

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

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Portugal --

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. The Portuguese marker system

1. The Portuguese Leniency Programme includes a marker system. A marker system has been in place in Portugal since the adoption of the first Leniency Program in 2006.
2. The Portuguese Leniency Program was established by the Law No. 39/2006 of 25 August (“Law No. 39/2006”) and the applicable procedural rules were set out in the Portuguese Competition Authority’s (“PCA”) Regulation No. 214/2006, 22 November (“PCA Regulation No. 214/2006”).
3. These rules were in place until 2012 when a new Competition Act entered into force (Law No. 19/2012, 8 May), which repealed Law No. 39/2006 and PCA Regulation No. 214/2006.
4. The current Leniency Program is now part of the Portuguese Competition Act (chapter VIII - Articles 75 to 82) and new procedural rules applicable to leniency applicants were approved by the PCA by PCA Regulation No. 1/2013, 3 January (“PCA Regulation No. 1/2013”). The marker system is currently provided for in Article 4(1) to (4) of PCA Regulation No 1/2013.
5. One of the main goals of the 2012 reform of the Leniency Program was to further align it with the Model Leniency Program of the European Competition Network (ECN). One of the most relevant changes was the increased flexibility in setting the time-limit for the perfection of the marker, in particular to allow for a smooth cooperation between competition authorities within the ECN, as described below.
6. Another important innovation is the possibility for leniency applicants to submit their requests under an oral procedure, in order to ensure an adequate protection from discovery in civil damages proceedings.
7. Moreover, legal certainty for applicants regarding the functioning of the marker system was increased, as further indications were introduced in the Notice published by the PCA.
8. The marker is available to leniency applicants¹ seeking full immunity (Type 1 applicants) and/or a reduction of the fine (Type 2 applicants)².
9. Information related to the Portuguese Leniency Programme is available on the PCA's website, including the relevant legislation and notice, in Portuguese and in English³.

¹ According to the Portuguese Leniency Program, undertakings and the management of undertakings may apply for leniency, as both may be investigated and ultimately fined in administrative proceedings regarding cartels. The leniency application by an undertaking also benefits its management, as long as there is full and continuous co-operation with the PCA. On the contrary, the application by an individual does not benefit the undertaking (see Article 79 of the Portuguese Competition Act).

² The level of reduction of the fine is determined as follows: a) the first company to provide information and evidence of significant added value can qualify for a reduction of 30% to 50%, b) the second undertaking to provide information and evidence of significant added value can qualify for a reduction of 20% to 30%, c) the subsequent companies to provide information and evidence of significant added value can qualify for a reduction until 20%. If the application for a reduction of the fine is made after the notification of the statement of objections, the percentages mentioned shall be reduced by half. In determining the reduction of the fine, the Authority considers the order in which the information and the evidence were presented and its significant added value to the investigation and to the establishment of the infringement.

10. Moreover, the PCA has published a brochure on leniency named “*STOP. Be Brave*”⁴ and has organized a Roadshow under the motto “*Fair Play*” covering various cities in Portugal, from October to December 2014, in which it raised stakeholders’ awareness of the leniency program, among other topics⁵.

2. “Rationale” of the marker system

11. The purpose of the Portuguese marker system is to protect an applicant’s place in the leniency queue, while granting the applicant additional time to gather information and evidence necessary to ensure the viability of the leniency application.

12. From the perspective of the PCA, the marker system has the advantage of encouraging applicants to cooperate with the Authority, by allowing to approach it with a minimum level of information.

13. This is achieved by a simplified procedure which grants applicants legal certainty, namely by listing the information and evidence requirements that they must comply with in the initial leniency application in order to be eligible for a marker.

14. At the same time, the marker system ensures that applicants submit the most complete and accurate information available, through the concession of additional time to gather evidence. This fosters the investigative powers of the PCA by ensuring the gathering of strong evidence to support the finding of an infringement. Moreover, the PCA will only grant conditional immunity or reduction of fines to well-grounded applications, avoiding the rejection of incomplete applications that could in fact develop into a valuable source of information.

15. Furthermore, the system also aims at avoiding manipulation by applicants. The granting of a marker is dependent on the provision of a minimum amount of information by the applicant. This prevents applicants from using the marker system in an abusive way with the intention of merely gaining an advantage in the ranking of applicants without the PCA being able to truly assess and evaluate the type of information that the applicant effectively has in its power. Therefore, this systems enables the Authority to only grant markers when the viability of the application and the corresponding cooperation with the Authority are ensured.

3. Components of the marker

3.1 *Obtaining a marker*

16. Under Article 4 of PCA Regulation No. 1/2013, following the submission of a leniency application, the PCA may, by its own initiative or upon a duly substantiated request, grant the applicant a marker, establishing a period for the completion of the leniency application.

17. In order to qualify for a marker, the applicant must comply with information requirements. The applicant must, thus, provide its name and address, and information regarding the participants in the alleged cartel, the affected product(s) and/or service(s) and geographic area(s) covered, the estimated duration of the alleged cartel and the nature of the alleged cartel conduct, as well as mention any leniency

³ For information in English:
http://www.concorrenca.pt/vEN/Praticas_Proibidas/Leniency_Programme/Pages/Leniency-Programme.aspx.

⁴ Available on <http://www.concorrenca.pt/fairplay/assets/brochuraclemencia.pdf>.

⁵ More information on the “Fair Play” Roadshow on <http://www.concorrenca.pt/fairplay/>.

applications that it has or intends to submit to other authorities in relation to the alleged cartel. The applicant must also duly justify its request for a marker.

18. In line with the ECN Model Leniency Program, informal or anonymous leniency applications will not be considered by the PCA as eligible for a marker. The PCA may be approached in an informal way prior to the submission of an application for the discussion of general aspects of the leniency program or issues related to the infringement, including on a hypothetical basis. However, in order to be granted a marker a formal application must be submitted, either by writing or orally.

19. The grant of a marker is a discretionary decision by the PCA.

3.2 *Completing a marker*

3.2.1 Time-limits

20. As a general rule, the PCA will grant leniency applicants a period no shorter than 15 days for the completion of the marker, according to the circumstances of each case. The flexibility on the deadline for the completion of the marker was introduced in the 2012 legislative reform, replacing the former rule of 15 working days for the perfection of the marker.

21. In addition, the PCA may grant the leniency applicant a longer or shorter deadline whenever justified for reasons related to the cooperation with other European Competition Authorities, in accordance with Regulation (EC) No 1/2003, of December 16, 2002. It seeks 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 when applying for leniency in different European jurisdictions.

22. If the applicant completes the application within the period granted, the PCA considers the application to have been made on the date and time of receipt by the PCA.

3.2.2 Information requirements

23. Within the time-limit established by the PCA, the leniency applicant must provide further information and evidence to the application, in order to meet the thresholds for conditional immunity or reduction of fines.

24. A leniency application will be assessed under the legal criteria established in Article 77 of the Portuguese Competition Act for immunity applications and Article 78 for reduction applications.

25. In order to complete the marker, the information and evidence provided must contain complete and accurate details of the agreement or concerted practice and the companies involved, including its purposes, activities and means of operation, the product or service concerned, the geographic scope, the duration and specific information about dates, locations, content and participants and all relevant explanations provided in support of the leniency application.

26. In addition, further requirements are established, which differ from immunity and reduction of fine.

27. Regarding immunity from a fine, the applicant must reveal its participation in an alleged agreement or concerted practice, provided that it is the first to submit information and evidence, which, in the PCA's view, will enable it to: a) Justify the request for a judicial warrant to carry out dawn raids and at the time of the application, the PCA did not yet have sufficient information to conduct such an

investigation (Type 1A applicant); or b) check for the finding of an infringement, provided that at that time, the PCA did not yet have sufficient evidence to find an infringement (Type 1B applicant).

28. As regards to reduction of fines, pursuant to Article 78, undertakings must provide information and evidence of an infringement which represents significant added value by reference to the information and evidence already in the possession of the Authority.

29. Moreover, the applicants must comply with the following cumulative conditions in order to obtain immunity or reduction of a fine:

- a) Cooperation: applicants must cooperate fully and on a continuous basis with the PCA from the time of its application for leniency and complies with the obligation to: i) provide all the information and evidence which it possesses 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 performing any acts that may hamper the investigation, namely the destruction, falsification or concealment of information or evidence related to the infringement; iv) refrain from disclosing the existence or the content of the application, or the intention to submit an application for immunity, unless otherwise agreed by the PCA;
- b) End of participation in the cartel: applicants must end its involvement in the infringement until such time as it provides the PCA with the information and evidence referred to in subparagraph a), except to the extent that it is reasonably necessary, in the view of the PCA, to preserve the effectiveness of the investigation; and

30. Immunity applicants must also not have coerced the other undertakings to participate in the cartel.

31. Once the application for immunity has been validated, the PCA will inform the applicant whether it fulfils the criteria, thereby granting the undertaking conditional immunity from fines in writing.

32. Regarding the reduction of the fine, if the PCAs concludes that the evidence supporting the application, has significant added value by reference to the information and evidence already in the possession of the Competition Authority, it shall inform the applicant of its intention to apply a reduction of the fine, with the indication of the applicable percentage range.

33. The PCA will take its final position on the grant of immunity or reduction of the fine at the end of the prosecution proceedings.

3.3 *Non-completion of a marker*

34. If the applicant does not complete the marker within the specified period, the application is rejected and the documents are returned to the applicant. The documents submitted may be considered as cooperation with the PCA as a mitigating circumstance when setting the fine, if the applicant so requests within 10 working days following the notification of the decision taken by PCA on the leniency application.

35. This is a regime similar to the rejection of a complete leniency application.

36. If the PCA finds, upon examination of the request, that an application for immunity is not available due to failure to comply with the conditions, it informs the applicant thereof in writing. If the immunity application is rejected, the applicant has 10 days from notification of the Authority's decision, to withdraw its application and the supporting evidence disclosed for that purpose or to request the Authority to consider both for the purposes of a reduction of the fine. The same applies to applications for a reduction

of fines, if the PCA concludes outright that the evidence submitted in the request does not have a significant added value by reference to the information and evidence already in its possession.

37. The cooperation provided throughout the proceedings by the applicant which failed to qualify for immunity or for a reduction of the fine will be considered in the determination of the fine, in accordance with Article 7 of PCA Regulation No. 1/2013 and Article 69(1) subparagraph *i*) of the Competition Act.

4. Access to leniency documents

38. Article 81 of the Competition Act guarantees the confidentiality of the leniency application including the request for a marker, along with the confidentiality of all the documents and information submitted in support of the application.

39. Access by third parties to applications, documents and information submitted by the leniency applicant is only granted subject to the consent of the leniency applicant.

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

41. The PCA will grant to the parties concerned in the proceedings access to the leniency applications and the supporting documents and information following the notification of the statement of objections, for the purpose of the exercise of the rights of defence. However, any reproduction of the leniency applications is strictly forbidden unless duly authorized by the leniency applicant.

5. Final remarks

42. The experience-sharing at the international level, in particular within the European Competition Network (ECN) and the International Competition Network (ICN), have clearly influenced the options taken by the PCA in relation to its marker system, as did the contributions received during the public consultation which was held prior to the adoption of PCA's PCA Regulation No. 1/2013.

43. The marker system in place since the adoption of the new PCA Regulation in 2013 is thus further aligned with the marker system foreseen in the ECN Model Leniency Programme.

44. In contrast to the 2006 framework, the PCA Regulation No. 1/2013 clearly defines the minimum requirements necessary for a leniency applicant to qualify for a marker, thus increasing the level of legal certainty for applicants in relation to the possible outcome of the marker application.

45. Moreover, a flexible time frame for the completion of the application was introduced, allowing for a case-by-case assessment by the PCA taking into account particular circumstances alleged by the applicants to justify the concession of a longer period of time to allow for the submission of detailed information and evidence, and needs of cooperation within the ECN. The legislative amendments in 2012 have most likely contributed to an increase of leniency applications in general and of the marker system.

46. Since it was first introduced in 2006, the PCA has granted markers in four of the six leniency cases it has dealt with to date. In all instances markers were granted upon request of the applicants. The time frame granted for the completion of the leniency application has evolved after the 2012 legislative reform. Under the 2006 procedural framework, a strict 15 working days rule applied. After 2012, in the majority of cases, the time set by the PCA for completion of the marker has been 20 working days.

47. From the standpoint of the PCA, the marker system has proved to be an effective way to attract and challenge applicants to enter the leniency race and to reward them for their cooperation, while ensuring that an adequate evidential threshold is safeguarded in order to guarantee the effectiveness of the leniency program.

48. The PCA is fully committed to applying the marker system and to encouraging applications from undertakings and individuals willing to admit their participation in a cartel.