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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**Session II: Leniency Programmes in Latin America and the Caribbean –  
Recent Experiences and Lessons Learned**

-- Contribution from Portugal --

12-13 April 2016, Mexico City, Mexico

*The attached document from Portugal is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.*

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# LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



## 14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

### Session II: Leniency Programmes in Latin America and the Caribbean – Recent Experiences and Lessons Learned

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#### -- CONTRIBUTION FROM PORTUGAL\* --

#### 1. The Portuguese Leniency Programme

1. The Portuguese Leniency Programme was first approved by the Portuguese Competition Authority (PCA) in 2006. Six years later, in 2012, with the adoption of the new Competition Act (approved by Law 19/2012, 8<sup>th</sup> May), the framework of the leniency programme was incorporated into its legal provisions (Chapter VIII – Articles 75 to 82 of the 2012 Competition Act), and new procedural rules (Regulation 1/2013 of 3<sup>rd</sup> January) and guidelines were approved<sup>1</sup>.

2. The aim of the Leniency Programme is to increase cartel detection and to ensure effective enforcement against the most serious competition infringements, thus also strengthening deterrence. This policy purpose is valid for both to first-in applicants and subsequent applicants. By rewarding cooperation of cartel members, the leniency programme has been key in the detection, investigation and prosecution of cartels.

3. The 2012 reform of the Portuguese Leniency Programme aimed at further aligning it with the Model Leniency Programme of the European Competition Network, thus ensuring improved cooperation at regional level. The reform also took into account the PCA's experience in applying the 2006 leniency programme in order to enhance its effectiveness in fighting cartels.

\* This is a contribution from the Portuguese Competition Authority to Session II of the Latin American and Caribbean Competition Forum to be held in Mexico on 12 and 13 April 2016.

<sup>1</sup> [http://www.concorrenca.pt/vEN/Praticas\\_Proibidas/Leniency\\_Programme/Pages/Leniency-Programme.aspx](http://www.concorrenca.pt/vEN/Praticas_Proibidas/Leniency_Programme/Pages/Leniency-Programme.aspx).

4. The main innovations introduced in the Portuguese Leniency Programme in 2012 were: (i) application of the programme only to the most serious competition infringements, cartel cases; (ii) increase in the number of undertakings that can benefit from reduction of fines; (iii) introduction of provisions for the protection of confidential information provided by the leniency applicant including the possibility to submit oral applications; (v) improvements in the marker system<sup>2</sup>; and (iv) possibility to submit summary applications in English<sup>3</sup>.

5. In this contribution, we will first describe the main features of the Portuguese leniency programme, secondly the interplay with settlement procedures and private enforcement, and conclude with final remarks.

## 2. Main features of the Portuguese Leniency Programme

6. Under the Portuguese Leniency Programme, leniency is available to both undertakings and individuals, namely members of the governing bodies of undertakings that may be held liable for competition infringements under the Portuguese Competition Act<sup>4</sup>.

7. The Portuguese Leniency Programme is applicable to administrative offence proceedings concerning cartels, whereby the Portuguese Competition Authority may grant (i) immunity from fines to the first-in applicant that reveals its participation in an alleged cartel and provides evidence<sup>5</sup>, or (ii) a reduction of fines to subsequent applicants, which provide evidence with significant added value with respect to the information already in possession of the PCA<sup>6</sup>.

8. The PCA will grant immunity from a fine or reduction of fines to applicants that comply with duties of cooperation, which imply that the applicant must (i) provide all the information and evidence in its possession or which comes into its possession or under its control; ii) reply promptly to any request for information that may contribute to the establishment of the facts; iii) refrain from any acts that may hamper the investigation, namely the destruction, falsification or concealment of information or evidence related to the infringement; and iv) refrain from disclosing the existence or the content of the application, or the intention to submit a leniency application, unless otherwise agreed with the PCA.

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<sup>2</sup> For a more complete overview of the Portuguese marker system, see PCA's contribution to the WP3 Roundtable "Use of Markers in Leniency Programs" (DAF/COMP/WP3/WD(2014)42).

<sup>3</sup> The PCA may accept a summary leniency application if the applicant has submitted or may submit a (full) leniency application to the European Commission, when the infringement affects competition in more than three European Union Member States. In these circumstances, the European Commission is particularly well placed to investigate the infringement, under the provisions of paragraph 14 of the Commission Notice on cooperation within the Network of Competition Authorities.

<sup>4</sup> Sanctions on individuals under the Portuguese Competition Act have an administrative nature and are applicable to members of the board of directors or the supervisory board of legal persons and equivalent entities, as well as those responsible for the executive management or supervision of areas of activity where the competition infringement has occurred.

<sup>5</sup> As provided in Article 77 of the Competition Act, the PCA will grant immunity from a fine to the first-in applicant that reveals its participation in an alleged agreement or concerted practice, provided that the undertaking is the first to submit information and evidence which in the PCA's view will enable it to: a) Justify the request for judicial warrant to carry out inspections and, at the time of the application, the PCA did not yet have sufficient information to conduct such an investigation; or b) detect an infringement provided that, at that time, the PCA did not yet have sufficient evidence on the alleged infringement.

<sup>6</sup> The level of reduction of the fine to applicants that provide information and evidence of significant added value is determined as follows: a) the first applicant - a reduction of 30% to 50%, b) the second applicant - a reduction of 20% to 30%, and c) the subsequent applicants - a reduction up to 20%.

9. Regarding the involvement of the applicant in the infringement, as a general rule the applicant must end its participation by the time it submits the leniency application. However, there may be instances in which the PCA may allow for the continuation of the involvement to the extent reasonably necessary to preserve the effectiveness of the investigation.

10. For immunity applicants, there is an additional requirement that it has not coerced the other undertakings to participate in the infringement.

11. In determining the reduction of the fine, the Authority considers the order in which the information and the evidence were presented, as well as its significant added value to the investigation and to the establishment of the infringement.

12. In a recent cartel case (PRC/2014/2 – prefabricated modules), the PCA decided to award a higher reduction to the applicant which was third in line in the leniency queue (40%) based on the added value of the information and evidence presented by the undertaking when compared with the information and evidence provided by the second in line, which was awarded a reduction of 30%<sup>7</sup>. In this case, the PCA considered that the information provided by the third applicant was more precise and detailed than the one provided by the second applicant, thus leading to greater reduction of the fine.

13. Leniency applications can be made in written or oral form in the context of a meeting held in the premises of the PCA, and a marker system is available both to immunity applicants and applicants seeking a reduction of the fine.

14. Under the marker system, the PCA may, under its own initiative or upon a duly substantiated request, grant the applicant a marker, establishing a period of at least 15 days for the applicant to complete the leniency application.

15. The deadline to complete a marker may be altered in order to allow for effective cooperation with other European competition authorities within the European Competition Network. With this option, the PCA sought to accommodate the need for leniency applicants to adjust their internal evidence collection procedures to the legal regime of different national legal systems, in particular, regarding information and deadline requirements.

16. Since it was first introduced in 2006, the PCA has granted markers in five of the six leniency cases it has dealt with to date. In all instances markers were granted upon request from leniency applicants.

### **3. Interplay between leniency and settlement procedures**

17. The settlement procedure was first introduced in the Portuguese legal framework with the adoption of the 2012 Competition Act. Under the settlement procedure, the PCA rewards the cooperation of investigated parties by way of a reduction of fine. The parties must acknowledge their participation and liability for a competition infringement, waiving certain procedural steps, thus expediting procedures.

18. The use of the settlement procedure is a policy priority for the PCA given the procedural gains and efficiencies which may be generated, as well as the ability to ensure a more effective competition enforcement.

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<sup>7</sup> More information on the case:

[http://www.concorrenca.pt/vEN/News\\_Events/Comunicados/Pages/PressRelease\\_201518.aspx?lst=1&Cat=2015](http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201518.aspx?lst=1&Cat=2015).

19. Leniency and settlements are complementary tools in the PCA's competition enforcement policy: leniency is an investigative tool, aimed at unearthing cartel infringements and collecting evidence, whereas settlements provide for a faster and more efficient way to conclude the administrative procedure, thereby allowing for procedural savings and internal efficiencies.

20. However, reductions awarded under the settlement procedure, which are cumulative with the reductions awarded under the leniency programme, must not undermine the incentives of applicants to cooperate under the leniency programme. Therefore a fine equilibrium must be established in order to preserve the incentives of both instruments.

21. By way of example, the third settlement case decided by the PCA was both a settlement and a leniency case (PRC/2014/2 – prefabricated modules, mentioned above). The case was triggered by an immunity application, and three further leniency applications were filled following dawn-raids on the premises of all the undertakings involved in the infringement.

22. Based on all the evidence collected, the case was a clear cut infringement case and a strong candidate for settlement. In this case, the PCA decided to grant immunity to the first-in applicant, a 30% reduction to the second in line, a 40% reduction to the third in line and 20% reduction to the fourth in line. As a result of the settlement procedure, the PCA decided to grant an additional 10% reduction of the fine.

23. The different levels of reduction of fines ensured that incentives to cooperate under the leniency programme remain higher than for cooperation under the settlement procedure.

#### **4. Interplay between leniency and private enforcement**

24. The success of private enforcement depends in a high degree on vigorous public enforcement. Robust investigations by competition authorities are the first step towards solid civil actions. Therefore, preserving the effectiveness of leniency programmes is key in ensuring successful follow-on private damages actions.

25. One of the most important amendments introduced in the Portuguese Leniency Programme in 2012 was the introduction of specific provisions for the protection of leniency information and the possibility to submit oral leniency applications.

26. The protection of leniency documents is key in ensuring a balance between public and private enforcement, thus guaranteeing that cartel participants who cooperate with competition authorities are not worse-off than non-cooperating cartelists in private damages claims<sup>8</sup>.

27. Article 81 of the 2012 Competition Act guarantees the confidentiality of the leniency application along with the confidentiality of all documents and information submitted in support of the application.

28. Access by parties to leniency documents is allowed pursuant to the exercise of rights of defence in the proceedings. However, no copies are permitted unless authorized by the applicant. Access by third parties to applications, documents and information submitted by the leniency applicant is subject to its consent.

29. The parties concerned in the proceedings shall not have access to copies of the leniency applicant oral statements and third parties shall be denied access to the oral statements made by the leniency applicant.

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<sup>8</sup> On the interplay between public and private enforcement, see PCA's contribution to the WP3 Roundtable "Relationship between Public and Private Antitrust Enforcement" (DAF/COMP/WP3/WD(2015)15).

30. Therefore, the current Portuguese legislation aims at striking a balance between access to file and the protection of the leniency programme as an important tool for detection of infringements and efficient handling of investigations by the PCA.

## 5. Final remarks

31. The overall experience of the PCA with its Leniency Programme has been very positive. The Leniency Programme has proved to be an effective way to attract cartel participants to come forward and to reward them for their collaboration.

32. The PCA is fully committed to applying its Leniency Programme and to encourage applications from infringers willing to admit their participation in a cartel.

33. Since the reform in 2012, the PCA received twelve leniency applications and has opened proceedings in five cases which were triggered by leniency requests. These cases form part of a growing trend of leniency applications which confirm the underlying benefits undertakings are able and willing to take by coming forward and allowing the PCA to effectively implement its enforcement policies.

34. Nevertheless, the PCA aims at continuously increasing the overall awareness regarding its Leniency Programme. Following the successful Fair Play Campaign<sup>9</sup>, the PCA will proceed with a new campaign in 2016 on its leniency programme targeted at the legal and business communities, namely business associations.

35. An effective leniency programmes is also only possible with transparent and predictable procedures, as well as by ensuring vigorous enforcement and an adequate level of fines. In this regard, the PCA has set as a priority to strengthen *ex-officio* detection of cartel infringements, namely by the use of screens and other methods in the area of public procurement.

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<sup>9</sup> <http://www.concorrenca.pt/fairplay/>.