

Unclassified

DAF/COMP/WP3/WD(2014)43

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

20-Nov-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

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

#### USE OF MARKERS IN LENIENCY PROGRAMS

-- Slovak Republic --

16 December 2014

*This document reproduces a written contribution from the Slovak Republic 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)].

**JT03366679**

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## **1. Introduction**

1. The Antimonopoly Office of the Slovak Republic (AMO) considers cartels to be the most harmful anticompetitive practices from which only their participants may benefit. That is why AMO considers revealing cartels as its main priority. Cartels are very difficult to reveal and it is also very hard to obtain information and evidence on their existence. The Office actively uses all available tools provided by the valid legislation to receive the necessary evidence.

2. Leniency programme is a very important tool in this process. The Act on Protection of Competition allows the Office not to impose a fine or to reduce the fine for the cartel participant, which would otherwise be imposed for this illegal conduct. It is possible not to impose a fine only to one, namely the first undertaking, which has provided the Office with the decisive evidence to prove a cartel agreement or was the first to provide, on its own initiative, information and evidence being decisive to conduct a dawn raid, by which decisive evidence to prove a cartel agreement should be obtained. In case the cartel participants provide the Office with significant evidence which is not sufficient to prove a cartel agreement by itself, but in connection with information already available to the Office, it could enable the Office to prove it, and it is possible to reduce the fine up to 50% of the fine amount which would be otherwise imposed. Before submitting the application for immunity from fines the undertaking may apply for reservation of ranking (marker), or submit a hypothetical application pursuant to the Decree of the Antimonopoly Office of the Slovak Republic laying down details of leniency programme. According to Slovak legal system, marker system is available for leniency applicants<sup>1</sup>, which apply for full immunity, but they are not able to provide in the application for immunity all particulars of the application required by law (e.g. evidence of infringement). Before submitting an application for immunity from fines the undertaking thus may apply for reservation of ranking (marker).

## **2. Legal framework**

3. Legal framework for marker system is provided by the Act, which states, that details of submitting applications for reservation of ranking, particulars of these applications, shall be determined by the general legal regulation issued by the Office. Marker system is thus governed by Decree of the Antimonopoly Office of the Slovak Republic laying down details of leniency programme („Decree“). Other document - Leniency Programme (soft law) also addresses further details, particularly describing the procedure for submission of the marker. AMO provides leniency programme, which involves marker system since 2009.

4. The last amendment to the Act on Protection of Competition, which entered into force in July 2014 responds to the need for legislative changes in certain areas following changes in the practice. It also aims at enhancing the efficiency of the competition rules. The area of antitrust is also subject to certain amendments: the provisions on the leniency programme were amended to increase legal certainty for undertakings. The leniency programme has been revised to reduce the concerns of potential leniency applicants and increase their motivation to submit a leniency application, thereby intending to increase the number of revealed cartels.

5. Marker system was thus included into the Act on Protection of Competition and consequently into the Decree by this amendment to the Act on Protection of Competition. Before this amendment marker system was provided on the basis of a piece of soft law. Inclusion of marker system and leniency programme into the Act on Protection of Competition does not constitute substantive changes in AMO

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<sup>1</sup> According to Slovak competition law for immunity can apply undertakings which are party to an agreement restricting competition and which operate on the same level of production or distribution chain.

approach, the change is just in legal status of this system. AMO practices in leniency and marker system are coherent.

### **3. Principal purpose and benefits of marker system**

6. The main purpose of involving a marker system into AMO practice was to ensure at the earliest possible stage for the leniency applicant the optimum protection under the law and therefore increase attractiveness of leniency program.

7. The advantage of the marker for the applicant is the possibility to obtain reservation for ranking in time it is not able to submit all the documents and information required by the immunity application. Marker for leniency applicant for a certain time ensures reservation for ranking among others, potential applicants. The applicant with marker is required to submit in the time limit stipulated by the AMO a complete application for immunity. If an applicant fulfils that obligation, he receives the best applicants ranking and he will be the only one who gets full immunity. The applicant for immunity using a marker system can obtain a marker and will also have a certain amount of time to complete all documentation and information necessary to obtain immunity.

8. AMO takes marker system as a tool, enabling it to increase the attractiveness and effectiveness of leniency program and it could help to increase the number of detected cartels. AMO should obtain information on potential infringements of the law at an earlier stage than on the application for immunity, and therefore it could be more informed about the functioning of the market, and be prepared for further proceedings.

### **4. Marker system**

9. The basic requirement for initiating the process of granting a marker is the undertaking's request, which must meet the requirements specified in Decree and must also include justification why the entrepreneur cannot submit a complete application at that time.

10. Minimum requirements to obtain marker are listed in the Decree, namely an application for marker must contain:

1. indication of applicant;
2. indication of parties to the notified agreement restricting competition;
3. determination of goods pursuant to the Article 3 par. 2 of the Act (hereafter referred to as “the goods”) which the notified agreement restricting competition referred to;
4. determination of geographic area which the notified agreement restricting competition covers;
5. estimation of duration of the notified agreement restricting competition;
6. description of functioning of the notified agreement restricting competition;
7. explicit application for reservation of ranking, information on leniency applications or similar programme application relating to the same agreement restricting competition which the applicant submitted to the competition authorities of other Member States of the European Union or to the European Commission or which he/she intends to submit;
8. justification of application for reservation of ranking; and
9. proposal of time limit for immunity application in the scope according to the enclosure.

11. Application for a marker can be submitted by an undertaking - a party to the agreement restricting competition or together by the undertakings - parties to the agreement that belong to one economic group within the meaning of the Act.

12. According to the Decree AMO shall confirm in written without undue delay granting or non-granting of reservation of ranking to the applicant. Confirmation on granting of reservation of ranking consists of applicant's ranking, date and time of delivery of application for reservation to which the ranking is reserved for the applicant, time limit for submitting the immunity application according to the enclosure.

13. The AMO could grant reservation of ranking to more than one applicant. In case of submission of complete applications for leniency by all/more applicants, AMO takes into account the date and time of an application.

14. In the application for reservation of ranking the applicant must indicate all data and information known to him/her at the time of application. The applicant also has to submit the reasons why it is not able to submit all documents and information necessary for the immunity application. Such reasons could be, for example, the applicants need for internal audit to find out, who has important evidence, or long period of the infringement reasoning inability for relevant evidence submission.

15. The scope of information that the applicant is required to submit in the application for marker is narrower than in the application for immunity. In case of application for reservation of ranking it is not required the submission of evidence of infringement, which is the main difference compared with the application for immunity.

16. Without undue delay the Office shall confirm in written granting or non-granting of reservation of ranking to the applicant. Confirmation on granting of reservation of ranking consists of applicant's ranking, date and time of delivery of application for reservation to which the ranking is reserved for the applicant, time limit for submitting the immunity application according to the enclosure. AMO sets time limit strictly on a case by case base. If the applicant submits an immunity application in the time limit stipulated by the Office in the scope according to the Decree, his/her immunity application is considered as delivered on the day when the reservation of ranking has been granted to him/her; once the time limit stipulated by the Office expires the applicant loses his/her reservation of ranking.

17. If the time limit expired without completion of the application, this applicant automatically lost the ranking. It is not possible to complete the application for marker by a hypothetical application.

18. Submission of an application for reservation of ranking is not a precondition for submitting an application for immunity. If the undertaking is able to submit complete application for immunity, it is possible to apply directly just for immunity, without previous marker application.

19. From the first moment when the Office learns about the interest of the applicant, it tries to fully cooperate with him/her and to guide him/her in case of uncertainty. Now we can observe the obvious trend that the applicant is represented by the legal representative. In some cases, for the sake of confidentiality, the applicant is represented by the authorised employee of the undertaking. Vigorous formal and informal communication for the sake of content requirements of the submitted leniency applications is between the authorised employee of the applicant and the employees of the Office.

## **5. Presentation of marker system**

20. Undertakings can obtain information on existence of a marker system at regular lectures organized by the AMO for public, at conferences, as well as on the AMO website. Practical exploitation of marker system by the undertakings is dated around 2009.