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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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

#### **USE OF MARKERS IN LENIENCY PROGRAMS**

-- Austria --

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*This document reproduces a written contribution from Austria 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. In January 2006 a leniency programme was introduced in the Austrian Competition Act. As foreseen in the Competition Act (§ 11/5) at the same time a manual was published laying down the practice of the Austrian Competition Authority (Bundeswettbewerbsbehörde, BWB) in implementing the leniency programme. The use of markers was included in the manual which was revised twice since 2006, with the last revision in March 2013.

2. The contribution will first give a very short summary of the leniency programme and then describe the use of markers as well as the experience with it.

### **1. Leniency programme**

3. The leniency programme was introduced in 2006. It was adjusted in 2013 according to the standards of the leniency programme of the European Competition Network ("Modell Leniency Programme"). Key characteristics are the following:

4. The BWB may refrain from applying for the imposition of an administrative fine if the following conditions - specified in § 11 (3) Competition Act - are met:

- The company has stopped participating in a cartel;
- the company is the first to provide the BWB with information which allows the BWB to file an application with the Cartel Court, (so-called type 1a-applicants<sup>1</sup>); or  
if the BWB already had enough information to apply for a search warrant, the company was the first to provide additional evidence and information which allows to directly apply for the imposition of fines in a procedure before the Cartel Court (so-called type 1b- applicants<sup>2</sup>);
- It cooperates with the BWB without restrictions;
- It has not forced others to participate in the cartel.

5. If a company cannot qualify for immunity as it was not the first applicant fulfilling the conditions mentioned above it can still be granted a reduction of the level of the fine: the second applicant might be granted a reduction of 30 - 50 %, the third a reduction of 20 - 30 %, every other company up to 20 %. The company is only eligible for a reduction in fines if the information provided represents "added value" in respect to the information already in the BWB's possession.

6. If the conditions mentioned above are met, the BWB refrains from the imposition of fines or only impose reduced fines. The decision to grant lenient treatment is communicated by the BWB by issuing a non-binding notice to the applicant. At that point in time, the second official party, the Federal Cartel Prosecutor (FCP), may not impose fines anymore. The Cartel Court - which imposes fines only upon application by the BWB and/or FCP- may not impose higher fines than these authorities have applied for.

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<sup>1</sup> According to § 11 (3) 1a Competition Act

<sup>2</sup> According to § 11 (3) 1b Competition Act. Immunity is granted only once either to a type 1A or to a type 1B applicant in a given case.

## 2. Use of markers

7. The use of markers is specified in the manual laying down the practice of the BWB in implementing the leniency programme. The first leniency manual had been published with the coming into force of the legal rules on leniency in 2006 and has been revised in 2011 and 2013.

### 2.1 Description of the marker system

8. The current system foresees in principle two cases in which a marker could be set:

#### 2.1.1 Cases with only national dimension:

9. In a national case a company can apply for leniency by either bringing in a full application or by setting a marker. The marker system is open only to the first immunity applicant. For the marker, the company has to fill in a form attached to the manual. The form only asks for the name, address and some basic information on the cartel like the product and geographic area concerned, duration and type of infringement and with which other competition authorities a leniency application was filed<sup>3</sup>. The BWB grants a marker when an applicant delivers all information required by the form.

10. When the BWB grants the marker, it sets a period not exceeding eight weeks within which the applicant has to perfect the marker by delivering all the information required by the Competition Act (§ 11 (3) 1a and b) and listed in detail in para 14 in the manual. Once this information is delivered, the BWB assesses the information in the light of the evidential thresholds pursuant to § 11 (3) 1a or b, or pursuant to § 11 (4) Competition Act ("added value"). Provided that the other conditions for leniency (see point 1 above) are given, the BWB sends a non-binding notice to the applicant stating that it will apply the programme.

11. One obligation of the company also encompasses the obligation to keep the cooperation with the BWB confidential vis-à-vis other participants of the cartel and third parties.

12. For transparency reasons the BWB publishes its own and the FCP's applications to the Cartel Court concerning a suspected infringement of Austrian or European Cartel Law, irrespective whether it is based on a leniency application. Such a notice must not contain any business secrets and usually does not disclose the fact that it is based on a leniency application. However, in its application to the Cartel Court - and therefore clear for the other participants of a cartel - the BWB specifies who is leniency applicant as it will not file an application for fines concerning that company. In addition, the BWB has the possibility to file an application for a declaratory finding that the leniency applicant took part in the antitrust infringement. This is particularly important in case the company is a repeat offender.

#### 2.1.2 Cases with EU dimension (summary applications)

13. In cases where the latter is particularly well placed to deal with a case in accordance with para 14 of the Commission notice on cooperation within the ECN, an applicant that has filed, or is in the process of filing, a leniency application with the European Commission, may file a summary application with the BWB. The form to be filled in corresponds with the so-called "model leniency programme". The marker is granted based on the date and time of the summary application. In this case, full submission of all relevant evidence within a given time limit is only required by the BWB, if it decides to act upon the case and the case is reallocated from the Commission to the BWB or if it is otherwise explicitly required by the BWB.

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<sup>3</sup> The information required is specified in para 33 of the manual.

14. The marker system is open to all immunity applicants: not only the first applicant but also subsequent leniency applicants can secure a place in the leniency queue at the BWB by a simplified procedure. This is particularly important as the order of application might differ between the European Commission and the member states.

15. In all cases (national and European) granting the marker is automatic upon meeting the requirements mentioned above.

## **2.2 Revisions of the manual and the marker system**

16. De facto a marker existed already since the **introduction of a leniency programme in 2006** as the only requirement for immunity applicants was to fill in a form which asked for only limited information.

17. Officially a marker was introduced with the revision of the leniency manual in **2011**<sup>4</sup>, but only with regard to cases with EU dimension ("summary application marker") in cases, where a leniency application was also filed with the European Commission (see point 2.1.b above).

18. In **2013** the manual was revised again<sup>5</sup> and introduced a marker for all immunity applicants. This became necessary as inter alia the level of evidence to be provided by the first leniency applicant was adjusted according to the ECN Model Leniency Programme (by way of amendments to the Austrian Competition Act) and thereby raised substantially: While the new manual foresees a detailed list of evidence and information to be provided which is in line with the Modell Leniency Programme, there was no indication of the necessary evidence to be provided by the leniency applicant in the previous Austrian leniency manual. Thereby the evidential threshold for immunity was increased, creating the need for an official marker system. Further amendments include the possibility to confidentially approach the BWB to clarify if immunity is still available.

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<sup>4</sup> In general the manual introduced some changes after more than five years of practical experience with the application of the original version and in the light of the relevant case law and developments at European level (alignment to the ECN leniency model programme). The revision of the manual aimed to provide more guidance to applicants and increase the transparency of the procedure with a view to enhance legal certainty for companies.

Key amendments include the following: further explanation on the exact content of the duty to cooperate; criteria which is used by the BWB when determining the fine within the bands in case of reduction of fines because of leniency applications (no taking into account of additional, aggravating facts previously unknown by the BWB and disclosed by the leniency applicant); detailing procedures.

<sup>5</sup> A revision of the manual was again necessary as it took into account the latest amendments to the Austrian Competition Act (introduction of new evidential thresholds: type 1A/type 1B), the case law of the Cartel Court and the Supreme Cartel Court and sought a further alignment with the ECN Model Leniency Programme, including its latest revision published in November 2012. Changes include the following: The manual now contains a detailed list of evidence to be provided by the first leniency applicant (so called "type 1A"). It clarifies details concerning the immunity application after inspections by the BWB (so-called "type 1B") based on the introduction of § 11 (3) 1 lit b Competition Act. It also clarifies that applications for immunity or for reduction of fines are not taken into consideration once the BWB has filed an application to impose a fine with the Cartel Court.

### **2.3 *Publication***

19. The manual was published on the website of the authority and communicated in articles and conferences, inter alia in one of the so-called "competition talks", ie a lunch debate event organised by the BWB, taking place every second month dealing with hot topics in competition matters. Before drafting the revision of the manual the BWB held a consultation meeting with lawyers to discuss the different concepts e.g. with regard to the introduction of the marker system.

### **2.4 *Purpose of the marker system***

20. The marker system is intended to make the leniency programme as attractive as possible, thereby leading to a high number of leniency applications.

21. It should alleviate the burden on companies which can protect their place in the leniency queue at an early stage while collecting all the information necessary.

22. Particular in the case of a summary application used in cases brought before the European Commission, it should alleviate the burden associated with multiple parallel applications on both the companies and the BWB. Full information is only required if the case is taken up by the BWB or otherwise explicitly required by the BWB.

### **2.5 *Experience with the marker system***

23. De facto a marker existed since the introduction of a leniency programme in Austria. The evidential threshold made application easy for the companies.

24. As the level of evidence to be provided to qualify for leniency was substantially raised in 2013, a marker open to immunity applicants was officially introduced. Since 2013 a marker was used in about one third of national cases and in all European cases, thus in about nearly 60 % of all cases.

25. It is therefore considered that the marker system works well. The manual gives clear instructions concerning the information needed and steps to be taken, clear timelines and the notice on the application of the leniency programme makes the procedure transparent and predictable for the company.