

Unclassified

DAF/COMP/WP3/WD(2014)32

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

04-Dec-2014

English - Or. English

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

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Lithuania --

16 December 2014

This document reproduces a written contribution from Lithuania 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].

JT03367944

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.

DAF/COMP/WP3/WD(2014)32
Unclassified

English - Or. English

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

1. Lithuanian leniency regime is based on explicit provisions in the Law on Competition, however, it is only in the Leniency Rules (Rules on Immunity from Fines and Reduction of Fines, a piece of secondary legislation) that the explicit provisions on the availability of a marker system under the Lithuanian leniency regime can be found. The Lithuanian leniency Rules foresee a marker option, which is designed to preserve and protect applicant's place in a leniency queue for a definite period of time. Marker system caters for the needs of those immunity applicants who, for legitimate reasons are not in the position to submit all necessary evidence and information at a given time, but are able to perfect their application within a certain specific time span.

2. Under Paragraph 19 of the Leniency Rules an undertaking wishing to apply for immunity from a fine or reduction of a fine, must in the first place inform the Competition Council of the Republic of Lithuania of its intention to be considered for immunity / fine reduction and request to set a period within which it would collect all necessary information and evidence needed to qualify for immunity / fine reduction. In that case, after a preliminary examination with the Anti-competitive Agreements Investigation Division an undertaking is usually given a time period of 15 days within which it must submit all remaining necessary information and evidence. If an undertaking submits the remaining information and evidence within the set period, the information and evidence will be deemed to have been submitted on the day of the receipt of the primary application to the Competition Council.

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?

3. As mentioned above, the principal purpose of marker system in Lithuania is to preserve and protect applicant's place in a leniency queue for a definite period of time without having to submit a complete leniency application.

4. Given the fact that an immunity applicant is about to report anti-competitive conduct unknown to the Competition Council at the given time, such company gains more time and flexibility to submit a complete leniency application and collect all necessary evidence. A marker allows a company to file an application as soon as it discovers an infringement without having all the information that is necessary to file an application. Besides, the applicant's position is reserved in the queue for the specified time frame. Therefore, the applicant receives a marker which provides certainty and clarity for potential applicants and encourages a race to contact the agency. Leniency applicants also still find the marker system and the 15 day period as a more secure way to discuss the details of the potentially anti-competitive conduct with the competition authority compared to the informal pre-leniency discussions.

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

5. Lithuanian marker system is set out in the Leniency Rules. The Competition Council communicates the leniency program by seminars for trade associations. The Competition Council had also prepared a brief note 'How to report a cartel?' which is published on the Competition Council's website. However, marker system is not particularly emphasized while presenting Lithuanian leniency program since its importance rises when the race to apply for leniency is strong, which is currently not the case.

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

6. An individual or a company can request a marker. It must be stated that the Leniency Rules and the Law on Competition foresee amnesty from a fine or reduction of a fine for the participants of horizontal agreements among competitors and participants of anti-competitive agreements between non-competitors on direct or indirect price fixing (i.e. resale price maintenance). Accordingly, undertakings involved in the above-mentioned agreements are eligible to obtain a marker under Lithuanian leniency program.

7. As previously mentioned an individual can also request a marker. The Law on Competition foresees disqualification of company's or former company's director, who inter alia organized or significantly contributed to an anti-competitive agreement. Company director can be disqualified from managerial positions for up to 5 years. A monetary fine can be imposed as well. Due to the fact that sanctions can also be imposed on individuals who were involved in anti-competitive agreements among undertakings, former director of such entities can request a marker. In case when an undertaking was immune from a fine or a fine was reduced its director will be covered by the corporate immunity.

8. It must be mentioned that the Leniency Rules do not specify between first-in and subsequent applicants on this issue, therefore it can be said that the markers are also available to the subsequent applicants.

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

In order to obtain a marker, applicants have to provide the applicant's name and address, details about the type and duration of the infringement, the identity of those involved, the product and geographic markets affected, description of the evidence to be provided in the future and other competition authorities where leniency applications have been or are intended to be filed. The Competition Council usually grants a period of up to 15 days to submit a full leniency application. The marker can be placed only in writing. It should be stated that in practice the Competition Council sets a relatively low evidential burden for obtaining the marker. All that is necessary is to establish a concrete basis for a suspicion of anti-competitive conduct and the fact that Competition Council is competent to conduct the investigation. Further criteria, including whether the application is genuine in nature are analysed at a further stage. If the leniency applicant refuses or fails to provide to the Competition Council a complete leniency application with all supporting evidence, his status of priority lapses and subsequent applicants move up in queue.

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?

9. Lithuanian leniency program provides an automatic marker system. This means that if the conditions set out in the Leniency Rules are fulfilled, the marker will be granted without any discretion on the part of the Competition Council. Competition Council is, in theory, free to apply its enforcement priorities also in leniency cases.

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?

10. Conditional immunity is normally granted following the marker process described above. However, an applicant who is able to provide full information immediately could choose to apply for conditional immunity on their first approach to the Competition Council. This will be converted into conditional immunity if the Competition Council determines that the applicant has provided sufficient information and the applicant is eligible for conditional immunity in line with the conditions set out in the Leniency Rules.

11. Conditional immunity shall be granted when the following conditions are met:

1. an applicant provides to the Competition Council information before investigation has been started;
2. an applicant is the first to provide such information;
3. an applicant provides all documents and information within its possession relating to the anti-competitive agreement and cooperates with the Competition Council during the investigation;
4. an applicant has not coerced others to participate in the anti-competitive agreement and has not instigated the above mentioned agreement.

12. A requirement to provide all documents and information regarding the anti-competitive agreements is fulfilled when the information enables the Competition Council to carry out a targeted inspection or finding an infringement. It should also be noted that an applicant must disclose (own) participation in a cartel/the other anti-competitive agreement. An applicant is also obliged to co-operate genuinely, fully, expeditiously and on a continuous basis with the Competition Council throughout the investigation. According to the Leniency Rules the Competition Council is obliged to decide on granting or rejecting conditional immunity within 30 days since a leniency application, which fulfils all the requirements, has been submitted to the Competition Council.

13. If conditional immunity has already been granted, any subsequent applicants will be informed that it is not available. However, the subsequent applicants will be informed about the possibility to obtain the conditional reduction of a fine.

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

14. Marker applications and leniency applications are subject to particularly strict confidentiality. However, as a marker is available also to subsequent applicants in Lithuania the Competition Council will inform the applicants whether a marker for immunity is still available, that is the fact of the marker (not the identity of the applicant) is not subject to confidentiality. It should also be noted that parties do not have access to documents related to marker proceedings, as a marker application is not part of the case files.

15. When applicants apply simultaneously in multiple jurisdictions, the Competition Council may ask for a waiver to discuss the application and exchange information with such competition authorities. This will allow the Competition Council to investigate the cartel or other anti-competitive agreement more efficiently. However, the Competition Council has never dealt with this issue so far.

9. **If you do not have a marker system, have you considered adopting one? If so, what considerations led you to decide against doing so?**
16. N/A
10. **If you have a marker system, please describe your experience with it. Has it been amended over time? Are you considering further amendments?**
17. Even though Lithuanian leniency program foresees a marker option so far the Competition Council granted only one marker in 2013 since the adoption of the Leniency Rules in 2008.
18. Since the adoption of the Leniency Rules a marker system has not been amended and the Competition Council is not considering further substantial amendments.