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USE OF MARKERS IN LENIENCY PROGRAMS

-- BIAC --

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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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The Business and Industry Advisory Committee ("BIAC") to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee's Working Party No. 3 for its roundtable on the use of markers in leniency programs.

1. Introduction

1. Effective cartel enforcement is vitally important to the business community.

2. Leniency programs have been instrumental in advancing cartel enforcement.

3. An effective marker system is an important element of a leniency program and over 40 jurisdictions have adopted a marker approach. While effective marker systems in a number of these jurisdictions have aided the reporting of cartels, BIAC believes that a multi-jurisdictional "one-stop shop" system for leniency markers would make cartel enforcement even more effective, particularly in those jurisdictions with less developed cartel enforcement programs. In this submission, BIAC focuses on the key elements of a proposed "one stop shop" leniency marker system, and makes several further observations on leniency marker systems as they are currently implemented.

4. The proposal for a global one-stop shop for leniency markers is laid out more fully in a 2012 article published in the ABA Antitrust Magazine, which we attach as part of our submission.[1]

2. The Rationale for a One-Stop Shop for Leniency Markers

5. Before reviewing the reasons that a one-stop shop would be beneficial, we examine a few of the problems that can result from the current dis-integrated system. The foremost problem that can arise, one that should be of significant concern to enforcers, is the existence of different "first in" leniency applicants in different jurisdictions. This can occur because a leniency applicant lacks sufficient information in the early stages about the exact geographic scope of the cartel, particularly as it relates to smaller markets. When this occurs, there is an immediate tension that arises because the admissions an applicant makes in one jurisdiction might enhance its exposure in another. Bearing in mind that some jurisdictions provide leniency for *only* the first-in applicant, an applicant faced with this situation may find it necessary to defend (or downplay) in one jurisdiction what it openly confesses in another. The threat of civil damage actions in the other jurisdiction would further exacerbate this effect. Thus, each time this occurs there are at least two cartelists with mixed motivations, threatening effective enforcement. The risk that it may occur is a disincentive to apply promptly for leniency in cases where the scope of the cartel is initially unclear.

6. The current dis-integrated structure also exacerbates the risk of premature disclosure of the cartel investigation. As a practical matter, a company must seek out local competition counsel in every jurisdiction in which it wishes to seek leniency. Ethics rules (as well as business realities) prevent firms from taking on representations that are adverse to existing clients. So the first thing that must occur is for the local law firm to learn the names of all of the members of the alleged cartel. Often, smaller jurisdictions have very few firms with an international reputation for competition matters. Because these firms are often counsel to other cartel members, it is common for several firms to be contacted before a conflict-free firm can be found. This means that the fact of an impending investigation, the product, and the parties often are known to a significant number of people in advance of any request for a marker being made, inevitably exacerbating the risk of a "leak." There is little doubt that a leak that occurs before "dawn raids" can seriously undermine a cartel investigation.

[1] John Taladay, Time for a Global "One-Stop Shop" for Leniency Markers, ANTITRUST, Fall 2012, at 43.

7. Finally, a one-stop shop would have significant benefits for evolving cartel enforcement regimes. At present, firms reporting cartels tend to focus only on those jurisdictions with a history of enforcement in international cartels. This is in part due to a perception that other jurisdictions do not pose a credible risk of enforcement. For example, despite the fact that more than 50 jurisdictions currently have a cartel enforcement regime, a recent (informal) poll of 150 experienced cartel practitioners found that none of them had been involved in a case with more than 10 leniency applications.[2] This undoubtedly included many global cartels with effects in more or even all of the 50 jurisdictions with cartel enforcement programs. A one-stop shop could help by lowering the barrier for seeking leniency in less-experienced jurisdictions, effectively "putting them on the map" of global cartel enforcement.

3. Proposal for a One-Stop Shop for Leniency Markers

8. Providing first-in leniency applicants with a one-stop shop option to report suspected cartel behavior and obtain a marker would benefit agencies and leniency applicants alike. First, leniency applicants would have an efficient mechanism to report cartels in all relevant jurisdictions at once, eliminating the potential for different leniency applicants in different jurisdictions and encouraging prompt and comprehensive reporting. Second, all jurisdictions – and most importantly, those developing jurisdictions whose procedures are still evolving – would learn of potential cartel violations at an early stage and be able to maximize their potential to pursue antitrust wrongdoers. Third, it would limit the amount of information required to be shared about the investigation, and the number of people exposed to that information prior to dawn raids. Fourth, it would facilitate coordination among the agencies themselves, for instance, in conducting synchronized dawn raids. And for all of these reasons, ultimately it would benefit businesses and consumers.

9. A one-stop shop marker system would not require any sacrifice of sovereign authority. It would not reduce any jurisdiction's independence of decision making in granting - or choosing not to grant - leniency. It would not impact the ability of each jurisdiction to determine whether to prosecute any cartel notified under the one-stop shop, nor prevent any jurisdiction prosecuting a cartel discovered in some other manner. Rather it would simply be a procedural means of coordinating the information the jurisdiction requires of applicants seeking a marker. It would give each jurisdiction a better opportunity to exercise its sovereign authority to prosecute cartels.

10. A one-stop shop marker system could be relatively easy to administer in the same way that many national systems are administered. In practice, an agency's marker system requires an intake process and a coordinating point of contact. In the United States, for instance, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement reviews all requests for leniency, but applicants may contact any one of the Division's field offices or its National Criminal Enforcement Section in Washington, DC. If the applicant contacts a field office, the request for a marker would be cleared through internal processes to ensure that no duplicate request had been made.

11. To secure a marker, counsel for the applicant must make the requisite disclosures and meet the stated criteria (discussed in more detail below). Once the availability of the marker is confirmed, the Division informs the applicant and establishes the time frame for perfecting the marker. The system in the EC is similar, although the marker is discretionary, and the Commission has the ability to determine whether to grant a marker to the applicant or to require a more thorough disclosure to obtain conditional leniency status.[3]

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2 "Defending International Cartels Without Leniency," ABA's 61st Antitrust Law Spring Meeting (Apr. 12, 2013).

3 See, Press Release, Eur. Comm'n, Competition: Revised Leniency Notice – Frequently Asked Questions (Dec. 7, 2006) (MEMO/06/469), available at http://europa.eu/rapid/press-release_MEMO-06-469_en.htm?locale=en (hereinafter EC FAQs).

12. Either of these systems could be adapted to permit one or more designated agencies (for example, the DOJ or EC) to become the "clearinghouse agency" for markers involving international cartel matters. In this scenario, the applicant would contact the DOJ or EC as the clearinghouse agency. The clearinghouse agency would ensure that the requisite information (discussed below) was gathered and then promptly send an alert to all "relevant agencies" with an official date and time of the one-stop shop application. The "relevant agencies" would include all of the agencies that opted in to the one-stop shop system that also were selected by the applicant for inclusion in the particular application. Any relevant agency that had received a prior marker request from another applicant (*i.e.*, other cartel member) with respect to the same conduct could reject the one-stop shop application in its own jurisdiction but could not void the one-stop marker application as to any other jurisdiction.

13. The applicant would then hold the marker for the prescribed period. Before that period expired, because the granting of conditional or formal leniency is a matter of individualized law and procedure, the marker would have to be perfected according to the separate laws or regulations of the various individual jurisdictions. In other words, *only* the granting of the marker would be the subject of the one-stop shop, *not* the granting of conditional or formal leniency status. An applicant could only attain leniency in an individual jurisdiction if it met the conditions for leniency established by that jurisdiction.

14. The one-stop shop mechanism would be an "opt-in" mechanism both for agencies and applicants. No agency would be required to participate in a one-stop shop marker system. The system could be established with a baseline group of jurisdictions (much in the way the ICN was formed), and individual jurisdictions could elect to participate or not.[4] Any jurisdiction electing to participate would make no assurance to any applicant that they would receive conditional leniency. The sole assurance would be that the one-stop shop applicant would be the first in line to have the *opportunity* to meet the individual jurisdiction's requirements for conditional leniency. To accomplish this, the applicant would still have to meet the individual conditions of each jurisdiction's leniency program, unless the applicant withdrew the marker through formal notification.

15. It also would be opt-in for the marker applicants. In each case, the applicant would have the option of selecting the jurisdictions in which it was seeking a marker. The applicant would not be obligated to seek a marker from all participating agencies. For example, if there were twenty jurisdictions that had opted-in to the program, an applicant could indicate that it wished to request a marker for twelve specified jurisdictions. This might be the case, for example, if the applicant did not operate on certain continents and was not capable of committing an offense in some jurisdictions. The twelve relevant jurisdictions (and only those twelve) would then be notified of the marker application by the clearinghouse agency and of all relevant information provided by the applicant. The applicant would be first in line in the twelve identified jurisdictions (unless rejected by any of them), but the "first in line" slot for the other eight jurisdictions would remain open. It would be possible for the same applicant to later approach the eight remaining jurisdictions to seek a marker and *might* be first in line but would bear the risk that another cartel member might apply first in those jurisdictions.

[4] As a practical matter, a one-stop shop marker system could not function without the participation of the U.S. and EC authorities, as well as at least several other jurisdictions that might include a number of jurisdictions that were the founding members of the ICN. Those founding members include Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia. See, Press Release, U.S. Dep't of Justice, Antitrust Division, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), available at www.justice.gov/atr/public/ press_releases/2001/9400.pdf .

16. Participating agencies would need to reach agreement on the information required to be submitted by the applicant in order to secure a marker. There are variations among jurisdictions on the amount of information required to seek a leniency marker. This does not mean that the one-stop shop should default to the most onerous reporting mechanism required among participating members (which might defeat the purpose), but it does suggest an approach that would satisfy the majority of the participating jurisdictions' current requirements. Because applicants involved in multinational cartels often seek markers in both the U.S. and EU, it would be reasonable for applicants to expect to provide the information required in those two jurisdictions. Because the EC's requirements are inclusive of the U.S. requirements, as well as the requirements set in virtually all of the other 40 jurisdictions with a marker system, (subject to the observations below regarding the current extent of those requirements), the EC requirements would be a reasonable benchmark.

17. Finally, while a one-stop shop system likely would work best and be better utilized if the granting of the marker was unconditional, the system could function with some of the jurisdictions retaining discretion over the granting of the marker. In practice, an agency utilizing a discretionary marker system should be able to evaluate the information provided by the marker system and decide whether to issue a marker. In other words, a jurisdiction that has opted-in to the one-stop shop system could still inform an applicant that, in its discretion, it would not issue a marker on the basis of the information provided. It is hoped that this rarely would be the case -- particularly in situations where the applicant believed the potential infringement was serious enough to warrant the use of the one-stop shop -- but the inclusion of discretionary systems should not be seen as a prohibition of the system.

18. In sum, BIAC believes that a one-stop shop would benefit agencies, the business community and consumers by providing a more efficient, more effective and more complete approach to seeking leniency in multiple jurisdictions for international cartels. The development of the actual procedures, guidelines and requirements should properly fall to the agencies who are expert in developing and enacting the policies and regulations that support their enforcement of the competition laws. BIAC stands ready, however, to assist the agencies in understanding the implications of these structures on the business community and potential leniency applicants.

4. Comments on Existing Leniency Marker Programs

19. The balance of BIAC's comments are directed at existing leniency marker programs, particularly for "first-in" leniency applicants. These applicants are normally provided a marker for provisional leniency that, if perfected, results in avoiding 100% of any potential agency enforcement, including fines and criminal sanctions.

20. Some marker systems apply only to a first in leniency (amnesty) applicant because later-in applicants are evaluated based on the value of their contributions rather than or as well as the timing of their application for leniency. Other systems provide formal leniency to second and later-in applicants by way of reduced fines, but most (or perhaps all) of these systems do not involve a marker system for later applicants.

21. The purpose of a marker system is to achieve several results, including among them: (1) to provide formal confirmation that the leniency applicant is first in the queue; (2) to provide sufficient information to the investigating agency to permit it to determine the product and geographic scope of the cartel in order to ensure that the scope of the marker does not unnecessarily range beyond the scope of the infringement; (3) to provide the leniency applicant with the incentive and comfort to thoroughly investigate the facts under the umbrella of leniency; and (4) to define the time frame under which the marker recipient has the opportunity to perfect the marker and obtain conditional leniency. As noted by the EC in instituting a marker system:

> *"[A] marker is granted to protect the place in the queue of an applicant which has not yet gathered the evidence necessary to formalise an immunity application. In order to protect the place in the queue without obtaining the relevant evidence in exchange, the Commission must be in a position to ascertain whether it already has a previous immunity application for the same cartel and ensure that the company is seriously engaged to provide the evidence."*

22. On this basis, the information required to obtain a marker should be consistent with the stated objective. Requiring information that goes beyond the objective creates barriers that could inhibit parties from seeking leniency, without countervailing benefits to the agency.

Requirements for Leniency Markers

23. Different jurisdictions currently require differing levels of detail in order to obtain a marker. BIAC suggests that the best way to approach these differences is by adopting a one-stop shop marker system as outlined above. In the meantime, improvements could be considered. The EC's requirements, for example are extensive. Only the first whistle-blower can gain full immunity from fines and the marker is used to protect the 'place in the queue' of an applicant seeking immunity that has not yet been able to gather all the information and evidence required for a formal immunity application.

24. Also importantly, a marker is available at the Commission's discretion only. In order to be able to obtain a marker, an immunity applicant must provide the Commission with the following information:

1. the applicant's name and address;
2. the parties to the alleged cartel;
3. the affected product(s) and territory(ies);
4. the estimated duration of the cartel; and
5. the nature of the alleged cartel conduct (e.g. price fixing, market sharing, etc.).

In addition, the applicant should:

6. inform the Commission of other past or possible future immunity applications to other competition authorities in relation to the same case; and
7. justify its request for a marker.

25. The Commission will decide on a case-by-case basis whether or not to grant a marker, thereby taking into account the applicant's justification. If the application is successful, the Commission will set a date by which the undertaking must 'perfect the marker' by providing the information and evidence necessary to meet the immunity threshold. The period granted to 'perfect the marker' will be decided by the Commission on a case-by-case basis; the Commission has indicated that this period will be rather short (*i.e.* not exceeding a few weeks) in order to keep pressure on immunity applicants and to avoid leaks.

26. If the immunity applicant perfects its marker within the time limit stipulated by the Commission, the immunity application will be deemed to have been submitted on the day the marker was granted. If the applicant fails to perfect the marker within the time limit, it may still present a formal application for immunity but its application will not date back to the provision of the marker.

27. In contrast, the U.S. requirements for a marker are less stringent. To obtain a marker, counsel must:

1. report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation;

2. disclose the general nature of the conduct discovered;

3. identify the industry, product, or service involved in terms that are specific enough to allow the DOJ to determine whether leniency is still available and to protect the marker for the leniency candidate; and

4. identify the client, except that in limited circumstances counsel may secure a very short-term (*i.e.* two to three days) 'anonymous' marker without identifying his or her client where counsel wants to secure the client's first-in-line place for leniency by disclosing the other information listed above, but needs more time to verify additional information before providing the client's name.

28. There are two other significant distinctions between the U.S. and EC marker systems. First, the U.S. marker system is unconditional rather than discretionary. Parties that come forward and meet the conditions above will receive a marker. Second, the U.S. typically allows a much longer period of time to perfect the marker. While the DOJ staff will expect relatively frequent updates that reflect significant progress in the investigation, the typical initial marker period is three months, with extension(s) being the rule rather than the exception. The DOJ has recently tightened-up its marker timing to keep investigations from languishing, the greatest impact has been to limit the extensions; a three-month initial period is still typical.

29. Because the objective of the two marker systems appears to be essentially the same – *i.e.*, to formalize the applicant's place in line, to define the cartel to ensure that first-in protection is not granted to another applicant for the same or an overlapping cartel, and to start the clock for the initial leniency period – it is difficult to see the rationale for such differing requirements. There is no indication, for example, that the lower information threshold required by the U.S. has inhibited in any way its cartel enforcement nor resulted in inefficiencies.

30. From the standpoint of leniency applicants, it can often be difficult to meet the timing conditions of leniency markers, particularly in those jurisdictions that allow for short and inflexible periods of time (*i.e.*, less than 30 days) to perfect leniency markers. This is particularly true where the investigation spans multiple jurisdictions and requires a complex and broad-ranging investigation over numerous countries or continents, languages, IT systems, legal systems, corporate entities and reporting lines.

31. One complication, for example, is that company employees in jurisdictions with criminal sanctions for individuals are often reluctant to be forthcoming in initial interviews. This is true even when the employees are informed that the company is in the position to receive leniency that would eliminate the potential for individual criminal sanctions. Company employees are often not trusting of this information (perhaps having seen one too many police drama where confession leads to prosecution) and, in any event, are often highly concerned about consequences for their employment and future financial security. To break this barrier, it often requires counsel to review and identify relevant incriminating documents, usually in the form of emails. These emails can force the employee to acknowledge at least some level of interaction with competitors – often by way of excuse – and also provides additional context. The context often can lead to a second level of investigation of documents and additional witnesses that produces further relevant evidence that can then be reviewed with the employee and lead to further acknowledgment on his part of the wrongful activity. Thus, gaining accurate non-speculative information about competitor communications and agreements often is an iterative process especially as it relates to employee interviews. Moreover, identifying, collecting, processing, searching and sifting through many thousands of documents is a process that is not achievable in a short period of time.

32. The volume of documents involved in a typical large-scale cartel investigation, for example, almost always requires the use of an outside electronic data processor ("EDP vendor"). The turnaround time for reliable EDP vendors is often several days for every custodian and can accommodate only a limited number of custodians at one time. Once this is completed, the documents are in a format that is in an efficiently reviewable platform. Thus, it frequently takes weeks just to process email files into a searchable format.

33. In BIAC's experience, inflexibility as to the amount of time to perfect markers often leads to overly-generalized and frequently broad claims by leniency applicants that are difficult to sustain and can lead to a misdirected investigation. While we recognize the need for expeditious investigation in order to perfect markers, a proper balance must be struck between time and accuracy.