

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

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Poland --

16 December 2014

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

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

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

JT03368381

Complete document available on OLIS in its original format
This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.



1. The Marker in Polish leniency regulations

1. The Polish leniency programme has been in force since 2004. A marker system was introduced to our leniency regulations in 2009 and the key rules for applying this institution have not thus far been changed. However, on 18 January 2015 the amendments to the Polish Act on competition and consumer protection will enter into force. According to these amendments, the Polish Competition Authority (UOKiK) will be eligible to impose pecuniary sanctions for infringements of antitrust law not only on undertakings (as has been the case) but also on the specific category of individuals referred to as “performing managerial functions or belonging to the executive body of the undertaking”. As a result, the Polish leniency programme, including the marker, will be applied both to the undertakings and to individuals that do not have the status of an undertaking.

2. The marker is a part of the Polish leniency programme created by appropriate regulations (“the leniency regulations”), the Guidelines for which were issued by UOKiK. They may be found on its website (www.uokik.gov.pl).

3. The leniency regulations provide for markers both for immunity and reduced fines applicants (i.e. for the first and for subsequent applicants). The principal purpose of the marker is to protect an applicant’s place in the leniency queue for a given period of time so it can gather the information and evidence required to meet the relevant evidential threshold for immunity or a reduced fine. In practice the marker means the undertaking may submit an abridged leniency application if at the moment of submitting the application it does not possess the complete information required. The abridged application guarantees the undertaking a place in the leniency queue if and only if the application is subsequently completed. UOKiK determines in each case the scope of information and evidence required to perfect the marker.

4. According to the leniency regulations, the marker (abridged application) should contain a general description of the agreement, indicating, at the very least, the following:

- the parties to the alleged infringement;
- the products or services the agreement refers to;
- the territory the agreement covers;
- the purpose of the agreement;
- the duration of the agreement;
- the names and official positions of the persons who performed significant (key) functions with respect to the agreement;
- whether an application for immunity from or a reduced fine has also been submitted to the competition protection authorities of the European Union Member States or of the European Commission.

5. A marker is granted automatically insofar as the submission of the application for a marker containing the foreseen requirements secures the place in the leniency queue. At the same time UOKiK reserves the right to assess whether the applicant has fulfilled these requirements. However, it does not immediately inform the applicant that it has been granted a marker, but only if it requests the applicant complete the application.

6. The deadline for perfecting the application is determined by UOKiK on a case-by-case basis. It generally runs to a few weeks. An applicant may request an extension to the deadline in justified cases, though UOKiK is not bound by the request and can refuse it. An application completed within the deadline is considered to be submitted on the date of the abridged application's submission. UOKiK then assesses the completed application and decides whether the applicant meets the required evidential thresholds for immunity or a reduced fine and whether it should be granted conditional immunity/leniency. An applicant that does not perfect its application loses its place in the leniency queue (UOKiK does not grant him the marker) and cannot earn conditional leniency.

7. With regard to the confidentiality of applications for a marker and waivers of such confidentiality, the Polish leniency regulations¹ currently foresee general rules applied to the leniency documents and statements, including the applications for a marker. As a rule, only the parties of the proceedings have access to the information and evidence received by UOKiK under the leniency procedure (including the marker application); however, they gain that access only at the final stage of the proceedings, prior to the decision being issued. This rule is not applied, and information and evidence may be made accessible to the other parties of the proceedings, if the applicant for leniency (including for the marker) agrees in writing to make available the information and evidence submitted to UOKiK. Moreover, according to the amendments discussed at the beginning of this contribution², documents containing an applicant's statement may be copied by a party of the proceedings only if the applicant gives written consent. The party may take notes provided it commits to using the information gained thereby solely for proceedings before UOKiK or the court, the latter of which is conducted as the result of UOKiK decision being appealed).

8. While leniency applications may currently only be submitted in writing, UOKiK has been considering oral submissions for the applications, including for the marker, with no signature required, if they are done on the record. At the present time, an applicant may submit the application orally for the record, but UOKiK employee preparing the record puts the date and the time on the document and both the employee and the applicant must sign the document.

2. Poland's experience with and conclusions about the markers

9. Since 2009, when the marker was introduced to the Polish leniency regulations, UOKiK has received 11 applications for markers, constituting 27% of all leniency applications (there have been 41 in total, i.e. 11 abridged applications and 30 full applications). This shows that the marker is popular among leniency applicants. However, UOKiK rejected three of the marker applications, one on the grounds that the alleged anticompetitive agreement had already expired and the other two because they had met neither the immunity nor the leniency thresholds. The latter two applicants could not have been granted either conditional immunity or leniency. Another issue regarding the applications for a marker is that none of them had been submitted to UOKiK before an investigation, which is the most expected scenario, and may lead to effectively uncovering anticompetitive agreements.

¹ Article 70 of the Act on competition and consumer protection.

² Article 70.4 of the amended Act on competition and consumer protection.

10. UOKiK recognises that the key benefit linked to the marker system is that it can increase the race to UOKiK by allowing the applicant to come forward on the basis of very limited information, i.e. as soon as the applicant knows about the conduct infringement and before it could have completed an internal investigation. This extra incentive offers a high degree of security, especially for the first-mover's fate in the further investigation, since it can, at an early stage, secure its position at the front of the leniency queue without having to provide a complete application. As a result, the marker system encourages applications and may therefore have a destabilising effect on cartels. Moreover, the marker can create an incentive to apply for immunity since it increases the legal certainty and security from an early stage and fosters spontaneous early cooperation. However, in order to achieve this aim, the criteria under which the authority assesses a marker application should be clear from the leniency regulations and not too detailed to enable potential applicants to estimate with a sufficient level of predictability if a future application would be successful or not in view of the information at hand. The Polish leniency regulations specify the requirements for a marker application (see above), but if a potential applicant has any doubts concerning these requirements it may contact UOKiK before beginning the application to request clarification.

11. In a number of situations, after having been provided a marker application by a first-mover, UOKiK received a full leniency application with information or evidence which had not been provided by the first-mover marker applicant. This raises the question of how to assess each of the applications and which applicant is eligible for immunity. Even if the application for a marker is completed by the deadline set by UOKiK, it will still be done later than the application of the second leniency applicant, who has provided UOKiK with a full application. However, because the applicant for a marker as the first mover decided to provide UOKiK with information about a cartel, it should be granted first place in the leniency queue along with conditional immunity. Such situations lead to the conclusion that UOKiK should base the assessment of leniency applications, including applications for a marker, on the existence of cartel behaviour and other requirements specified in the leniency regulations such as a lack of the information or evidence the Authority requests. On the other hand, markers should not be denied for reasons not related to the assessment of the application itself (e.g. submission of a full application by a subsequent applicant or the assumption that other undertakings could be willing to file a full application), while refusal to grant a marker should be based on objective reasons such as the failure to meet the thresholds.

12. UOKiK also recognises that there could be some disadvantages for the leniency programme that result from applying a marker system to all leniency applicants, i.e. those applying for immunity and for a reduced fine. The marker available for immunity applicants may speed up the investigation of a cartel and benefit the authority, especially if it did not possess any knowledge about the cartel. In case of availability of markers not only for immunity applicants but also for reduced fines applicants, there is a risk of submitting applications of poor quality, with a lack of benefits for an investigation. Moreover, practical experience shows that following or even during UOKiK's inspection there may be several leniency applications, including marker applications submitted in a short period of time. Applications for reduced fines are assessed on the basis of their value at the point of time when the application is submitted. It is therefore difficult for UOKiK to effectively process and assess two or more simultaneous markers for reduction.