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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm

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1. Introduction

1. Leniency programmes are a key tool for competition enforcers. The success of a leniency programme depends on a number of factors, such as its scope, the level of fine reduction it provides or the interplay with other enforcement tools (e.g. settlement procedures, private enforcement).

2. The Portuguese Leniency Programme has been an important enforcement tool since its inception in 2006¹. Six years later, in 2012, the framework of the Leniency Programme was improved and incorporated into the legal provisions of the new Competition Act². Furthermore, the Autoridade da Concorrência (AdC) – Portuguese Competition Authority enacted new procedural rules³ and guidelines⁴.

3. The 2012 reform of the Portuguese Leniency Programme took into account the experience of the AdC in applying the 2006 Leniency Programme. In particular, it focused on increasing transparency, legal certainty and predictability, in order to enhance the programme's effectiveness in fighting cartels.

4. In addition, the reform aimed at further aligning the Portuguese legal framework with the Model Leniency Programme of the European Competition Network, thus ensuring improved cooperation at regional level.

5. In this contribution, we will describe the main features of the Portuguese Leniency Programme (section II), share our practical experience concerning challenges faced in its application (section III), discuss the need for coordination of leniency programmes (section IV) and conclude with final remarks (section V).

2. The Portuguese Leniency Programme

6. Under the 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 Act⁵.

¹ Law No. 39/2006 of 25 August 2006.

² Law No. 19/2012 of 8 May 2012 (2012 Competition Act). See, in particular, Articles 75 to 82 (Chapter VIII).

³ Regulation 1/2013 of 3 January 2013.

⁴ Notice regarding Regulation 1/2013 of 3 January 2013, available at http://www.concorrenca.pt/vEN/Praticas_Proibidas/Leniency_Programme/Pages/Leniency-Programme.aspx.

⁵ 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.

7. The Leniency Programme is applicable to administrative offence proceedings concerning cartels, whereby the AdC may grant (i) immunity from fines to the first-in applicant that reveals its participation in an alleged cartel and provides evidence⁶, or (ii) a reduction of fines to subsequent applicants which provide evidence with significant added value regarding the information already in possession of the AdC⁷.

8. The AdC will only grant immunity from a fine or reduction of fines to applicants that comply with a number of duties of cooperation, under which an 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 AdC.

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

10. As an additional requirement, applicable only to immunity applicants, the latter must not have coerced the other undertakings to participate in the infringement.

11. In determining the reduction of the fine, the AdC 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. Leniency applications can be made in written or oral form, and a marker system is available both to immunity applicants and applicants seeking a reduction of the fine.

13. Under the marker system, the AdC 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.

14. 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, such as an increased flexibility in

⁶ As provided in Article 77 of the Competition Act, the AdC 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 AdC's view will enable it to: a) Carry out inspections, provided that, at the time of the application, the AdC does not have sufficient information to carry such inspections; or b) find an infringement, provided that, at the time of the application, the AdC does not have sufficient evidence on the alleged infringement.

⁷ The level of reduction of the fine to applicants that provide information and evidence of significant added value is determined as follows: a) a reduction of 30% to 50% for the first applicant, b) a reduction of 20% to 30% for the second applicant, and c) a reduction up to 20% for the subsequent applicants.

setting the time-limit for the perfection of the marker⁸; and (iv) possibility to submit summary applications in English⁹.

15. In the following section, we discuss some of the challenges faced in the application of the Leniency Programme, and how the AdC has tried to tackle such challenges.

3. Challenges to the implementation and application of leniency programmes

3.1. Interplay between leniency and private enforcement

16. One of the major challenges regarding leniency programmes is ensuring that the risk of follow-up damages actions does not reduce the incentives of applying for leniency, as a potential leniency applicant will weigh leniency benefits against the exposure to civil liability which the leniency application may carry under private enforcement.

17. The Portuguese Parliament has recently approved a law transposing the European Directive on antitrust private enforcement into national law¹⁰, which aims to improve the interaction between private enforcement of EU competition rules and public enforcement carried out by the Commission and EU national competition authorities. The law is currently before the President of Portugal for promulgation. Therefore, at this stage there is no practical experience regarding its application.

18. However, 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 information¹¹.

19. Indeed, the protection of leniency documents is a crucial element in the Leniency Programme, as it guarantees that cartel participants who cooperate with competition authorities are not worse-off than non-cooperating cartelists in private damages claims¹².

⁸ For a more complete overview of the Portuguese marker system, see AdC's contribution to the WP3 Roundtable "Use of Markers in Leniency Programs" (DAF/COMP/WP3/WD(2014)42).

⁹ The AdC 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.

¹⁰ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

¹¹ 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.

¹² On the interplay between public and private enforcement, see AdC's contribution to the WP3 Roundtable "Relationship between Public and Private Antitrust Enforcement" (DAF/COMP/WP3/WD(2015)15).

20. 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.

21. The parties concerned in the proceedings may have access to leniency applicant oral statements but shall not make any copy by mechanical means of the record or transcription, whereas third parties have no access to those oral statements.

22. Therefore, the current Portuguese legislation aims at striking a balance between access to file, which is a potential source of information for private damage actions, and the protection of the leniency programme as an important tool for detection of infringements and efficient handling of investigations by the AdC.

3.2. Interaction between leniency and settlement procedures

23. The settlement procedure was introduced in the Portuguese legal framework with the adoption of the 2012 Competition Act. Under this procedure, the investigated parties must acknowledge their participation and liability for a competition infringement, waiving certain procedural steps, thus expediting procedures. As a reward for cooperation, the AdC provides a reduction of the respective fines.

24. Typically, leniency and settlements are complementary enforcement tools: 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.

25. However, there is a fine equilibrium which must be achieved in order to preserve the incentives of both instruments. In this respect, 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.

26. By way of example, one of the settlement cases decided by the AdC, concerning a cartel in the market for prefabricated modules¹³ for schools, was also a leniency case. 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.

27. Based on all the evidence collected, the case was a clear-cut infringement and a strong candidate for a settlement procedure. In this case, the AdC 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 a 20% reduction to the fourth in line. As a result of the settlement procedure, the AdC decided to grant an additional 10% reduction of the fine.

28. In this regard, the different levels of reduction of fines ensure that incentives to cooperate under the Leniency Programme remain higher than for cooperation under the settlement procedure.

¹³PRC/2014/2 – Algeco – Construções Pré-Fabricadas (Algeco), Elevatrans – Pré-Fabricados, S.A. (Elevatrans), Grupo Vendap S.A. (Vendap), Movex – Produção, Venda e Aluguer de Módulos Pré-Fabricados, S.A. (Movex) e U.E.M. – Unidades de Estruturas Metálicas, S.A. (U.E.M.).

3.3. Raising awareness

29. The changes to the Leniency Program introduced in 2012 reflect, to a certain extent, some of the challenges faced by the AdC in the application of the Leniency Programme between 2006 and 2012, and were in general aimed at increasing the effectiveness of the Leniency Programme.

30. Based on the figures relating to the application of the Leniency Program, it appears that the 2012 reform has improved the Program's effectiveness. While the figures relating to the application of the Leniency Program since 2012 are encouraging, more could be done to stimulate further leniency applications

31. These figures are encouraging, as the average of applications per year quadrupled after the reform. Likewise, the changes in the Leniency Programme concerning the marker system and the introduction of oral leniency applications appear to have had a significant impact. However, more could be done to stimulate further leniency applications. For example, after a surge in 2014 with 7 leniency applications, in the two following years the number dropped to 3 and 4 applications. Furthermore, the number of leniency applications received in 2017 (8) may also be (at least partially) explained by the significant reinforcement of the AdC's enforcement agenda. In 2017, the AdC carried out dawn raids in 16 investigations, an eight-fold increase in dawn raids when compared to the historical average of the AdC. Moreover, the number of leniency applications submitted by domestic undertakings is still relatively low. These results show that it takes more than having a clear and robust framework to make a leniency program a success.

32. In that respect, the AdC has been strongly committed to fostering further competition advocacy initiatives aimed at raising awareness about the Leniency Programme among the Portuguese business and legal communities. For example, in 2014 the AdC launched the Fair Play campaign, organizing workshops in 8 major Portuguese cities, explaining to SMEs the benefits of competition and the risks of breaking antitrust rules. In 2016, it launched a campaign to fight bid-rigging in public procurement, creating a direct communication interface between public procurement officials and bodies with responsibilities in public procurement and the AdC, with recourse to the Good Practices Guide on Competition in Public Procurement, published in 2015. Also in 2016, the AdC published a guide for business associations and distributed it to trade, industry and professional associations. In 2017, it launched a new complaints website with a dedicated tipline aimed at facilitating complaints. In 2018, the website will be developed to allow for anonymous whistleblowers to contact and communicate with the AdC.

33. The AdC believes that these outreach initiatives are an important complement to the legal framework of the Leniency Programme, as they contribute to embedding a competition culture in the business community.

4. International coordination of leniency programmes

34. International coordination regarding leniency programmes is desirable as, for example, coordination provides more legal certainty to leniency applicants which need to file multi-jurisdictional applications. In this regard, one of the aims of the 2012 reform of the Portuguese Leniency Programme was to align it with the Model Leniency Programme of the ECN, thereby improving cooperation at regional level.

35. For instance, following the 2012 reform, the deadline to complete a marker may be altered in order to allow for effective cooperation with other European competition authorities within the ECN. This option addresses 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.

5. Concluding remarks

36. The overall experience of the AdC 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.

37. The 2012 reform of the Leniency Programme has also brought positive developments. The leniency cases triggered after the overhaul are 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 AdC to effectively implement its enforcement policies, in conjunction with private enforcement and other enforcement tools such as the settlement procedure.

38. Nevertheless, there is still room for improvement if we consider, for example, the fluctuation in the yearly number of leniency applications and the relative low number of domestic companies applying for leniency. In this respect, the AdC aims at continuously increasing the overall awareness regarding its Leniency Programme and maintain a strong enforcement agenda as regards cartel activity.