

INTERNATIONAL CHAMBER OF COMMERCE
The World Business Organization

**PROPOSAL TO THE INTERNATIONAL
COMPETITION NETWORK
FOR A ONE-STOP-SHOP
FOR LENIENCY MARKERS**

An issues paper prepared by the ICC Commission on Competition

The International Chamber of Commerce ("ICC") strives to develop an environment where companies can compete globally with the same rules and where cooperation among national competition authorities in applying competition rules will be enhanced.

Global business, as represented by ICC, firmly believes that an open multilateral system facilitating the flow of goods, services, and investments across markets is a major force in raising living standards and creating jobs in all parts of the world.

ICC recognizes that international cartels hinder economic growth. Therefore, the eradication of illegal conduct is key to creating a competitive and fair business environment, and hence, to stimulating international trade and investment.

Considering that more and more international cartels are being disclosed to competition authorities through leniency programmes, ICC would like to submit to the International Competition Network ("ICN") a proposal aimed at offering companies and their employees or managers an efficient system for reporting cartel behaviour while preserving incentives to enter into leniency programmes in multiple jurisdictions.

I. The Proposal

The proposal seeks to create a one-stop-shop marker system providing a mechanism for applicants to apply for leniency with a marker application before a single agency, thereby avoiding conflict with another applicant and becoming "first-to-file" in another jurisdiction. This would enable a successful applicant to reserve its place in the queue in all jurisdictions participating in the system by applying for the marker in only one of them. While in general the proposal of the one-stop-shop marker system might be valuable and beneficial to large multinational companies, it can also, to a certain extent, jeopardize incentives to leniency programmes at national level. In addition, the resulting "forum shopping" to identify the "sole agency" for the marker application might lead to the overexposure of those competition authorities which are already leading in the public enforcement of competition law worldwide due to a number of factors such as resources and independence from political influence.

The issue has recently been analysed by the OECD (DAF/COMP/WP3(2014)9, *Use of Markers in Leniency Programmes*) which studied the background and implications of this step forward in international cooperation in antitrust matters. The need to address such an issue has become increasingly compelling further to the judgement of 20 January 2016 (Case C-428/14, *DHL*) by which the European Court of Justice definitively held that, in the absence of an European Union- wide system of fully harmonised leniency programmes, an application for leniency to a given authority (including the European Commission) is not to be considered as an application for leniency to any other authority.

The proposed system would be voluntary for agencies and also for applicants, who could well decide to "opt in" to the one-stop marker and is based on the mutual recognition of the marker application.

However, once the opting-in applicant has made a valid marker request, the mechanism would allow the agency which has received and cleared the marker application to

immediately notify all the other jurisdictions explicitly mentioned by the applicant that the one-marker had been granted. In practice, the marker applicant should clearly specify the jurisdictions covered by the marker and to be therefore notified based on a certain minimum information which he declares to have in relation to those jurisdictions.

This could easily be done through the creation of a platform where the agency receiving the application informs all the other requested agencies not only of the exact timing of the filing, but also of the minimal information necessary to identify the cartel. To avoid losing its priority, the agency concerned should be entitled to ask the applicant to integrate its application in case of lack of some minimal information, or presence of clerical errors, which should not put in question its validity from the outset.

Subsequently, the successful marker applicant should have to complete its leniency application in all the affected jurisdictions under the substantive standard required by each of these jurisdictions within an agreed time period provided under the one-stop-shop system. Consequently, the one-stop-shop marker system cannot be applied in the jurisdictions where formal proceedings have been already opened.

In this regard, it should be clear that participating in the one-stop process does not constitute a general waiver for all purposes. The applicant should be free to negotiate waivers in each of the jurisdictions in which it has applied with respect to its continuing its participation in the leniency procedures

An important example of one-stop is provided by the international patent regulations, in accordance with the Paris Convention Treaty ("PCT") signed by more than 140 countries. This regulatory system includes an international patent application that provides "first to file" protection to the first applicant under the PCT regardless of where the patent has been filed: in a nutshell, the applicant gains protection, recognized by participating PCT jurisdictions, from the date of the first filing.

Thus, the same first-to-file approach could be regarded as a benchmark in order to establish a one-stop-shop for leniency markers. Under this scenario, the first applicant to file with the one-stop-shop would be granted a marker date that would be respected by the agencies of jurisdictions other than where the application was filed.

The practical effect of the proposed system is that, pending the marker application, none of the other notified agencies can open an investigation before the applicant completes the leniency application within the due deadline.

II. Some practical issues

ICC is aware that the rules on marker applications in each country differ with respect to the possibility of having a mandatory or discretionary system for requesting acceptance of the application. Our proposal does not address this issue.

Instead, as a part of its proposal ICC suggests that there be an indication of a uniform and common minimum period of time (not less than 30 days) that all the competition authorities

participating in the "one-stop" system for leniency markers are obliged to grant to the applicants in order to proceed with the leniency application. In order to avoid opportunistic behaviours of marker applicants, it might be worth suggesting not just a congruous time of not less than 30 days to complete or perfect the application but also – most importantly – a maximum time period of – for instance – 45 days or in any case no more than 60 days to perfect the marker application in all relevant jurisdictions. A longer period of time would unduly penalize other potential leniency applicants.

Finally, in order to avoid any opportunistic behaviour on the part of marker applicants, ICC believes that any marker request could be considered complete only when the following information has been received by the participating authority:

- **Name** (i.e. the applicant's name and contact information);
- **Type / Nature of the conduct** (e.g. price fixing, bid rigging, market allocation as well as brief description of reporting conduct);
- **Products(s) / Service(s)** (affected by the alleged cartel);
- **Geographic Area(s)** (affected by the alleged cartel or that the applicant suspects may be affected);
- **Time / Duration** (e.g. the applicant's participation in the alleged cartel in the following form: from [date of entering into anti-competitive agreement / collusion] to [date of withdrawal from an alleged cartel or information applicant still remains in it]);
- **Other Parties** (involved in the alleged cartel); and
- **Other Competition Authorities** (a list of the other jurisdictions affected by the alleged cartel and where the applicant requests a marker under the system).

The aforementioned information is the only information to be transferred to the competition agencies indicated by the applicant. In this respect, a standardized information form – structured in such a way as to provide all competition agencies indicated by the applicant with such minimal information – could be useful in reducing transaction costs and ensuring legal certainty.

A standardized form could also result in a valuable tool for encouraging leniency applications by small- and medium-size enterprises (SMEs), which are often less familiar with cross border legislations and jurisdictions entailing antitrust proceedings.

III. Conclusion

ICC's proposal to deepen the discussion on the creation of a one-stop-shop for leniency markers could be implemented through ICN while leaving individual jurisdictions the choice to decide whether they wish to participate in it or not.

The purpose of this network would be to: i) facilitate cooperation among the opting-in agencies, ii) notify the applicant of the grant of the marker once it has been released by a single agency and, consequently, iii) exchange cartel information and evidence unveiled with the other participating jurisdictions.

In the event that ICN decides to implement or adopt such a proposal, the potential advantages for business could be as follows:

- i) seek conditional leniency in all the jurisdictions affected by the cartel in one efficient procedure;
- ii) avoid, on the one hand, multiple and simultaneous applications in several jurisdictions, and therefore, save time and resources; and
- iii) reduce, on the other hand, the time pressure put on the applicant by inconsistent time frames in numerous jurisdictions with respect to developing supporting evidence to complete the marker application within the time period set by the competition agency.

Potential advantages for the agencies could include the following:

- i) potential discovery of multi-jurisdictional cartels at an early stage; and
- ii) enhanced inter-agency cooperation during the investigations promoted by a harmonisation of the time frames required to develop foundation evidence.

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