the Commission.

<sup>6</sup> See also Article 28 of Regulation 1/2003 which states that information collected pursuant to Article 19 of Regulation 1/2003 may be used only for the purpose for which it was acquired.

<sup>7</sup> Directive of the European Parliament and of the Council of on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Article 6 paragraphs 6 and 7.

<sup>8</sup> See <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.

<sup>9</sup> This system is governed by the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition ("Regulation 1/2003"), Official Journal L 1, 04.01.2003, p.1-

## 7. Conclusions

27. Since its introduction in 2006 the marker system has proven to be an efficient tool under the European Commission leniency programme. It allows for the flexibility for companies to complete their application. While the applicant's place in the queue for immunity is protected for specified period of time, it can continue its internal investigation and uncover information that is necessary for the Commission to launch a targeted inspection in a timely manner. Experience shows that applicants can as a result provide the Commission with better quality leniency applications with a more detailed description of the alleged cartel including specific dates, locations, content and participants in the alleged cartel contacts.

28. The European Commission does not envisage amendments to the legal provision on the marker system as set out in the Leniency Notice. The system is flexible and allows for adjustment of the practical modalities (such as the time period to perfect the marker) depending on circumstances in individual cases and experience in practice.

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25. Articles 4 and 5 of Regulation 1/2003 give the Commission and the national competition authorities' full parallel competences to apply Articles 101 and 102 of the Treaty on Functioning of the European Union.

<sup>10</sup> Article 12 of Regulation 1/2003. Nevertheless, in view of differences in systems of sanctions within the ECN, the use in evidence of information received from another competition authority in the ECN is subject to certain additional conditions, as laid down in paragraphs 2 and 3 of Article 12.