

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

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Brazil --

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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. Preliminary remarks

1. Leniency programs are currently considered one of the most effective instruments to prevent and punish cartels. The signature of an agreement with a participant of a cartel or of any other collective anticompetitive conduct allows the lenient to report the infringement to the authority and to cooperate with it in the investigations in exchange of administrative and criminal immunity or fine reductions. As recognition to the effectiveness of leniency programs, many jurisdictions adopt these programs in order to disclose such conducts and enhance anti-cartel enforcement.

2. In this context, marker systems play a special role within an enforcement policy to fight cartels. In some cases, a company or individual willing to denounce a cartel may not have yet gathered all the documentation and/or evidence required for an ordinary leniency application. The main function of a marker system is to enable the applicant to claim a place in the queue even without all the required documentation for a leniency agreement. A marker is usually a commitment issued by a competition authority stating that a company or individual is the first to offer cooperation in a possible investigation. The owner of a marker is granted a period of time in which the evidence and documentation must be gathered and provided in order to perfect the marker.

3. For the private sector, a marker system makes less burdensome for participants in a cartel to self report, as it enables the companies to provide preliminary information at a first moment and then a more complete documentation for the signature of the leniency agreement. At the same time, a marker system also makes the cartel more instable and tends to stimulate the race between its members to be “first at the door”, considering that only the first one may benefit of full immunity. In this way, a marker system discourages a “wait-and-see” corporate strategy for reporting wrongdoing to authorities, which is also in the interest of competition authorities to an effective enforcement policy.

4. The marker is temporary by nature, as it grants a time period to be perfected. This time period must be relatively short in order to stimulate the company to conduct investigations internally, gather all the evidence as soon as possible, but at the same time assure a certain quality of the documents to be provided. A period of one month is usually a reasonable time period, which can be eventually extended, without prejudice of still being considered the first one in line.

5. In the next sections, an overview of the Brazilian Leniency Program will be provided, including the requirements for a marker request, the conditions and the confidentiality of the marker, as well as the time period granted by the Brazilian Competition Authority (CADE) for the applicant to perfect the marker.

2. The Leniency Program in Brazil

6. The leniency program for competition enforcement exists in Brazil since 2000. It adopts a “winner-takes-all approach” and serves as an important tool to discover and sanction cartels, although the program is not restricted to cartel conducts. The scope of application also includes bid-rigging and the crime of participating in a criminal organization connected to antitrust infringements.

7. Both companies and individuals can benefit from the leniency program and the leniency agreement may lead to full immunity in both administrative and criminal prosecutions. Nevertheless, it does not protect the beneficiary from civil liability actions brought by third parties. The authority’s decision to grant full immunity or just a penalty reduction will mainly depend on the stage of the investigations (if existent).

8. According to the Brazilian Competition Law, in order to benefit from the leniency agreement, the following requirements must be fulfilled: (i) the applicant must be the first to come forward and notify the practice; (ii) the applicant must completely cease its involvement in the infringement; (iii) the investigative body of the competition authority must not have enough evidence yet to ensure the conviction of the applicant; and (iv) the applicant must recognize his guilt in the infringement and fully cooperate with the investigation.¹

9. If the applicant is not eligible to full immunity (either for not being the first-in or due to an advanced stage in the authority's investigation), it can still be eligible for a settlement (i.e. fine reductions) depending on the extent of its cooperation. Hence, in Brazil there is the possibility of subsequent applicants for granting a lenient treatment, although this modality is not formally included in the leniency program but rather in a settlement program.²

10. Once CADE's Tribunal adjudicates a case in which a leniency agreement took place, it must verify whether the applicant complied with the terms and conditions of the negotiated agreement. If full compliance is confirmed, the benefit, which may vary from a full immunity to a fine reduction, is granted.

11. The program has been remarkably successful so far. There are some international cases that have been initiated through a leniency agreement in Brazil, for instance the marine hoses, the refrigerating compressors and the air cargo cartel cases. The last one is particularly interesting since it may be considered the first international case, initiated by a leniency application, which was sanctioned by CADE. This cartel was carried out from 2003 to 2005 and the air freight companies fixed prices and dates of fuel surcharges.

12. Furthermore, especially as a result of the new settlements regulation approved in 2013, a number of cases initiated by leniency applications have led to subsequent settlements requested by other defendants that can offer new evidences to deepen the investigation. The Brazilian Leniency Program also foresees a leniency plus agreement, which may result in a fine reduction.

3. The Marker System in Brazil

13. The Brazilian Marker System is not established by the Competition Law. Instead, it was initially created by Regulation n° 04/2006 of the Brazilian Ministry of Justice³, a few years later to the first leniency agreement concluded in 2003 in a private security cartel case. Nowadays, the marker system is established and regulated by CADE's Internal Regulation. It expressly states that a potential leniency applicant, who has not gathered all the required information and documentation to be eligible for a formal leniency application, may request the CADE's General Superintendence to issue a "declaration", which takes shape

¹ The requirements can be found in article 86, § 1, of the Brazilian Competition Law (Law n° 12.529/2011).

² The main provisions for the settlement procedure are established in the Brazilian Competition Law: "Art. 85 - In the administrative proceedings referred to in items I, II and III of Art. 48 of this Law, CADE may obtain from the defendant a cease-and-desist commitment related to the practice under investigation or its harmful effects, if duly grounded, for convenience and at the proper time, and if it understands that it complies with the interests protected by law. §1 – The agreement should contain the following elements: I - the specification of the defendant's obligations not to practice the investigated activity or its harmful effects, as well as obligations deemed applicable; II – the establishment of the fine to be paid in case of failure to comply, in full or in part, with the undertaken obligations; III - establishment of the pecuniary contribution to be paid to the Diffuse Rights Defense Fund, whenever applicable".

³ Portaria n° 4, from 5 January 2006. Available at: <http://www.cade.gov.br/upload/2006portariaMJ04.pdf>.

of a statement letter, from CADE certifying its first position in the line for leniency concerning a particular anticompetitive practice.⁴

14. The requirements for issuing a marker are much less rigid than the ones for the leniency agreement: the applicant must be the first-in and it must provide its complete identification and appoint the other participants of the cartel. Also, it must report the products, services and geographic area affected by the anticompetitive practice and, if possible, its duration. If all requirements are fulfilled, the marker may be granted, and the General Superintendence has three days to issue it. In a nutshell, there are basically four questions to be answered in order to request a marker to CADE: what, who, where and when? Nevertheless, CADE retains full discretion whether to sign or not a leniency agreement at the end of the process of leniency agreement negotiation.

15. If CADE is already negotiating a leniency agreement under the same conduct at the time the marker is requested by a third party, the applicant will be registered in a waiting list, as a second-in, third-in and so on, with whom the authority will start dealing in case of failure in the ongoing negotiation. In case this ongoing negotiation process leads to a leniency agreement or if there is already a leniency agreement signed at the specific investigated market, the marker request will be submitted to the General Superintendence as a Cease and Desist Agreement request and may start a settlement procedure within CADE's settlement program.

16. According to CADE's Internal Regulation, once a marker is granted, the applicant has up to 30 days to provide all the documentation and the information required for a formal leniency application. The market may also be renewed according to CADE's discretion for same period of time.⁵

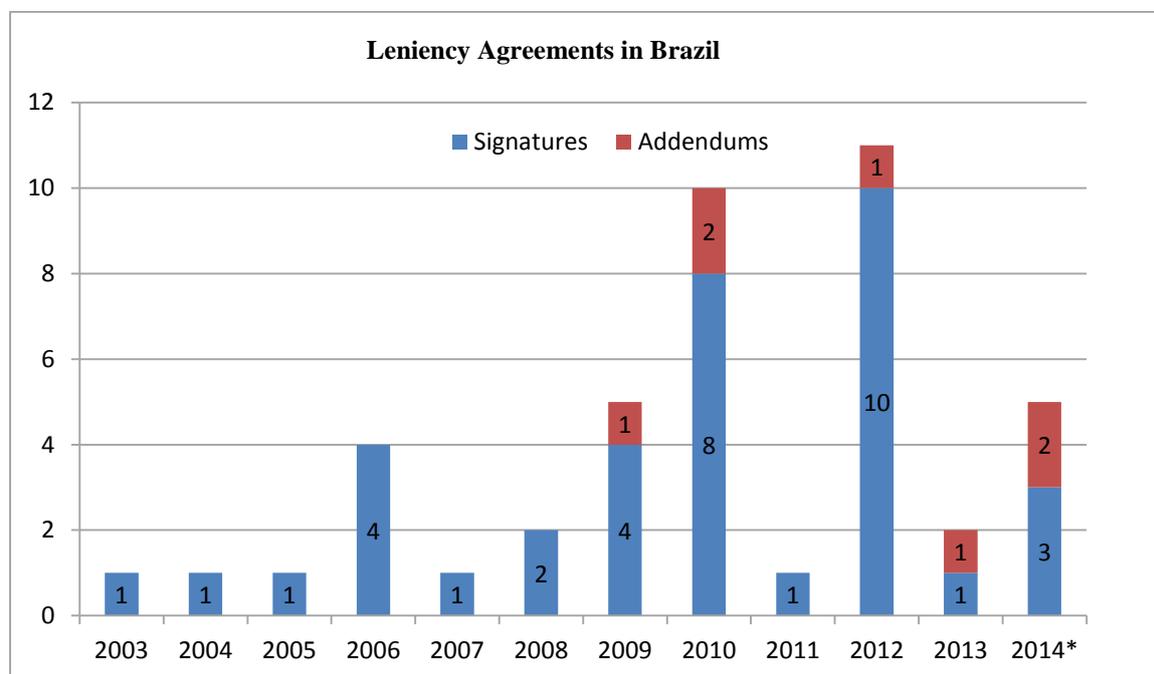
17. The confidentiality of the marker request is regulated by the rules of the leniency program. Hence, according to Brazilian Competition Law and to the CADE's Internal Regulation, the leniency and marker applications shall be treated confidentially, and only the individuals expressly authorized by the General Superintendent shall have access to the application.⁶

⁴ CADE's Internal Regulation (Resolution n° 1/2012, amended by Resolution n° 5/2013 and Resolution n° 7/2014): "Art. 199. The applicant who has not gathered all the information and documents required to formalize a leniency agreement application may request, orally or written, a statement from the General-Superintendence in which confirms that it has been the first one to present itself before the authority concerning a specific infringement to be reported or under investigation".

⁵ These rules may be found in CADE's Internal Regulation, in particular: "Art. 199. (...) §1° - In order to obtain the statement from the General-Superintendence, the applicant shall inform its complete qualification, the other participants of the infringement, the products or services affected, the geographic area affected and, if possible, the estimate duration of the reported infringement; §2° - After receiving the information mentioned in §1°, the General-Superintendence shall issue the statement within a maximum of 3 (three) days; §3° - The statement shall indicate a time period, no longer than 30 (thirty) days, in which the applicant must present the leniency agreement application to the General-Superintendence; §4° - The statement may be signed by the General-Superintendent, by his Chief of Staff, or by any other employee expressly appointed to do so by the General-Superintendent. The statement shall remain in possession of the General-Superintendence or the applicant, at the applicant's choice; §5° - At the applicant's discretion, the statement may contain only the time, date and products or services affected by the reported conduct".

⁶ Law 12.529/2011: "Article 86. (...) § 9 - The agreement proposal referred to in this Article is considered confidential, except in the interest of the investigations and the administrative proceeding". In the same line, CADE's Internal Regulation also has provisions related to confidentiality: "Art. 200. The leniency agreement application may be in oral or written form. §1° - The application shall be treated confidential, with access exclusive to people authorized by the General-Superintendent; §2° - In case of a written application, it will be filed as confidential and none of its content will be included in CADE's management system for documents".

18. Some numbers prove the success of the leniency program in Brazil, including its marker system. The table below indicates the number of leniency agreements and addendums signed in Brazil during the last 12 years:



* Until October 2014.

19. The Brazilian Leniency Program has proven to be very effective throughout the years of its existence. In the period of 2003 to 2014, 47 leniency agreements (including new leniency agreements and addendums) were signed with CADE and more than a dozen are under negotiation. While the “signatures” concern the number of leniency agreements that were signed, the “addendums” refer to changes in leniency agreements to enlarge the scope of the practice under investigation and/or add new beneficiaries, such as individuals that work in the beneficiary company.

4. Looking forward

20. The Brazilian Leniency Program has developed significantly in recent years and the creation of a marker system is a major example of an important improvement in the program. As there is always room to improve the marker system, CADE has been investing in an effective management of the leniency program, including its marker system.

21. In terms of case management strategy, CADE has been keen to reduce backlog and focus on better cases, with stronger chances of conviction. For this reason, it has rejected numerous cases that had weak evidences and has been more selective in the decision to open new cases. In this context, the quality of the evidences of an infringement became a key factor in the pre-investigation phase and the standards adopted in the analysis of evidence, provided by leniency applicants, are thus more severe (for instance, concerning the effects of the infringement in the Brazilian market, in cases of international conducts). The same goes for the commitment of beneficiaries to collaborate with the investigations. The marker system plays a key role in this strategy and it has enabled a better set of evidences and more cooperative relation with beneficiary companies, which are very useful to underpin condemnations. As a reminder, the Brazilian system adopts a “winner-takes-all approach” for the leniency program, so it is important for

companies to provide robust evidence of the infringement in order to foster its chances to the signature of a leniency agreement.

22. CADE has also been investing in knowledge management. In this sense, it is currently working on an internal guide to assist case handlers to deal with the leniency agreements procedures in all stages, including drafting documents. The objective is to provide a didactic guide to CADE's staff in both procedural and substantial issues that may arise in the leniency negotiation process. This initiative contributes to standardization of leniency procedures in Brazil and it fosters the retention of knowledge within the authority, in case of changes and rotations in the leniency team.

23. Last, CADE is also creating a Frequently Asked Questions (FAQ) page in the authority's website regarding the leniency program and rules, which will make much easier to clarify any doubts that may arise. The initiative was inspired by other jurisdictions that already have a FAQ accessible and it aims to improve legal certainty to companies that intend to seek for a marker in the Brazilian leniency program.