

Unclassified

DAF/COMP/WP3/WD(2014)55

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

-- Turkey --

16 December 2014

This document reproduces a written contribution from Turkey 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].

JT03367943

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)55
Unclassified

English - Or. English

1. Leniency systems as an indispensable constituent of the cartel regime have been playing a crucial role in public enforcement of competition law all over the world. In this context, with a view to keep up with the modern approach, Turkey amended the Act No. 4054 on the Protection of Competition (Competition Act) in 2008 enabling full immunity/reductions for leniency applicants. Thereafter, the Regulation on Active Cooperation for Detecting Cartels (Leniency Regulation)¹ was published in the Official Gazette on 15.02.2009 and special unit called The Cartel and Investigation on Spot Support Unit (The Unit) which is also in charge of dealing leniency applications was established within Turkish Competition Authority (The TCA). The aim of this contribution is to provide information about the marker system in leniency applications in Turkey and to give a general framework for leniency practices.

2. The Leniency Regulation, *inter alia*, provides provisions for a marker system. In the system, the applicant might be allowed for a certain period to collect more and detailed information/evidence concerning the case and in return, the TCA secures its place in the application line until it finalizes its application in the given period.

3. The main purpose for the TCA is to be able to access to more evidence as much as possible and to encourage parties to apply which do not possess enough document establishing the infringement at the outset. Hereby, the TCA strengthens its case, saves for the costs of potential investigations on spot both in terms of labor and time and in addition reduces the potential risk of a judicial annulment by the administrative courts. As to the related party, it attains a strong protection from the subsequent applicant(s) since it will be treated as the first applicant which may mean to obtain a full immunity depending also on the other conditions.

4. Another point that should be emphasized is that the marker system is available for both undertakings and their managers/employees (here after individuals). By doing so, the race between undertakings, between individuals and also between undertakings and individuals to be the first one to apply to obtain a full immunity from the monetary fine is sustained. In addition, the marker system does not exclude the subsequent applicants and secures their own line. In other words, the second applicant is protected from the third one and benefits from a higher reduction rate although it cannot get a full immunity.

5. The Leniency Regulation states a basic three-fold requirement for obtaining a marker for both undertakings and individuals. Accordingly, at least the products affected by the cartel, duration of the cartel and the names of the parties to the cartel should be provided. The applicant shall submit its demand for a period in written form, however those three elements might also be stated orally. If this is the case, the staff of the Unit in charge of with dealing the leniency transforms it into written form and makes the applicant verified. However, it should be kept in mind that meeting those requirements does not necessarily mean that a marker will be provided automatically. The unit has discretion. In the Guidelines on Leniency² (para 58) it is stated that the discretion is exercised on a case by case basis, however that it is unlikely to get marker at a very late stage of the investigation. As a matter of practice, the amount and the scope of the information or the documents that applicant intended to provide is also relevant. As a rule, the period shall not exceed a month, however, it may be extended (Guidelines para. 58-59). According to the data of the Unit, up to now, the period provided has been varied between 7 and 39 days. Justifications as that the IT system of the undertaking is so complex and some curial documents are stored in the servers which is abroad and cannot be retrieved from Turkey, translation need for voluminous documents, the high number of the employers that should be consulted have also been experienced in practice.

¹ <http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fRegulation%2fyonetmelik10.pdf> (access 11.11.2014).

² <http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKilavuz%2fpismanlikkilavuz.pdf> (Access 11.11.2014).

6. By the end of the period the undertaking or the employee shall complete the required information which is formulated in the Art. 6(1) and 9(1) of the Leniency Regulation as “... *information and evidence in respect of the alleged cartel including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings*”. As may be deduced from here, in addition to information provided at the outset, the applicant must submit all information to the largest possible extent regarding the alleged cartel. Lack of that submission at end of period culminates with the loss of line in the application.

7. Had the applicant achieves to fulfill that phase, a conditional immunity will be in question.

8. Before heading to conditions that are required for immunity there are some other basic points that should be reminded.

9. The Leniency Regulation foresees full immunity and reductions for both undertakings and individuals.

10. Full immunity, which covers the managers and employees automatically, is granted for undertakings under Art. 4 of the Regulation in two situations. The relevant article is as follows:

1. *The first undertaking which submits the information and evidence and meets the requirements laid down in Article 6 of this Regulation, independently from its competitors, before the Board decides to carry out a preliminary inquiry, shall be granted immunity from fines. The implementation of this paragraph depends on the fact that an application pursuant to Article 7(1) of this Regulation has not been made.*
2. *The first undertaking which submits the information and evidence, and meets the conditions laid down in Article 6 of this Regulation, independently from its competitors, as of the decision by the Board to carry out preliminary inquiry until the notification of the investigation report, shall be granted immunity from fines on condition that the Authority does not have, at the time of the submission, sufficient evidence to find the violation of Article 4 of the Act. The implementation of this paragraph depends on the fact that an application pursuant to Article 4(1) and Article 7 of this Regulation has not been made.*
3. *Managers and employees of the undertaking covered by the scope of this Article shall also be granted immunity from fines.*

11. Reduction for undertakings is provided under Art. 5 of the Leniency Regulation. Accordingly, undertaking that applies independently from its competitors after the Board’s decision to start a preliminary inquiry, but before the notification of investigation report and meets the requirements laid down in Art. 6, however cannot benefit from Art. 4, obtains reductions depending on the application order.

12. Under the Leniency Regulation, immunity and reductions are formulated similarly for individuals. Therefore, it is not discussed in details.

13. Following the explanations regarding the basic structure, the conditions of immunity and reduction might be handled which were similarly provided under Art. 6 and Art. 9 of the Leniency Regulation for undertakings and individuals.

14. Those conditions may be enumerated as follows : (i) – as discussed above- to provide all information regarding the alleged cartel, (ii) not conceal or destroy information or evidence related to the alleged cartel, (iii) to end involvement in the alleged cartel except when otherwise is requested by the assigned unit on the ground that detecting the cartel would be complicated, (iv) to keep the application confidential until the end of the investigation, unless otherwise is requested by the assigned unit, (v) maintain active cooperation until the Board takes the final decision after the investigation is completed.

15. After the finalization of the application by the end of the period the Competition Board shall decide that the immunity/reduction to be granted with the conditions mentioned above. However, for immunity there is an additional condition which is that the applicant has not acted as a coercer in the infringement. On this point, it should be noted that for reduction cases there is not such a condition.

16. As a final point, the confidentiality subject may be dwelled on. Undoubtedly, the confidentiality of whole process is so important to secure the investigation particularly concerning the evidence obtaining. So, it is envisaged as condition of the immunity/reduction which is imposed on the applicant. However, there is no explicit norm requiring the TCA to treat applications of marker in a confidential manner. Rather, it is stated in the Guidelines on Leniency that the Unit shall inform the potential applicant whether it could benefit from immunity/reduction. That obligation/practice may lead the reveal of the existence of a marker holder to other potential applicants. However practice experience demonstrates that an applicant willing full immunity does not withdraw its application after being informed that there is a previous application with a view to benefit from reduction.