

CPI's Europe Column Presents:

Cartel Leniency & Immunity: The Mysterious Case of the Missing Markers

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Intro by Juan Delgado (Global Economics Group)

The European Commission introduced in its 2006 revision of the Leniency programme the concept of 'marker' which is a temporary protection for potential leniency applicants while they prepare a full leniency application. The object of the marker is to grant companies some predictability on the level of immunity they will obtain once they submit the full application and to induce earlier leniency applications by inducing competition between potential applicants. However, the marker system is not actually being used in the case of complex cartels where the Commission is unable to establish criteria to implement it. As Oliver Bretz and Sarah Long (Euclid Law, London) point in this month's column, the solution in these cases is not to skip the marker system but to improve it to make it effective.

Something strange has been happening at DG Competition recently. The word 'marker' has been excised from the vocabulary.

The introduction of the 'innovative' marker system

The introduction of a discretionary marker system came into force on 8 December 2006, as part of the revised Commission Notice on Immunity from fines and reduction of fines in cartel cases¹ (**'the Leniency Notice'**). Prior to 2006, no marker system was available to applicants under the European Commission (**'the Commission'**) leniency program. At the time, the Commission described the marker system as an 'innovation' in the revision of the Leniency Notice as (where justified) an application for leniency could be accepted on the basis of only limited information. The applicant would then be granted time to perfect the information and evidence to qualify for immunity.²

The requirements for obtaining a marker are set out in Article 15 of the Leniency Notice, which states that to be eligible to secure a marker:

"...the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct ...[and]... other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. [...]If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted."

The object of Article 15 is to enable the Commission to establish an orderly queue, while allowing the applicant sufficient time to 'perfect' the marker in order to gain conditional immunity. The requirements for obtaining conditional immunity are set out in Article 16 of the Leniency Notice, and an undertaking must:

"(a) provide the Commission with all information and evidence relating to the alleged cartel

available to it [...]including corporate statements; or (b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. [...]However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.”

The Commission opted for a discretionary marker system in order to “*maintain the race between companies to provide the information and evidence required to meet the conditions for immunity and thereby to facilitate the detection and termination of infringements.*”³ The decision to grant a marker is therefore made on a case-by-case basis, and the Commission will take into account the relative specificities of each situation. The EU marker system is therefore designed to cater for immunity applicants who, for legitimate reasons, are not able to submit all the necessary evidence and information (for example, where new management realise that the company is involved in a cartel). The cartel conduct can be reported to the Commission immediately upon detection, and significantly before the company would be ready to submit a completed immunity application.⁴ Once the Commission is satisfied that the conditions for a marker is met, then it will be granted within a few hours. Unlike the granting of conditional immunity to a company, granting a marker is an administrative act carried out by DG Competition and takes the form of a letter signed by the Director for cartels.⁵

The unforeseen problem of complex cartels

The Commission considers that the marker system has proven to be an ‘efficient tool’ since its introduction in 2006, enabling flexibility for applicants to complete their application, and resulting in better quality leniency applications.⁶ However, the recent prevalence of complex cartels across Europe involving multiple, non-homogenous products (particularly in the financial sector) has caused somewhat of a road-block in the use of markers by the Commission of late. Let us take an example by way of illustration.

Suppose that Party X applies to the Commission for a marker on 10 September for products A and B, Party Y applies for a marker for products B and C on 14 September and Party Z applies for a marker for products A and D on 15 September. In granting a marker to Party X, the Commission must decide whether the relevant infringement only covers A and B or whether the infringement might be wider and cover A, B, C and D. While this may seem obvious, imagine a situation involving several complex financial instruments, a multitude of different geographies and numerous participants located worldwide. The complexity is evident.

To date, the Commission’s practical solution to this problem has been to skip Article 15 entirely and simply say that a marker is not available. As a result, a leniency applicant is obliged to proceed immediately towards conditional immunity under Article 16, with no certainty as to their position in the queue or whether immunity is actually available. This

current state of affairs is deeply unsatisfactory. Even the Commission case teams are struggling with the issue by trying to give informal assurances and creating an informal queuing system. As a result, the parties are left for significant periods of time without any information as to their applications, and entirely dependent on the goodwill of the case team. In a number of cases this will ultimately be resolved either because only one party qualifies for conditional immunity, or the case is de-prioritised. However, eventually there will be a case where these issues go to the Court - and at that point the mechanism and the actions of the case teams will come under uncomfortable scrutiny.

A practical solution for improving the marker system

So how could it all be done better? The first thing to emphasise is that Article 15 exists for a reason. It allows the Commission to establish an orderly queue and provides some certainty to the leniency applicant as to whether immunity is available. The applicant can then take its decisions and brief its Board based on that information. The solution is not, therefore, to skip Article 15 but to work within it. Where an application contains several complex products, geographies or parts, the marker should be sub-divided into those products, geographies and parts, without prejudice as to whether it is a single and continuous infringement or not. If an applicant fails to perfect any part within a reasonable deadline, that part should become available again. In this context it is notable that the Department of Justice (**DOJ**) has adopted a policy where it sometimes informs other applicants that a marker has become available again for a particular part. There is no reason why the Commission could not do the same.

The leniency process is set up as a race between the applicants: that is the nature of the European system. However, that is no reason for the current lack of transparency in the use of Articles 15 and 16. Provided the information is given to all applicants at the same time, there is no distortion, and the best and fastest applicant should obtain the marker. The marker is an essential and fundamental part of the leniency system. It should not be allowed to fall into disuse simply because the application of it is inconvenient, or because it falls into the 'too difficult' box.

¹ 2006/C 298/11

² Commission press release IP/06/1705, Brussels 7 December 2006, "*Commission adopts revised Leniency Notice to reward companies that report cartels*"

³ European Union written contribution submitted for the OECD Competition Committee roundtable discussion on '*Use of Markers in Leniency Programs*', 16 December 2014, para 4.

⁴ Ibid, para 8.

⁵ Ibid, para 12.

⁶ Ibid, para 27.