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

16 December 2014

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during Item III of the 120th meeting of Working Party No. 3 held 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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EXECUTIVE SUMMARY[(*)]

By the Secretariat

From the background paper, the country contributions and the roundtable discussion on the Use of Markers in Leniency Programmes, the following points emerge:

(1) There is a general consensus that leniency programmes play a crucial role in ensuring effective cartel enforcement by offering lenient treatment to companies and/or individuals that decide to disclose the existence of a cartel to the authorities and cooperate with the investigation. To increase the incentives for companies to come forward and cooperate, many jurisdictions have introduced marker systems in their leniency programmes. A marker allows applicants to reserve their place in the leniency queue for a limited time period, so that they can collect all the information needed to complete their leniency application.

Hard-core cartels are universally recognized as the most serious violations of competition law and as such are the main enforcement priority of many competition authorities. However, cartels generally operate in secrecy, and this complicates detection and successful prosecution. To overcome this difficulty, most jurisdictions around the world, including all the 34 OECD member countries, have adopted leniency programmes, which offer cartelists a lenient treatment in prosecution in exchange for cooperation with the investigation. There are two types of leniency programmes, those that reward only the first-in applicant with immunity, and those that in addition to granting immunity to the first applicant also reward subsequent applicants with more lenient treatment.

Leniency programmes aim to maximize the incentives for cartelists to come forward and cooperate swiftly, in order to enable the authority to detect an undiscovered cartel early and to carry out an investigation more effectively. With full immunity being available only to the first-in applicant and with the relevant threshold and the degree of lenient treatment available to subsequent applicants depending partly on the timeliness of cooperation and partly on the quality of cooperation, potential applicants must come forward as early as possible in order to maximize their benefits under the leniency programme.

However, in order to obtain leniency, applicants must also meet the relevant thresholds, which generally entails providing all information and evidence relating to their participation in a cartel. This inevitably creates a tension between the need for speedy applications on the one hand and the need to take time to collect all the relevant evidence required for a successful application on the other.

(*) This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the hearing and the conclusions of the expert papers.

To ease this tension, many jurisdictions have introduced marker systems into their leniency programmes. A marker is a mechanism that allows prospective leniency applicants to approach the competition authority with initial limited information about a cartel, in exchange for a commitment by the authority to hold their place in the leniency line for a finite period. This gives an applicant more time to finalize its internal investigation and collect all the evidence needed to successfully complete its leniency application.

Many delegations considered that marker systems are a useful component of leniency programmes and that they contribute to the optimal functioning of leniency programmes. This is confirmed by the fact that applicants generally tend to make use of marker systems when available under the leniency programme and by the fact that delegations have reported very positive experiences with their marker systems.

(2) There is a significant degree of commonality in approaches to markers. However, there are also many differences between the marker systems in different jurisdictions. These differences relate principally to the amount of information required for a successful marker application, the time granted to perfect the leniency application, the automatic or discretionary nature of the marker, the availability of markers for subsequent applicants and confidentiality in the marker process.

There roundtable showed that there are many common features in marker systems, starting from their purposes: (1) increasing incentives for companies to use leniency programmes; (2) providing certainty to businesses; and (3) increasing the quality of the evidence received through the leniency process. However, there are also important differences which relate to (1) whether markers are available only to the amnesty applicant or also to subsequent applicants; (2) the information requirements for obtaining a marker (some jurisdictions have strict information requirements while others favour a more flexible approach); (3) the time granted to the marker applicant to perfect the leniency application (ranging from 2 weeks to 90 days); and to (4) the ability of the agency to grant an extension to the initial time period.

(3) Concerning the type and amount of information required by competition agencies for a successful marker application, some jurisdictions list all the requirements that must be met by the applicant before obtaining a market (prescriptive systems) while other jurisdiction prefer to leave some flexibility as to the types of information that an applicant must submit to obtain a marker (non-prescriptive systems).

Non-prescriptive jurisdictions are more flexible about the types of information needed to obtain a marker. Generally they require only information sufficient for the determination whether a marker is available or not, such as the description of the general nature of the conduct and the product or service affected. This approach favours speed and flexibility over completeness and accuracy.

However, the majority of jurisdictions with marker systems adopts a prescriptive approach, setting out various types of additional information that have to be provided by the applicant in order to obtain a marker. The European Union and its member states whose leniency programmes are modelled on the European Competition Network Model Leniency Programme, fall in this category, requiring applicants to provide information such as estimated duration of the cartel, identity of other participants, list of other authorities that the applicant has approached or justifications as to why a marker should be granted.

The general enforcement framework also plays a role in the amount of information that a jurisdiction requires from marker applications. Criminal enforcement jurisdictions tend to favour lower informational requirements to minimize the need for applicants to conduct an internal investigation prior to making a marker application. The presence of a criminal cartel regime makes it particularly important for internal investigations to be conducted with great care so as not to taint evidence, which could later be used in criminal proceedings.

(4) Jurisdictions differ significantly when it comes to the time granted to a successful marker applicant to complete its leniency application. Some jurisdictions set a firm and a rather short period and do not allow for extensions. These jurisdictions are mostly concerned that extended time-frames could increase the risk that information leaks could jeopardise the agency investigation. Other jurisdictions decide on a case-by-case basis while giving a general guidance on what a 'normal', 'minimal' or 'usual' time-frame would be. Others allow for rather long periods and grant extensions to ensure that the internal investigation yields the best and most complete possible set of evidence.

Across the different jurisdictions, the initial time limits generally range between two weeks and 90 days. Many jurisdictions are prepared to grant longer initial timeframes in situations where the collection of the evidence necessary to complete the leniency application is reasonably expected to take more time. These situations include cases with complex conduct, foreign applicants, evidence located in various jurisdictions, high number of employees that need to be reviewed and so on. Around 65% of OECD members are willing to grant extensions in duly justified cases where the applicant is making a good faith effort, even though this possibility is not expressly mentioned in many of the agencies' public guidelines. Some agencies also take into account the need to coordinate with other jurisdictions when setting the time-frame for the marker. Generally, agencies aim to strike a balance, between giving applicants a reasonable time to collect the requisite information, so as to ensure its completeness and accuracy, and keeping the time-frame short enough, not to compromise the integrity and confidentiality of the investigation.

(5) As regards the nature of the marker process, most agencies favour a discretionary approach to the granting of markers over an automatic process. In fact only a few jurisdictions apply a model where a marker is granted automatically upon the applicant meeting basic information requirements.

While the distinction between an automatic and a discretionary marker system may not be so clear in the enforcement practice of different agencies, as even in jurisdictions with an automatic system agencies do evaluate if the applicant supplied the requisite information, the benefits of a fully discretionary system have been highlighted by several jurisdictions. In this respect some delegations mentioned that although marker applications are rarely rejected, there have been cases in which the relevant agency has done so, when upon the evaluation of the information submitted, it was determined that an applicant could not report an antitrust violation. The European Union added a further benefit of having a discretionary marker system within the context of the European Competition Network (ECN), in that it allows for the rejection of marker applications relating to conduct that would be better dealt with by another agency within the ECN.

(6) With respect to the availability of markers for subsequent applicants, the roundtable has shown that only a minority of jurisdictions offers this option. Most jurisdictions make the marker available only to the first-in applicant.

Many jurisdictions grant some form of lenient treatment to subsequent applicants that meet the relevant thresholds and sometimes the degree of the benefit granted depends on the order of the applicants. In such systems, markers may be available for subsequent applicants to preserve their second-in status, third-in status, etc. Jurisdictions which offer markers for subsequent applicants do so to increase the predictability and certainty of the process, as a result of which more applicants may come forward. The majority of jurisdictions, however, do not offer markers for subsequent applicants. The rationale for doing so is that a marker system for subsequent applicants could compromise the race between subsequent applicants to swiftly provide the best quality evidence.

(7) There is a general agreement on the need to ensure strict confidentiality within the leniency process in general, in order to ensure both its attractiveness for applicants and the effectiveness of agencies' own investigations. With respect to markers, only some jurisdictions allow for anonymous applications while the large majority keeps the identity of the applicant confidential.

Some jurisdictions offer prospective applicants the possibility to anonymously approach the agency to inquire about the availability of a marker, hence removing a potential disincentive to coming forward for applicants who are concerned about the possible consequences that their disclosure might have if the marker would not be available. The vast majority of agencies have strict rules that oblige them to keep the identity of the applicant and the content of the application confidential. The purpose of these rules is to safeguard confidentiality as a fundamental prerequisite of the leniency process as a whole. However, in the case of international cartels with multiple jurisdictions involved, the need to coordinate investigations among the relevant jurisdictions may require at least partial waivers of the agencies' confidentiality obligations. For that reason, agencies in many jurisdictions ask marker applicants to grant waivers of confidentiality that would allow the agency to discuss and coordinate with agencies in other jurisdictions.

(8) Differences in approaches to leniency and markers among the various jurisdictions may affect the incentives of some prospective applicants to come forward in some of the jurisdictions affected by the cartel. To facilitate the filing of multiple applications, the business community has suggested the introduction of a one-stop-shop system for markers. The roundtable has shown that while the idea of a one-stop shop for markers is appealing and theoretically sound its practical realization is fraught with many challenges which would require further analysis.

There is a general consensus that cartel enforcement has greatly benefited from the proliferation of leniency programmes around the world and that markers are an important feature that contributes to this success. This positive development has, however, also increased the regulatory complexity for potential applicants who wish to report a multinational cartel to multiple authorities. Although there is not enough evidence that such increased regulatory complexity has an impact on companies' incentives to apply for leniency in some jurisdictions, the proposed one-stop-shop system for markers could help to alleviate this possible risk.

The mechanism for a one-stop-shop for markers would enable a potential applicant to approach only one jurisdiction and reserve its place in the leniency queue in all the jurisdictions participating in the mechanism. The appeal for applicants is obvious, as the system would avoid

the risk that an applicant may have different leniency statuses in different jurisdictions. From the agencies' perspective the mechanism has the potential to expose the existence of the cartel to a wider set of agencies, in particular to those where leniency applications would not be a priority for the applicant, thus contributing to increased global deterrence. The system has also the potential to reduce the need for exchange of information amongst agencies and facilitate the coordination at a very early stage of the investigation process.

Concretely, a one-stop-shop mechanism would require that one or more designated agencies act as a 'clearinghouse' agency for markers involving international cartels. The clearinghouse agency(ies), upon receiving a marker application, would promptly notify the other members of the system of the time and content of the application. If a marker was not available in one of the member jurisdictions, the relevant agency could refuse the one-stop-shop marker request, but this would not block the granting of markers to the applicant in the other jurisdictions that are part of the system. Following the granting of a one-stop-shop marker, the applicant would then have to complete its leniency application in each of the jurisdictions involved according to its national rules. The system would be voluntary for agencies, who could decide not to join the one-stop-shop system, and for applicants, who could decide not to use the one-stop-shop marker but apply for a marker only in selected jurisdictions.

The roundtable concluded that while the idea of a one-stop-shop for markers is appealing, there are practical challenges that would make its implementation difficult. The European Union, for example, mentioned that the idea of a one-stop-shop was considered within the context of the ECN, but was rejected on account of the many practical difficulties involved. These include the difficulty of determining if a marker is available across the various jurisdictions involved, which is further exacerbated by the fact that at the stage of the marker application the precise scope of the conduct is not always fully known, thus making the determination of availability of a marker especially difficult across multiple jurisdictions. Other delegations stressed that these difficulties are amplified when one considers the different procedures at stake in criminal and administrative enforcement systems and the fact that in criminal and administrative systems there are different thresholds when it comes to the granting of a marker.