

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

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Colombia --

16 December 2014

This document reproduces a written contribution from Colombia submitted for Item III of the 120th meeting of the Working Party No. 3 on Co-operation and Enforcement on 16 December 2014.

*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. Regarding your invitation to participate in the roundtable on the use of markers in leniency programs, we would like to express that it is very valuable for us to share the experiences we have had so far during the implementation of our leniency program (Decree 2896 of 2010).

2. The proposed topic has been a subject of recent debates within the Superintendence of Industry and Commerce (herein after "SIC") and the controversy has arisen from the experience that the Agency has recently had as a result of the first leniency applications in Colombia. The leniency program was introduced in the Colombian legal system on 2009 with the enactment of the Statue 1340/09 but leniency proceedings were regulated until 2010.

3. This being so, we will proceed to answer the questions contained in the Annex of your communication, as follows:

1. Please describe any marker system you have and its relationship to your leniency program.

4. The Decree 2896 of 2010 establishes a marker system based on the date of the execution of a minute with the Deputy Superintendent for the Protection of Competition. In accordance with Articles 5 and 6 of the aforementioned Decree, in order to execute the minute the applicant must fulfill three requirements: i) recognizing its participation in the cartel, ii) submitting information about the mechanics of the cartel, and iii) committing to submit the evidence that it has in its possession within the time frame established by the Deputy Superintendent.

5. The SIC has faced practical drawbacks with this marker system because the person responsible for executing the minute is the Deputy Superintendent for the Protection and Promotion of Competition. In our experience, allocating this responsibility in a single person has created administrative issues.

6. For this reason, what has been implemented in practice is to guarantee the priority to the first person that requests a meeting with the Deputy Superintendent if such person expresses his/her intention to apply for a leniency program.

2. What is the principal purpose of your marker system? What are the potential benefits of your marker system for the agency and for marker applicants?

7. The purpose of the marker system that has been implemented by the SIC is to secure by means of a written document the applicant's position. In this sense, the minute is executed with the purpose of having a formal record of the order of priority the Agency shall consider when granting leniency benefits.

3. Is your marker system created by statute or regulation, or simple by agency practice? How have you communicated your system to the public -by speeches, written policies or rules, or Frequently Asked Questions (FAQs)?

8. The marker system was created by Decree 2896 of 2010 but it has been shaped by the SIC in order to give viability to the leniency program. Indeed, the Colombian Agency has intervened to steer the system since there have been some contingent and unforeseen practical situations related to having the Deputy Superintendent available for a meeting.

4. Who is eligible to obtain a marker under your system? As a marker available only to the first applicant, or also to subsequent applicants?

9. Any legal entity and natural person that recognizes its participation in the cartel is eligible to obtain a marker under our system. However, Statue 1340/09 specifically excludes ringleaders from the leniency program.

10. The marker is available not only to the first applicant, who will get a total reduction of the fine, but also to subsequent applicants who could benefit from a reduction of the fine depending on the order of arrival to the leniency program. Thus, the second applicant could obtain a reduction up to 70%, the third applicant may obtain a fine reduction of up to 50%, and the fourth applicant will be granted with a reduction up to 30% of the fine. Nevertheless, it is worth clarifying that Decree 2896 of 2010 specifically provides that reductions could only be granted to applicants who provide evidence that add significant value as compared with the information contained in the Agency's record. Thus, subsequent applicants have the burden of producing additional evidence with a relevant value in order to apply for a reduction of the fine.

5. What steps must be taken to initiate the process, and what are the threshold requirements for obtaining a marker?

11. To initiate the process, applicants must request an appointment with the Deputy Superintendent and such request must explicitly state: i) the intent to join SIC's leniency program; and ii) brief information about the cartel.

12. Afterwards, during the meeting with the Deputy Superintendent the applicant must: i) recognize responsibility for participating in an anti-competitive agreement; ii) provide relevant information on the existence of the cartel, its mode of operation, the product and service involved and participants implicated in the cartel; iii) deliver evidence about the cartel or commit to deliver the evidence in a time frame agreed with the Deputy Superintendent. It is important to remark that the applicant obtains the marker when the minute is executed at the meeting.

6. Is the grant of a marker automatic upon meeting these requirements, or does the agency retain some discretion? If the agency has some discretion, what factors does it consider?

13. The Deputy Superintendent grants the marker automatically with the execution of the minute. Nonetheless, the Deputy Superintendent retains some discretion to determine whether the applicant has fulfilled or not the requirements established in the Decree 2896 of 2010, namely: i) express recognition of the wrongdoing; ii) providing relevant information; and iii) submitting or committing to submit evidence.

7. At what point does the marker ripen into a conditional offer of leniency (conditional on compliance with all the ongoing conditions for leniency, such as continuing cooperation with the agency)? What is the process for obtaining the conditional offer of leniency, and what showing by the applicant is necessary for this step?

14. The marker ripens into a conditional offer when a leniency agreement is executed between the Deputy Superintendent and the applicant. The process is the following:

1. The SIC requests the applicant to gather the 100% of the information and evidence that it has in its possession;
2. The next stage is the appraisal of the information and the evidence in order to determine if it adds value to the investigation;
3. If so, the Deputy Superintendent makes an offer to the applicant;
4. Finally, if the applicant accepts the offer, a leniency agreement is satisfied.

15. The burden of proof established in the Decree 2896 of 2010 for subsequent applicants is high: significant added value. However, there is no specific burden for the first leniency applicant. In practice, the SIC encourages the first applicant to perform a profound self-assessment about its role in the cartel and

to provide partial reports on the results including the evidence gathered. Moreover, the SIC provides feedback to the applicant about its self-assessment and requests information on certain matters that need to be clarified in order to have a solid case.

8. Please describe any rules or policies with respect to confidentiality of applications for a marker, and waivers of such confidentiality.

16. Regarding the confidentiality of the program, Decree 2896 of 2010 provides that each leniency application will be processed in a separate file. Furthermore, the SIC has kept such leniency file absolutely reserved to any person except to the applicant. Thus, the SIC works with two files: the leniency file and the investigation file. Only the evidence that supports the commission of a wrongdoing is transferred from the leniency file to the investigation file.

17. In order to secure due process and the right of defense, the investigated parties have access to: i) all the evidence included in the investigation file; and iii) the identity of the applicants. However, the identity of the applicants remains confidential to third parties unless the applicant voluntarily waives such right.

18. The Agency is in favor of sharing investigations information with other international Agencies, though it can only be possible if the applicant expressly enables the SIC to share information with other authorities. In order to do so, a written waiver is required.

9. If you have a marker system, please describe your experience with it, has it been amended over time? Are you considering further amendments?

19. Nowadays, the SIC is drafting an amendment to Decree 2896 of 2010 in order to strengthen the leniency program and adjust our rules to the new challenges of the Agency. In this vein, designing a new marker system is one of the issues that is being under assessment and the main goal is to move towards a mechanism that certifies the order of priority with accuracy.