

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

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

**USE OF MARKERS IN LENIENCY PROGRAMS**

-- Estonia --

**16 December 2014**

*This document reproduces a written contribution from Estonia 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>*

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: [antonio.capobianco@oecd.org](mailto:antonio.capobianco@oecd.org)].

**JT03366476**

Complete document available on OLIS in its original format  
*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*



1. The leniency programme in Estonia is a relatively new instrument as the relevant amendments in law entered into force on 27 February 2010. The principles for leniency are based on ECN Leniency Programme (2006) which has been taken into consideration, although, having in mind specific circumstances of the national system.

2. In Estonia we have criminal law enforcement system for the anticompetitive cooperation between undertakings. Both horizontal and vertical anti-competitive collusion is penalized under criminal law (the Penal Code § 400) and the leniency is available for both types of anti-competitive cooperation. Because of the criminal enforcement system the leniency rules are thereby divided between two acts and regulated partly in the Code of Criminal Procedure and partly in the Competition Act. For the same reason the different tasks and activities related to leniency have been divided between the Public Prosecutor's Office (who directs pre-trial proceedings and represents public prosecution in court) and the Competition Authority (who is an investigative body and commences pre-trial proceedings).

3. According to § 205<sup>1</sup> of the Code of Criminal Procedure the Public Prosecutor's Office shall, by its order, terminate criminal proceedings with regard to a leniency applicant who complies with the conditions for application of leniency provided for in the Competition Act who is the first to submit a leniency application and the information contained therein referring to a criminal cartel offence enables to commence criminal proceedings (subsection 1). Even if criminal proceedings concerning a criminal cartel offence has already been commenced before the submission of a leniency application, the Public Prosecutor's Office shall, by its order, terminate criminal proceedings with regard to a leniency applicant who complies with the conditions for application of leniency and who is the first to submit a leniency application together with evidence which, according to the Prosecutor's Office, contribute significantly to bringing charges (§ 205<sup>1</sup> subsection 2 of the Code of Criminal Procedure). In both cases described above the fulfilment of the leniency requirements by the first applicant serves as the basis for full immunity from any punishments.

4. If the leniency applicant complies with all requirements of law the granting of leniency will be guaranteed therefore we have no conditional offer of the leniency provided by the law. In regards to the interpretation of § 205<sup>1</sup> of the Code of Criminal Procedure Estonian Supreme Court has decided in its case No 3-1-1-10-12 that the wording of this provision suggests that the applicant who is the first to fulfil leniency conditions has lawful expectation that criminal proceedings shall be terminated in regards its actions. However, the actual moment of granting the leniency shall be decided by the Public Prosecutor's Office. This mean that the time of granting leniency shall be decided based on procedural situation. The Code of Criminal Procedure provides for the possibility to renew the proceedings in regards to a person who has received lenient treatment. If, after an order of granting leniency is made, circumstances become evident which prevent application of leniency, the Public Prosecutor's Office may, by its order, resume proceedings with regard to the leniency applicant.

5. According to the Competition Act the leniency application shall be filed to the Competition Authority which carries out the initial assessment of the application. The application shall have to be submitted by means which allow written reproduction and in such a way and manner that the exact time and date of its submission can be recorded. Although it is possible in practice to make an oral application it should be recorded in written by the Competition Authority. Subsequently the Competition Authority shall confirm the receipt of a leniency application to the leniency applicant immediately by indicating the exact time of the receipt by the Competition Authority and forward the application with its annexes to the Prosecutor's Office. The Prosecutor's Office, having received a notice from the Competition Authority about leniency application, shall then coordinate further activities of the leniency applicant with the investigative body and the leniency applicant.

6. Although the law does not expressly call it a marker (as it is foreseen in the ECN Model Leniency Programme) still according to the Code of Criminal Procedure the Prosecutor's Office may grant the leniency applicant a deadline of up to one month for submission of evidence. The granting of this deadline is directly provided by Code of Criminal Procedure (§ 205<sup>1</sup> subsection 4). This possibility has the same object as the marker system and it is very similar to the marker as it enables the applicant approach the bodies conducting criminal proceedings and reserve himself a place in the queue even if the applicant does not yet have all the evidence. As the Public Prosecutor's Office directs pre-trial proceedings and ensures the efficiency thereof all the important decisions regarding the procedural acts and the next steps to be taken within the criminal proceedings is decided by the Public Prosecutor's Office.

7. The granting of additional time to present evidence is the Public Prosecutor's Office's discretionary decision which means that only the Public Prosecutor's Office will be in a position to consider whether the granting of additional time is needed and how much time should be granted to the applicant. At the same time the Public Prosecutor's Office should not be too conservative in regards to applications for time-extension as otherwise the leniency regulation is unattractive and does not facilitate coming of forward with the application for leniency. Thus, if the applicant needs additional time, it should be granted, especially, if it is necessary to clarify the grounds for initiating the criminal proceeding.

8. The law does not provide for minimum amount of data which the leniency applicant will have to provide in the application to reserve it's place in the queue. To ensure that the application is in accordance with formal requirements it ought to contain the information which is indicated in law as being mandatory and it should describe the anti-competitive actions of the undertakings concerned in sufficient detail. As for the evidence then it will be understandable that unavailable evidence cannot be presented immediately. The whole idea behind the time-extension is to give the applicant an opportunity to gather such evidence which is unavailable for him/her at the time of submitting the application. It has to be emphasized that the aim of the time-extension is only to get the currently unavailable evidence – the facts and circumstances in the application can be immediately verified and clarified within interrogation of the applicant in accordance with the rules of criminal investigation (which usually is the first procedural act).

9. Therefore, if the leniency applicant could not submit all evidence the Public Prosecutor's Office shall give the applicant up to 1 month to acquire and submit such evidence the applicant mentioned in his or her leniency application. Nonetheless, the application is deemed to have been submitted even despite the lack of some evidence.

10. Because the regulation in law is rather general in nature then both the first leniency applicant applying for leniency before any criminal proceedings have started and the first leniency applicant who applies for leniency after the criminal proceedings have already been initiated can ask for time-extension to submit additional evidence. In theory, also the applicant who is not the first one to apply for leniency may ask for additional time but as in regards to each subsequent applicant the requirements for quality of evidence is higher the Public Prosecutor's Office may not deem it justified to give additional time. To illustrate this - in case of first applicant, the application and the enclosed evidence should enable the Public Prosecutor's Office to decide only whether the information contained in the application referring to a criminal offence provided for in § 400 of the Penal Code enables to commence criminal proceedings, whereas, in case the leniency application is received after the initiation of the criminal proceedings, the application and evidence should according to the Public Prosecutor's Office contribute significantly to bringing charges against the offenders. Clearly the requirements for the amount and quality of evidence are very different in these two cases.

11. Our experience has so far showed that the quality of leniency applications has not been very high and occasionally leniency applications have been submitted in relation to infringements which are not of highest priority to the investigators (e.g. non-price related vertical infringements). Although the aim of the

leniency programme is to give the potential applicants an incentive to come forward as soon as possible and even if some evidence is still lacking the applicants have rarely exercised their right to ask for time-extension to submit additional or missing evidence and so the possibility to apply for leniency using this option has not been very popular. Furthermore, the Public Prosecutor's Office has given time-extension to submit additional evidence a few times only. Years ago, when the leniency programme was just introduced, the undertakings showed more interest for the programme but within the past few years there have been very few leniency applications.

12. The leniency programme has not been advertised recently in media but when the programme was initially introduced the Competition Authority promoted it in media by issuing several press releases. There is also information regarding the leniency and the contacts available in the authority's website. The Competition Authority has also explained the main principles of the leniency programme during different trainings and seminars, some of which were specifically dedicated to the leniency programme. As for practical aspects of the application of the leniency programme then these issues can only be explained by the Public Prosecutor's Office who has a key role in the actual enforcement of the programme.

13. As a general rule in the criminal proceedings the fact of someone having applied for leniency should remain confidential at least until leniency has been granted. One of the leniency conditions in the Competition Act also provides for that leniency applicant itself may not disclose facts relating to the leniency application or the criminal proceedings without the permission of the Public Prosecutor's Office. In accordance with the Code of Criminal Procedure the Public Prosecutor's Office may exclude a copy of a document from the statement of charges sent to a court (as well as from the case file) if the document contains information concerning a leniency application.

14. The current leniency programme (including the marker system) has been the same since the leniency programme was first introduced into our legal system and there are currently no plans to amend the law in this respect. As we have no extensive experience on the implementation of the leniency programme (because only a little more than 10 leniency applications have ever been submitted) it is not yet possible to make far-reaching conclusions regarding the regulation and application of the marker system. As it was previously mentioned there have not been very many cases involving applying for the marker and therefore we have not much practical experience in this regard either.