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SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON THE USE OF MARKERS IN LENIENCY PROGRAMS

16 December 2014

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Item III of the 120th meeting of Working Party No. 3 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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SUMMARY OF DISCUSSION

By the Secretariat

Mr. William Baer, the **Chair** of Working Party Nr 3, opened the roundtable on the use of markers in leniency programmes and welcomed all the participants. He noted that while many competition agencies have a marker system in their leniency programme, there are a number of differences between various jurisdictions when it comes to the availability of markers (i.e. whether it is only available to the first-in or also to subsequent applicants), the requirement that an applicant has to meet for obtaining the market and the time that applicants have to perfect their leniency application once they have obtained a market. The roundtable discussion will touch upon all of these aspects and discuss experiences with markers of both competition agencies and applicants.

1. Purpose of marker systems

The **Chair** opened the roundtable by asking the Canadian delegation to set out its experience with the use of markers for both immunity (first-in) and leniency (subsequent) applicants.

The delegation for **Canada** started by explaining that immunity and leniency programmes, as well as the marker systems that accompany them, serve different yet complementary purposes. The primary goal of an immunity programme is to detect and stop illegal anticompetitive behaviour and to increase deterrence. The immunity program has proven to be the Competition Bureau's single most powerful tool for detecting illegal cartels. The purpose of the leniency programme is the facilitation of effective and efficient enforcement. A leniency marker that establishes the leniency applicants' position vis-à-vis other applicants furthers this objective by providing applicants with a degree of certainty as to the treatment of their application. The Competition Bureau believes that potential leniency applicants are more likely to come forward as a result.

Answering the Chair's follow-up question as to whether leniency markers are vital to the success of the leniency programme, the Canadian delegation confirmed that the primary goal of its leniency marker system is to provide applicants with the necessary degree of certainty for them to come forward. In Canada, makers have certainly proved effective.

The **Chair** turned to the Brazilian delegation, which in its written submission highlighted the relationship between an immunity marker system and the quality of immunity applications, to elaborate upon the purpose of its immunity marker system.

According to the delegation from **Brazil** the primary purpose of its marker system, which was created in 2006, is to guarantee the applicant its place in the race for immunity. The main consequence of this is that the applicant has more time to gather all the relevant evidence, which reflects in the quality of the applications that the CADE receives. The evidence is evaluated only following the granting of a marker, during negotiations of the leniency agreement and the drafting of the history of the conduct, which is a key element of the leniency agreement. Since CADE retains discretion as to the granting of immunity, the quality of the evidence presented by the applicant is an important consideration in guiding its decision. If it comes to the conclusion that the application does not meet the criteria for the granting of immunity, CADE

may reject the application and enter into leniency negotiations with the next applicant in line. This aspect of its marker system also reflects CADE's case management strategy, which aims at reducing its backlog of cases by focussing on cases with good evidence and stronger chances of convictions.

In conclusion, the Brazilian delegation emphasised that its marker system aims at fostering transparency and legal certainty by guaranteeing full immunity to a successful marker applicant as long as it meets the legal requirements for a leniency agreement.

The **Chair** asked Hungary, which follows the European Competition Network's (ECN) Model Leniency Programme (MLP), to describe its marker system and the experience with its application.

The delegation from **Hungary** explained that its marker system for immunity applicants was introduced in 2006, together with the adoption of the leniency programme modelled after the MLP into the Hungarian Competition Act. A marker is available only to applicants for immunity, which is a solution that aims at stimulating the race for immunity. As far as its experience goes, according to the Hungarian delegation so far there have been no problems with the operation of the marker system. The delegation also noted one recent change to its system, effective as of June 2014, which excluded the availability of markers in already on-going cases.

The **Chair** turned to the Korean delegation to comment on the role that the marker system plays in the success of the Korean leniency programme.

The delegation from **Korea** emphasised the key role that a leniency programme plays in the detection of cartels in Korea. The marker system is an important element of the leniency programme, making an application for leniency easier and more efficient. It is available in situations where it takes applicants a considerable amount of time to collect the relevant material or if exceptional circumstances prevent them from submitting evidence together with their application. The use of markers enables the KFTC to detect cartels faster or, if an investigation has already begun, to deal with the case more effectively.

2. Information requirements to obtain a marker

The **Chair** then turned to the question of what information is required by the different jurisdictions in order to obtain a marker and asked the EU delegation to describe its system in this respect.

The delegation of the **European Union** explained that the rationale for the introduction of a marker for immunity applicants in 2006 was two-fold. First, the aim was to increase the incentives for coming forward by giving applicants more certainty and time to complete their application. Second, the goal was also to increase the quality of immunity applications that the European Commission (Commission) receives. Practical experience with operating the system suggests that both these goals have been met.

The EU delegation also explained that in the EU markers are available only to applicants for immunity in order to encourage them to come forward and self-report as early as possible while granting them the time to complete their application in due time. Markers are not available for leniency (i.e. subsequent) applicants because of the characteristics of the EU leniency system, which relies on a race between subsequent applicants to swiftly provide the best quality evidence.

As to the requirements to obtain a marker, there are a number of conditions that the applicant for a marker has to meet. First, it has to disclose its participation in the suspected cartel conduct and provide basic information about it such as (i) the identity of the other participants, (ii) the estimated duration of the cartel and (iii) the affected products and territories. Moreover, the Commission also asks the applicant whether it has approached, or intends to approach, authorities in other jurisdictions and if so, to provide waivers to allow for discussions with those authorities. Finally, to be able to determine if the granting of a

marker is justified, the Commission asks the applicant to explain how it discovered the cartel and to set out its plan to gather the relevant evidence.

The purpose of these requirements it to allow the Commission to establish at the outset that the reported conduct is a cartel affecting the EU and that immunity is still available. Moreover, these information requirements enable the Commission to see whether the conduct is already being dealt with by another authority within the ECN or if another authority within the network would be better placed to deal with it. In such a case, the applicant would be encouraged to approach that authority, resulting in an early focusing of the investigation, saving both the applicant's and the Commission's resources.

Finally, the EU delegation drew attention to the availability of oral procedure for the submission of applications, which is a particular feature of its leniency system. Applicants have the option of making their applications to the Commission orally, including for a marker. This ensures their full confidentiality and thus preserves the incentives for applicants to come forward with self-incriminating information. The majority of applicants takes advantage of this option and makes their application orally. There is a special regime for the protection of the confidentiality of both oral and written applications throughout the Commission's procedure. It is now reinforced by the recently adopted Directive on antitrust damage actions that extends these protections also to actions for damages before civil courts. The basic idea behind this system of protections is that cooperating companies should not be worse-off in civil litigation in comparison to those companies who do not cooperate with the Commission.

The Chair thanked the EU delegation and turned to Germany to explain its marker system, which has been described in its written submission as 'lean'.

According to the **German** delegation the German marker system shares many similarities with that of the Commission. However, an important difference is that markers are available for both immunity and leniency applicants. Last year, the Bundeskartellamt received 65 applications in 42 cases. The 'lean' nature of the German system rest on the fact that an application can be made in German or English, by various means (orally, in writing, over the phone or by fax) and with no need for a prior appointment. Importantly, a marker is granted automatically at the time of the application, provided that the requirements for leniency are later fulfilled.

In order to strike a balance between a flexibility and speed on the one hand and accuracy on the other, the Bundeskartellamt requires the marker applicant to provide at least basic information about the reported conduct such as product and geographic scope, estimated duration and the identity of the other participants. The applicant must also indicate whether it has approached any other authority in connection with the reported conduct. However, the applicant is not required to provide detailed information that would require it to conduct an internal investigation prior to coming forward. The fundamental incentive is for the applicant to come forward as early as possible and then use the marker period, which can be as long as 8 weeks, to do its internal investigation and complete its application. Overall, the experience with the operation of this system, which aims at balancing speed and completeness, has been very good.

The **Chair** then turned to the Slovak Republic and Bulgaria, which appear to have a detailed set of requirements that a marker applicant has to meet, to describe these requirements and explain if there is some scope for flexibility in their systems.

The **Slovak** delegation explained that the relevant requirements to obtain a market are set out in a decree of the Antimonopoly Office. These include: (i) identity of the applicant and other participants in the cartel, (ii) products and geographic area affected by the cartel, (iii) estimated duration and, (iv) description of the functioning of the cartel. The applicant also has to expressly request the reservation of its place in the queue for immunity and indicate which other authorities it has approached or intends to approach.

While these requirements may appear rather formal, there is a certain amount of scope for flexibility, in particular due to the fact that the Antimonopoly Office wishes to increase the use of its leniency programme and encourage applicants to come forward. To that end it tries to be as flexible as possible with applicants from the moment of the first contact.

The **Bulgarian** delegation noted that the requirements of the Bulgarian marker system are identical to those of the European Commission with one difference, in that the applicant does not need to justify why it is applying for a marker.

The **Chair** asked the Austrian delegation to describe the evolution in the requirements for obtaining a marker in Austria, which appear to have been tightened since 2013, and to discuss the impact of this change on the number and quality of applications.

The **Austrian** delegation explained that its marker system was in fact introduced only in 2013 together with an update of the Austrian leniency programme, which brought it in line with the ECN MLP. Until then there was no official marker system because the requirements for the filing of an immunity application were very low, which effectively meant that to obtain immunity an applicant had to provide only a limited amount of information. However, the 2013 revision of the Austrian leniency programme significantly increased the level of evidence and information that need to be submitted together with an immunity application. This change brought about the need to also introduce a formal immunity marker system.

To obtain a marker in Austria an applicant must provide basic information of the same type as mentioned by the other delegations. When granting the marker, the Austrian Competition Authority sets the deadline for its perfection which cannot exceed eight weeks.

The delegation further discussed summary leniency applications which are a particular feature of the ECN leniency system and which could be seen as markers with a European dimension. In cases where an applicant applies for leniency with the European Commission, it may also choose to file a summary application with the Austrian Competition Authority (or other European competition authorities). This summary application contains only basic information and serves as a marker should the case be eventually taken up by the Austrian Competition Authority, in which case it has to be duly completed with all the required information.

Finally, the delegation noted that its experience with the operation of the leniency programme and the marker system has been very positive. Since the introduction of the leniency programme in 2006, there have been about 50 applications leading to proceedings at the end of which more than 100 million Euros in fines have been imposed. Since their introduction in 2013 markers have been used in about two thirds of all cases. The delegation concluded by stressing transparency and predictability as key factors contributing to the success of the Austrian leniency programme.

The **Chair** then addressed a follow-up question to Germany and Austria, which both mentioned an eight week deadline to perfect a marker, whether there is any flexibility in this respect.

The **Austrian** delegation responded that there is no flexibility to exceed the eight week deadline. However, experience shows that applicants don't have a problem in submitting the required information within that timeframe. The **German** delegation echoed the same point and added that the applicant's cooperation does not end after the completion of the marker and that it can always provide further information afterwards. For subsequent applicants this means that information provided after the perfection of the marker would still be taken into account in determining the level of fines reduction.

3. Other requirements to obtain a marker

The **Chair** turned to the US delegation and asked it to present the US Department of Justice's (DoJ) marker system.

The delegation from the **United States** described the general features of its corporate leniency programme under which leniency, in the form of non-prosecution of the company and its executives, is offered to the first-in applicant that satisfies the requirements of the programme. A key requirement is that the company must admit and provide evidence of its involvement in a criminal antitrust violation. When a potential applicant wishes to apply for leniency but does not yet have the evidence to demonstrate the existence of a criminal antitrust violation, the applicant can be granted a marker. In such situation, the applicant secures the opportunity to be the sole leniency applicant. The applicant then has time to conduct its internal investigation and either satisfy the leniency requirements or withdraw its marker request. Markers and their extensions are generally granted orally as leniency applicants normally do not want any written communication, which could be subject to discovery.

The US marker system has been described as non-prescriptive because the DoJ requires applicants to provide only information sufficient to determine whether a marker is available for the alleged conduct. This normally includes a description of the general nature of the conduct and the product or service affected. Applicant's counsel is not required to disclose the applicants name until after the availability of the marker is confirmed.

In designing such a system with only minimal requirements on marker applicants a conscious choice to value speed over completeness of accuracy has been made. An early application allows the DoJ to put a stop to the cartel conduct as soon as possible, and enables it to focus its own, as well as the applicants' investigation, early on. The applicant is required to cooperate with the DoJ by providing documents, witnesses and other information throughout the marker period. This system also benefits the applicants, in that it allows them to confirm at a very early stage that leniency is available, and to find that out by making only a limited disclosure.

A marker is normally granted for an initial period of 30 days, which can be extended if the applicant is moving quickly to satisfy the requirements for leniency. The DoJ endeavours to make a decision whether the applicant qualifies for leniency within six months. However, if anytime throughout the process either the leniency applicant or the DoJ determines that the applicant cannot satisfy the requirements for leniency the marker can either be withdrawn or permitted to expire. Once the applicant has fulfilled the conditions for leniency, it will receive a conditional leniency letter, which can be revoked if the applicant fails to provide full cooperation during the rest of the investigation. Once the investigation and all resulting prosecutions are completed and the applicant has made the required restitution of its victims, the DoJ will issue a final leniency letter.

The US delegation concluded by stressing its positive experience with the operation of the US marker system within the context of the DoJ's corporate leniency policy.

The **Chair** added two observations from his own experience with the DoJ's marker system. First, he noted an evolution in the approach to what the applicant is required to report when requesting a marker. In the past, applicants would request a marker for conduct, which they did not consider a crime but reported anyway in case the DoJ would see it as one. To deal with this problem the DoJ tightened its conditions, now requiring applicants to admit that they engaged in a wrongdoing. The second observation concerned the large amount of time it normally takes to complete the marker in large cartels with international scope. The Chair expressed his opinion that this may be an area for improvement, for example through clearly

communicating to the applicants the importance of investing substantial resources into their internal investigation, in order to shorten the time needed to complete their leniency application.

The **Chair** turned to Lithuania and asked whether there is any particular reason for the existing requirement that a marker application be made in writing and if this requirement limits applicants' willingness to come forward.

The **Lithuanian** delegation began by explaining that its leniency programme is based on the ECN MLP which has already been mentioned. As to the requirement to make a written marker application, the delegation noted that since the marker threshold is rather low, a written application facilitates the Competition authority's task of determining whether marker is available and if the reported conduct constitutes a cartel. It may also serve as a disincentive for companies to report conduct they do not find problematic just in case the authority does. So far, the feedback received from the relevant stakeholders does not suggest that the requirement to make a written marker application would be a disincentive to coming forward for leniency as there is very limited private enforcement in Lithuania. Accordingly, there are no plans to remove this requirement at the moment.

The **Chair** asked Chile to describe its marker system.

According to the delegation from **Chile**, the marker process in Chile can be split into four steps. In the first step the applicant has to fill an online form in which it provides basic information of the type described by the EU delegation. The second step is a meeting between the applicant and the authority, in which the powers of attorney are verified. At the end of this meeting the authority issues a formal written resolution confirming the granting of the marker. As third step, the applicant has to present all the required evidence and information within 90 days from the date of the first contact with the authority. Finally, the authority meets with the applicant to announce its decision whether or not leniency is granted. Concerning the degree of the authority's discretion in granting a marker, the delegation explained that there is no room for discretion once the applicant proceeds to step two of the process.

The **Chair** then turned to the Australian delegation to discuss the risks associated with giving a marker that is either too broad or too narrow, which are described in its written submission.

According to the **Australian** delegation risks could stem from not properly distinguishing between two separate cartels or describing the same conduct as two separate cartels. The first situation results in reducing the availability of immunity while the second may lead to two applicants being rewarded with immunity for one and the same cartel. These risks most often arise in relation to multiple applications from the same sector, in particular if that sector is very complex. In such situations, the Australian Competition and Consumer Commission (ACCC) may ask an applicant to wait for a limited period of time until the ACCC has a clearer picture of the relevant conduct without expressing itself as to whether a marker is available or not. If the market has already been granted, the ACCC may also go back to the first applicant with a request for further information that would allow it to make a proper determination. There have been several situations like this in the past few years and the ACCC has been very careful in its approach. If in doubt, however, as to whether a marker is available or not the ACCC prefers to say that it is not.

The **Chair** then turned to Poland and asked it to describe its system of automatic markers and to elaborate on the cases mentioned in its written submission, in which a marker was apparently rejected.

The **Polish** delegation confirmed that markers in Poland are granted automatically and can be used by both immunity and leniency applicants. However, the Competition authority still assesses whether the conditions for the granting of immunity or leniency are met once the applicant has submitted its full application within the marker period. The three cases mentioned in the written submission concern situations where an investigation with respect to the reported conduct was either time-barred, or where the applicants did not satisfy the conditions for the granting of immunity or leniency within the marker period.

4. The timing of the marker period and possible extensions

The **Chair** turned to another topic which emerged from the written contributions and where experiences of competition authorities seemed to differ, i.e. the length of markers and their possible extensions. To kick off this discussion the Chair asked the Japanese delegation to describe its experience with operating a marker system with short periods and no possibility of extensions.

The **Japanese** delegation explained that in order to obtain a marker in Japan an applicant must provide basic information to the Japanese Fair Trade Commission (JFTC) concerning the type of conduct they are reporting, its start date and the products or services affected. Once this information is provided, a marker is granted automatically. The JFTC notifies the applicant about the marker and informs it of the deadline within which a full application must be made. This period is generally no longer than two weeks without possibilities of extensions. If the applicant is not able to make a full application within the marker period, the marker will expire. In that case, it becomes available to other applicants or may be granted to the same applicant following a new application. This effectively means that in practice the original applicant can renew its marker, as long as there have been no other applications in the meantime. The Japanese delegation also explained that having a system with a short marker period without the possibility of extensions reflects the JFTC's choice of protecting the effectiveness of its investigation, and in particular the need to preserve the effectiveness of dawn raids. Granting long marker periods increases the chances that the other participants in the reported cartel will become aware of the application and take steps that might compromise the effectiveness of the JFTC's investigation. The delegation concluded by noting that the JFTC's leniency programme works very well and that no issues have surfaced in the operation of the marker system.

The **Chair** turned to Mexico, whose written contribution states that there are no written rules for the duration of a marker, and asked to explain what criteria the Mexican competition authority relies on when deciding how long to hold a marker open.

According to the **Mexican** delegation the length of a marker, which generally ranges between 30 and 60 days, is decided on a case-by-case basis, taking various criteria into account. An important role among plays the applicant's suggestion as to the time it needs to collect all the requisite information. The Mexican competition authority considers that the applicant is better placed to know how much time is required to gather the relevant evidence and its suggestion is therefore an important factor in the agency's decision as to the length of a marker.

Besides the applicant's suggestion, the following criteria are also considered. First, immunity markers are generally granted for longer periods than markers for leniency (subsequent) applicants. Second, the agency looks at the justifications provided by the applicant to justify the requested marker duration. These normally include the number of cartel participants inside and outside the company, the scope and the effects of the cartel. Finally, the third element is the complexity of the market involved. The more complex is the market affected by the cartel, the more time is generally granted to perfect a marker so that the applicant can provide all the relevant information needed for the proper assessment of the conduct scope and effect. An international dimension of a cartel with evidence located abroad and the involvement of authorities in other jurisdictions is also a factor that generally favours the granting of a longer marker period.

The delegation also mentioned an upcoming public consultation of a leniency guide, which will also cover markers. The guide is going to give a definition of a marker as well as set out an indicative marker length of 60 days. However, this timeframe is going to be merely indicative as the competition authority would like to keep flexibility in determining the marker duration, which has worked very well so far.

The **Chair** turned to Portugal to discuss the recent reform of its leniency programme, which, among others, introduced greater flexibility as regards the length of a marker.

The **Portuguese** delegation explained that its leniency programme was introduced in 2006 and reformed in 2012 in the context of an overall reform of the Portuguese Competition Act. The changes aimed principally at enhancing legal certainty within the leniency system as well as bringing it further in line with the ECN MLP. One of the changes was the removal of the mandatory time limit of 15 days to perfect a marker, which was done to introduce greater flexibility. Currently the minimum marker period is 15 days with the possibility to set a longer period if so justified by either the applicants' situation or case factors. This allows the competition authority to take account of the applicant's specific circumstances as well as to coordinate the time-line of the investigation with other jurisdictions. In conclusion, the delegation stressed that the benefits of the marker system relate to the fact that it stimulates the immunity race and leads to the increased quality of the evidence submitted by applicants.

5. Confidentiality of the marker application

The **Chair** thanked the delegations for their contributions and turned to the issue of confidentiality in the marker process as next topic for discussion. He asked New Zealand to describe the importance of confidentiality in its marker system and to explain the circumstances under which a marker may be granted to an anonymous applicant, which is an option mentioned in its written contribution.

According to the delegation from **New Zealand** all applicants are normally required to disclose their identity when applying for a marker. However, in exceptional circumstances the competition authority has the discretion to grant a marker to an anonymous applicant. There are no set criteria guiding the decision if to grant a marker to an anonymous applicant and the authority approaches such requests on a case-by-case basis. Nevertheless, an anonymous marker would be granted only under the condition that the applicant discloses its identity within a short timeframe. Moreover, the applicant would have to provide sufficient information to allow the authority to determine if a marker is available or not and present a genuine concern over an early disclosure of its identity. The delegation explained that an anonymous marker has been granted in only case so far. In that situation the authority prioritized uncovering the cartel over the need for the applicant to be identified at the time of its marker application.

The **Chair** then turned to Chinese Taipei and asked it to discuss the treatment of information provided by marker applicants and the impact of confidentiality rules on the ability of the agency to coordinate its investigation with other jurisdictions.

The delegation from **Chinese Taipei** explained that marker applicants are not obliged to provide the competition authority with a confidentiality waiver at the time of the application. They may choose to do so but they are not obliged to. If they do not, the authority must keep their identity confidential. This may limit its ability to exchange information with authorities of other jurisdictions and coordinate its investigation. To overcome this limitation, the authority may ask the applicant to voluntarily provide a general or specific waiver, which would then allow the authority to exchange the information needed to coordinate its investigation with authorities in other jurisdictions.

The **Chair** turned to Turkey, which in its written contribution mentioned the lack of formal confidentiality obligations in its marker system, and asked whether this has led to any problems.

The **Turkish** delegation emphasised that while there are no statutory confidentiality obligations on the competition authority, in practice the authority maintains a high level of confidentiality. Applicants, on the other hand, are under an obligation to keep the fact and the details of their application confidential. So far there has been no problem with the functioning of this system.

6. Marker systems in criminal enforcement regimes

The **Chair** turned to the United Kingdom to describe its experience with the application of markers in a system with criminal liability for cartel behaviour, which is the next area of discussion.

At the start of its presentation the delegation of the **United Kingdom** stressed the important role that the marker system plays in the UK leniency programme by incentivizing applicants to come forward as soon as possible. Its principles and functioning are very similar to what has been already mentioned by other delegations, in particular those with programmes modelled on the ECN MLP. The delegation then went on to explore the particularities of the UK marker system that stem from the fact that there is a separate cartel offense for individuals in addition to administrative penalties that can be imposed on companies. It underlined the importance of having a leniency regime that applies to both companies and individuals so as to preserve their incentives to come forward. With respect to the impact of the dual (administrative and criminal) enforcement regime on the marker system, the delegation focused on two aspects, the threshold for the granting of a marker and its timing.

First, the marker threshold is generally rather low with applicants being required to show a concrete basis to suspect a cartel activity coupled with a genuine intention to cooperate. This standard, which may be low compared to those in other jurisdictions, is intended to minimize the need for the applicant to conduct an internal investigation prior to making a marker application. The introduction of a criminal cartel regime in the UK has made it particularly important for internal investigations to be conducted with great care so as not to taint evidence that would later be used in criminal proceedings. Applicants are therefore encouraged to approach the Competition and Markets Authority (CMA) as soon as possible in order to receive guidance on how to proceed with their internal inquiries.

Second, concerning the timing of the marker, the UK delegation explained that there is no set time within which an applicant must perfect the marker in the UK. Neither does the CMA undertake a verification exercise in relation to the information provided by the leniency applicant within a specified period of time. This is because the CMA itself conducts an investigation of the applicant instead of relying on the applicant's own internal investigation. As the CMA's investigation may continue very late into the procedure, the marker remains in effect until the formal granting of leniency, which is usually just before the statement of objections is issued.

The UK delegation also discussed the possible impact that the UK procedural regime may have on the applicant's ability to fulfil its obligations towards other jurisdictions where it has also filed an application. The delegation recognized the possible difficulty that an applicant might face when needing to produce relevant evidence in order to perfect its marker in other jurisdictions, while being somewhat limited in its ability to conduct a full internal investigation as a result of the UK regime. To alleviate this risk, the CMA has published a detailed guidance for applicants on how to conduct internal investigations. The applicant's adherence to the guidance is considered to be an important aspect of its cooperation. As such, any possible non-compliance with the guidance might lead to the loss of the leniency benefits. The CMA thus invites applicants, who are concerned about the impact of the CMA's leniency process on their obligations in other jurisdictions, to approach the CMA for confidential guidance. Finally, the delegation emphasised that the CMA guidance recognizes the need to cooperate with other jurisdictions, in order to help resolve any practical difficulties that may arise from the differences between the respective regimes.

The **Chair** asked Estonia, which also has a criminal regime, to discuss whether the fact that the cartel offense is partly dealt with in the criminal code and partly in the competition act, has any impact on the effectiveness of the marker system.

According to the **Estonian** delegation cartel behaviour carries criminal liability in Estonia for both individuals and companies. The responsibility for the application of the leniency programme is shared between the competition authority and the public prosecutor's office. While the Estonian law does not provide for a marker as such, there is a similar instrument in the code of criminal procedure, which has essentially the same characteristics as a marker. It allows an applicant to request the public prosecutor's office to reserve its place in the queue for up to 30 days in order to be able to collect all the relevant evidence. This procedure has been used only rarely and this may be due to the fact that the leniency programme has been in place only since 2010.

7. Recent (or proposed) developments in national marker systems

The **Chair** thanked the intervening delegations and turned to recent or proposed developments in marker systems as the next thematic issue for the roundtable discussion. He asked the Colombian delegation to present its experience with the application of the marker system and to explain the changes that are being considered to deal with some of the challenges that were mentioned in its written submission.

The **Colombian** delegation replied that its leniency programme and marker system share the same basic characteristics discussed by the other delegations. One issue that has been seen as potentially problematic is the current legal requirement that an application for a marker be made in a meeting with the deputy superintendent for competition. Arranging for such a meeting may at times be difficult, which makes the process for obtaining a marker unnecessarily complicated. Therefore, in the context of Colombia's accession to the OECD there is an ongoing reform, which aims to introduce a lean marker system similar to that described by the German delegation.

The **Chair** turned to the Irish delegation, whose written submission mentions ongoing discussions about how to improve the Irish marker system, and asked what aspects of the marker system could be changed and why.

The delegation from **Ireland** explained that changes were currently being considered with respect to the duration and discretional nature of markers as well as the requirements placed on applicants to perfect a marker. For example, with respect to the requirements to perfect a market, experience has shown that the threshold could be higher, in order to obtain the bulk of the applicant's cooperation prior to the granting of leniency rather than after. Therefore, a higher threshold to perfect a marker could be one of the changes to be introduced as part of the new cartel immunity programme, which will be published in January 2015. Overall, the programme brings the Irish regime closer to the ECN MLP. Finally, as regards the duration and discretionary nature of markers, it was decided, in line with many other jurisdictions, to retain flexibility and rely on case-by-case assessment rather than to move to a prescriptive system.

The **Chair** thanked the Irish delegation for highlighting some of the tensions between flexibility and the need for sufficiently precise information to decide if an applicant qualifies for a marker and leniency, which have been surfacing in many of today's contributions. He then asked the Russian delegation to explain some of the changes to its marker system that, according to its written contribution, are currently being considered.

The **Russian** delegation set out the general cartel enforcement framework in Russia as well as the basic features of its leniency programme and marker system. The fight against cartels has been a top priority for the Federal Antimonopoly Service (FAS) since 2008 with a dedicated department focused on cartel enforcement. A leniency programme, including a marker system, was introduced by an order of the head of the FAS in the same year. The leniency programme offers full immunity to the first-in applicant and reductions in fines to subsequent applicants. The programme has been working well and has brought a steady stream of cases. However, their number could be potentially even higher if the approach to leniency in the administrative court (under the responsibility of FAS) and criminal court (under the responsibility of other authorities) was harmonized.

The Russian delegation also discussed the changes currently before the Parliament as part of the fourth antimonopoly package. Their main goals of these proposals are to increase legal certainty for applicants and to improve leniency and marker procedures. If these changes are adopted, applicants should be able to inquire anonymously, even over the phone, if immunity is available. Moreover, there would be a unified way of registration of applications across all regional offices of FAS as well as a standard form that a leniency applicant would have to submit, containing all relevant information about the cartel as well as a declaration of its commitment to full cooperation. As regards markers, the FAS would have the ability to extend them for an appropriate period of time beyond the currently mandated 30 days. Finally, the part of the final decision dealing with the application of leniency would become confidential so as to protect applicants from unwarranted negative consequences. Apart from these changes, which may come into effect in 2015, there are ongoing discussions to harmonize approaches to leniency in administrative and criminal courts as well as leniency cooperation in the framework of Eurasian economic space.

The **Chair** thanked the intervening delegations and asked the BIAC delegation to comment on the issues discussed and to present the proposal of a one-stop-shop marker system described in its written contribution.

BIAC opened its remarks by noting that the written contributions to this roundtable as well as the discussion so far has shown that there is great degree of commonality in approaches to leniency and markers across different jurisdictions. There may be slight variations with respect to some issue, such as time limits or the informational requirements placed on marker applicants, with criminal systems tending to have lower thresholds for obtaining a marker and higher for perfecting it while administrative systems appear to favour the opposite. However, overall there are no particular discrepancies or conflicts between marker systems in different jurisdictions, which is commendable from the perspective of the business community.

As for the one-stop-shop for marker system, according to BIAC it has not received much attention yet, perhaps due to the relative novelty of leniency and marker systems in many of enforcement regimes. It noted that an international one-stop-shop for markers would bring benefits not only to applicants but also to competition agencies. This may particularly be the case for competition agencies with less developed or successful leniency regimes that appear to face difficulties in attracting applicants reporting on international cartels. Those applicants naturally approach the major developed jurisdictions but rarely come forward in less developed jurisdictions even though the cartel may have had an impact there. A one-stop-shop might provide at least a partial remedy in this respect and facilitate leniency and enforcement in jurisdictions with less developed regimes.

The **Chair** noted that while the idea of a one-stop-shop is potentially appealing there are a number of important challenges that might make it difficult to achieve at this point. These include differences in enforcement regimes and marker systems between the various jurisdictions. Also, it is questionable whether, from a deterrence perspective, it is necessary that all the affected jurisdictions take enforcement actions, which moreover may prove difficult to efficiently coordinate so as to avoid negative impacts on each other's investigations.

BIAC responded that it is not suggesting that all jurisdictions affected by an international cartel should take enforcement actions, but that in some cases investigations could benefit from a greater ability to collect evidence stemming from the involvement of more agencies. It stressed that this is an important issue that should receive proper consideration by all delegations.

The **EU** delegation agreed that this is an important issue but one fraught with many practical difficulties. It reported, however, on the serious challenges that have come up in discussions on this topic within the ECN. For example, in order for a one-stop-shop marker system to work, the agency receiving the marker would need to find out if a marker is available or if it has already been granted in another jurisdiction with respect to the relevant conduct or its part. As has already been mentioned during the discussion, the question of the scope of the conduct and marker availability is already complex within just one jurisdiction, let alone across many. Also, the authority receiving the marker would have to check whether immunity is available in all the potentially affected jurisdictions. All of this would not only take time, but also significantly increase the risk of leaks at a stage when confidentiality is of paramount importance for the success of an investigation. Taken together, these practical difficulties make the introduction on a one-stop-shop system very difficult to achieve.

The **Canadian** delegation commented further on BIAC's proposal for a one-stop-shop marker system. It began by highlighting the importance of improving cooperation amongst agencies and achieving soft convergence, so as to make enforcement more efficient, which benefits both agencies and businesses. In this context a one-stop-shop marker system is a worthy objective. However, one that is difficult to achieve because of many practical concerns, including those mentioned by the EU delegation. These are further amplified when one considers the different procedures at stake in criminal and administrative systems. In jurisdictions with a criminal regime it is often the prosecutor who ultimately grants immunity or leniency. This introduces further practical complications. Moreover, as already transpired from the discussion, in criminal and administrative systems there are different thresholds when it comes to the granting of a marker and immunity or leniency. Therefore, in view of all these practical difficulties, it is questionable whether there is any efficiency to be gained by introducing a one-stop-shop for markers

The **BIAC** acknowledged these difficulties and referred to its written contribution to this roundtable, which explores possible ways of overcoming them.

8. Questions and comments

Before closing the roundtable discussion, the **Chair** opened the floor for questions and comments on the issues covered in the roundtable.

The **Colombian** delegation took the floor and mentioned that in Colombia immunity is not available for the cartel ringleader but that this may, at times, act as a disincentive for companies to come forward. For example in situations of management changes. It then went on to ask the US delegation to discuss its experience with the application of a similar rule in the US system. The **US** delegation replied that its approach has been to define the concept of a ring-leader narrowly, which means that it typically covers coercion of others or sole implementation of the entire conspiracy. Companies that did not coerce others but simply initiated contact while the others willingly followed, have been granted leniency and marker in the past.

The **South African** delegation asked the US delegation a question concerning dawn-raids and their possible effects on the leniency race. In South Africa the practice is to issue a press alert immediately following a dawn raid, so as not to give an advantage in the leniency race to those companies that were raided and which are by definition aware of the investigation. This practice has, however, been challenged by foreign counsels. The **US** delegation replied that the DoJ does not issue a press release following dawn-raids. In its view this does not give an undue advantage to the companies that were raided. Typically, the DoJ searches all the companies in its jurisdiction and coordinates with other authorities so that searches of all the companies involved are carried out simultaneously. Even when there are no simultaneous searches the news of the dawn-raids tends to spread quickly, hence allowing the companies to which the DoJ did not have access, to self-examine whether there is an issue that could be reported to the DoJ under its leniency programme.

The **Austrian** delegation noted that while in Austria there is no discretion as to the granting of a marker, the discussion has shown that there are many jurisdictions with discretionary markers. It therefore asked other delegations to comment on the importance of such discretion and their experience with its application.

The **EU** delegation replied, explaining that its experience with a discretionary marker, whereby the Commission can decide whether to grant marker on not, has been positive. Although there are no statistics about the number of rejected applications, the Commission rarely refuses to grant a marker. It has, however, done so in cases where it was either clear that the reported conduct did not constitute a cartel or where the case would have been better dealt with by another competition authority within the EU. In that sense, the Commission uses its discretion to facilitate case allocation within the ECN and to minimize the number of cases with no prospects.

The **US** delegation commented as well, and noted that the DoJ has occasionally refused a marker if, upon hearing the description of the conduct, it came to the conclusion that the applicant would not be able to report a criminal antitrust violation that the DoJ could pursue. The applicant can, however, continue its internal investigation and apply for another marker if it comes up with evidence addressing the DoJ's concerns.

The **Australian** delegation followed up on the point of disqualification of ringleaders from immunity raised previously by the Colombian delegation. In the past, the Australian leniency programme had a provision excluding clear leaders and coercers from immunity. However, this provision has been revised based on the difficulty in some cases to identify a clear leader of a cartel. In particular, because over the life-time of a cartel companies may take on different roles, making it difficult to identify a clear leader. Therefore, it was decided to change the leniency programme so as to exclude from immunity only those that had coerced others into participating in or remaining into a cartel.

The **Chair** closed the discussion and thanked all delegations for their contributions and participation.