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The Future of Effective Leniency Programmes – Note by Portugal

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenieny-programmes-advancing-detection-and-deterrence-of-cartels.htm>

Antonio CAPOBIANCO
Email : Antonio.CAPOBIANCO@oecd.org

JT03521427

Portugal

1. Introduction

1. The fight against cartels is one of the main priorities of the Autoridade da Concorrência – Portuguese Competition Authority (AdC), given the serious harm they cause to the economy and consumers.
2. The Portuguese Leniency Programme has been an important enforcement tool since its inception and the recent growing number of leniency applications have helped maintaining a strong enforcement agenda as regards cartel activity in recent years.
3. Notwithstanding, the AdC’s experience shows that enforcement and leniency programmes can also benefit from proactive detection tools and investigative approaches (e.g. cartel screening, whistleblower tools, cooperation with sector regulators), which help in increasing detection and strengthening deterrence.
4. In this contribution, we will review recent leniency trends in Portugal and assess how proactive detection tools and investigative approaches have complemented the Leniency Programme. We will describe the main features of the Leniency Programme and review recent leniency trends in Portugal (section 2), share our practical experience with proactive detection tools such as cartel screening, as well as with other investigative approaches and outreach initiatives (section 3), and conclude with final remarks (section 4).

2. The Portuguese Leniency Programme

2.1. Legal framework

5. The Portuguese Leniency Programme has been an important enforcement tool for the AdC since its inception in 2006¹. Six years later, in 2012, the framework of the Portuguese Leniency Programme was improved and incorporated into the legal provisions of the new Competition Act². Moreover, the AdC enacted procedural rules and guidelines. In 2022, the Leniency Programme was further amended following the transposition of Directive (EU) 2019/1³, named “ECN+ Directive” as it aimed at empowering the national competition authorities of the European Competition Network (“ECN”).
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 Act⁴.

¹ Law No. 39/2006, of 25 August.

² Law No. 19/2012, of 8 May.

³ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.

⁴ 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

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 evidence⁵, or (ii) a reduction of fines to subsequent applicants which provide evidence with significant added value regarding the information already in possession of the AdC⁶.

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; (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; and (v) make directors, managers and other members of staff available for interviews and make reasonable efforts to make former directors, managers and other members of staff available for interviews 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. The applicant must also not have destroyed, falsified or concealed relevant information or evidence or have disclosed the fact of, or any of the content of, its contemplated application, other than to any other competition authorities or competition authorities of third countries.

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.

equivalent entities, as well as those responsible for the executive management or supervision of areas of activity where the competition infringement has occurred.

⁵ As provided in Article 77 of the Portuguese 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 perspective 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.

⁶ 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.

14. The “ECN+ Directive” included a number of provisions aiming at harmonizing the national leniency programmes across the European Union.

15. Even though the 2012 reform substantially aligned the Portuguese legal framework with the ECN Model Leniency Programme, the transposition of the Directive through Law no. 17/2022, of 17 August, brought a number of changes to the Portuguese Leniency Programme, in particular:

1. it became explicitly foreseen that associations of undertakings performing an economic activity on their own behalf are eligible for immunity from fines or reductions of fines if they participate in an alleged cartel on their own behalf and not on behalf of their members;⁷
2. in order to qualify for leniency for participation in secret cartels, the applicant cannot destroy, falsify or conceal relevant information or evidence, nor it can disclose the leniency application to others than competition authorities, and it must make directors, managers and other members of staff available for interviews with the AdC and make reasonable efforts to make former directors, managers and other members of staff available for interviews with the AdC;⁸
3. if the applicant submits compelling evidence which the AdC uses to prove additional facts which lead to an increase in fines as compared to the fines that would otherwise have been imposed on the participants in the secret cartel, the AdC shall not take such additional facts into account when setting any fine to be imposed on the applicant for reduction of fines which provided this evidence;⁹
4. under certain conditions, current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are protected from sanctions imposed in administrative and misdemeanor proceedings, in relation to their involvement in the cartel covered by the application for immunity from fines, for violations of Article 101 TFEU and Article 9 of the Portuguese Competition Act.¹⁰

2.2. The AdC's experience

2.2.1. Positive leniency trend

16. If we consider complete leniency requests¹¹, in 2022 the AdC received a record number of leniency applications and the double of the maximum number of applications

⁷ Article 76(c) of the Portuguese Competition Act.

⁸ Article 77(2)(a)(v), (d) and (e) of the Portuguese Competition Act.

⁹ Article 78(4) of the Portuguese Competition Act.

¹⁰ Article 79(3) of the Portuguese Competition Act.

¹¹ Under Articles 80-A and 80-B of the Portuguese Competition Act, leniency applicants may file complete or summary applications with the AdC. Summary applications are filed when applicants consider that the Commission is particularly well placed to deal with their case because their application covers more than three Member States as affected territories. In such cases, they submit a full application to the European Commission and summary applications to the national competition authorities of the relevant Member States. This protects their position in the leniency queue if their case is subsequently re-allocated to one or more national competition authorities because the Commission does not intend to pursue it or intends to pursue it only partly. See European

received in the previous years. It is a significant increase from previous years and may reflect a perception of greater risk of detection of anticompetitive practices.

17. The AdC's experience suggests that the right mix of advocacy and vigorous enforcement may constitute a strong incentive for companies and individuals to apply for leniency.

18. First, the AdC has carried out dawn raids every year, increasing the perception of higher risk of detection. Namely, between 2014 and 2023¹², the AdC carried out 44 dawn raids.

19. Second, the AdC is holding a series of advocacy campaigns (see Section 3), regularly asserting the authority's presence amongst stakeholders, public and private, in order to raise awareness on the benefits of competition, its rules and with a view to increase a competition culture.

2.2.2. Importance of international coordination

20. When assessing the effectiveness of the Leniency Programme, it is also worth considering the importance of international coordination of leniency programmes.

21. One of the goals of the ECN+ Directive is to harmonize the conditions for companies to benefit from leniency across the EU¹³.

22. Coordination provides more legal certainty to leniency applicants which need to file multi-jurisdictional applications. As recognized in the ECN+ Directive, “[t]he marked differences between the leniency programmes in the Member States lead to legal uncertainty for potential leniency applicants. This may weaken their incentives to apply for leniency. If Member States were able to implement or apply clearer and harmonised rules for leniency in the area covered by this Directive, this would not only contribute to the objective of maintaining incentives for applicants to disclose secret cartels, in order to render competition enforcement in the Union as effective as possible, but would also guarantee a level playing field for undertakings operating in the internal market.”¹⁴

23. The transposition of the ECN+ Directive into national legal systems is expected to increase the incentives for companies to resort to leniency programmes in the EU. In this respect, it is worth noting that prior to the ECN+ Directive the Portuguese Leniency Programme's was already harmonized with the European Commission's practices concerning the treatment of leniency applications.

24. Even before the transposition of the ECN+ Directive, the AdC has benefited from the coordination of leniency programmes and the formal cooperation available under Regulation (EU) 1/2003¹⁵ in two recent investigations involving leniency, in which dawn raids simultaneously carried out with the *Comisión Nacional de los Mercados y la*

Commission, “FAQs on Leniency” (October 2022), available at https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf.

¹² Until April 2023.

¹³ Articles 17 to 23 of the ECN+ Directive.

¹⁴ Recital 11 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.

¹⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1-25.

Competencia (CNMC), concerning the provision of commercial and financial information services on businesses (2021)¹⁶ and the wood chips market (2022)¹⁷.

3. Proactive detection tools and investigative approaches

25. The AdC has complemented its Leniency Programme with a range of proactive detection tools and investigative approaches, with the aim of increasing the likelihood of detection of anticompetitive practices.

3.1. Cartel screening

26. Cartel screening constitutes an important detection tool for the AdC, particularly concerning the investigation of bid-rigging practices.

27. Pursuant to a Memorandum of Understanding concluded in 2017 between the AdC and the Institute of Public Markets, Real Estate and Construction (IMPIC), the sector regulator which runs the national public procurement database, the AdC has been granted unfettered direct and permanent access to the national public procurement database (“Portal BASE”). The available data is electronic and dates back to 2009.

28. This database provides a comprehensive set of public procurement data which has been used by the AdC to carry out targeted screens. The screens may be used to detect collusive patterns, enabling new investigations or strengthening evidence in ongoing investigations.

29. The AdC’s cartel screening activity has had a positive impact on the authority’s enforcement.

30. For instance, in 2022, the AdC sanctioned a bid-rigging cartel active in the provision of surveillance and security services for manipulating public tenders with a fine of approximately EUR 41 million¹⁸. In this case, the AdC concluded that the undertakings coordinated the participation in public procurement procedures by sharing clients and fixing the price levels of the services to be provided.

31. Furthermore, in 2023, the AdC sanctioned an array of undertakings in the energy sector for an anticompetitive price fixing and market sharing agreement in public procurement procedures launched by REN (the national electricity infrastructure manager) for the supply of cables for electricity transmission with a fine of approximately EUR 2 million.¹⁹

¹⁶ See

https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?IsEnglish=True&Ref=PRC_2021_2.

¹⁷ See <https://www.concorrenca.pt/en/articles/portuguese-and-spanish-competition-authorities-conduct-unannounced-inspections>.

¹⁸ See

https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?IsEnglish=True&Ref=PRC_2019_4.

¹⁹ See

https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?Ref=PRC_2021_1&IsEnglish=True.

32. In these cases, cartel screening contributed to effective investigations by (i) allowing the confirmation of *indicia* and evidence received through complaints, (ii) providing substantiated arguments used in obtaining judicial warrants to perform dawn raids, and (iii) providing substantiated arguments allowing the AdC to formally initiate proceedings.

3.2. Outreach initiatives

33. The AdC regularly carries out advocacy initiatives that are instrumental not only to raise awareness and engage stakeholders on the benefits of competition and its rules, but also to contribute to the AdC's enforcement.

34. The AdC outreach initiatives include the AdC's sessions "20 years, 20 cities – Competition near you", the presentation of the "Guide for Business Associations"²⁰, the presentation of the "Report and Best Practices Guide on anticompetitive agreements in the labor market"²¹, as well as the countrywide outreach initiative "Combatting Bid-Rigging in Public Procurement"²², which has been a priority for the authority.

35. The aim of this initiative is to raise awareness regarding bid-rigging in public procurement and promoting competition in this area has reached above 3500 participants in more than 50 sessions held in Portugal. These sessions have included key public procurement stakeholders, such as the Court of Auditors or IMPIC, different government areas – health, education, defence, infrastructure –, as well as municipalities and regions.

36. This campaign has proven to be successful, leading to a significant increase, both in terms of quantity and quality, of the complaints received concerning public procurement. Also, the campaign has directly led to new investigations and, ultimately, sanctions. For instance, in the past years, the AdC has sanctioned public procurement cartels in the provision of railway maintenance services²³, health services²⁴, surveillance and security services²⁵, teleradiology services²⁶ and cables for electricity transportation²⁷.

²⁰ See <https://www.concorrenca.pt/en/best-practices-business-associations>.

²¹ See <https://www.concorrenca.pt/en/articles/adc-publishes-final-report-and-best-practices-guide-anticompetitive-agreements-labor>

²² See <https://www.concorrenca.pt/en/combating-bid-rigging-public-procurement>

²³ See https://extranet.concorrenca.pt/pesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?IsEnglish=True&Ref=PRC_2016_6

²⁴ See https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?Ref=PRC_2019_2&isEnglish=True

²⁵ See https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?IsEnglish=True&Ref=PRC_2019_4.

²⁶ See https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?IsEnglish=True&Ref=PRC_2021_3.

²⁷ See https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?Ref=PRC_2021_1&IsEnglish=True.

3.3. Other additional tools and approaches

37. The AdC has developed other relevant proactive detection tools and investigative approaches that may successfully complement the AdC's Leniency Programme.

38. First, in 2020, the AdC set up a digital team that has been investigating several complaints and engaged proactive investigation. The digital team's activity has mainly focused on two lines of action: the analysis of complaints and investigation within the AdC's enforcement powers; and proactive initiatives to interact with stakeholders, in order to map competition issues and monitor developments in the sector.

39. The digital team also developed web scraping tools, which allow for a more efficient analysis of *indicia* and evidence of possible anticompetitive practices, and are used to assess the relevance of complaints relevant investigative tools to use in competition law enforcement.

40. Using these web scraping tools, the AdC has gathered online information on products from a large array of sectors, using data to substantiate decisions to open investigations, as well as to request a warrant for dawn raids in the context of a potential Retail Price Maintenance (RPM) conduct.

41. Second, the AdC has focused on interacting better with complainants, recognizing for example that it is crucial to protect the identity of informants to encourage tipoffs. In this respect, in 2021, the AdC revamped and modernized its electronic complaints website, together with its complaints' portal²⁸, which had already been streamlined in 2017.

42. In addition, following the EU Whistleblower Directive²⁹ in September 2022 the AdC introduced a new whistleblower tool³⁰, complying with the rules set out in Law No. 93/2021, of 20 December, which transposes the Whistleblower Directive into the national legal framework.

43. Third, reinforcing the relationship with sectorial regulators, including through the sharing of information, may also contribute to a successful enforcement strategy against anticompetitive behaviour. For example, the AdC has entered into bilateral protocols with sectorial regulators for the purpose of strengthening cooperation in the context of enforcement of competition rules³¹. The fruitful cooperation between the AdC and sectorial regulators also contributes to a more robust knowledge of markets.

4. Concluding remarks

44. While leniency plays a key role as a detection tool and the recent leniency numbers in Portugal have been encouraging, the leniency programme is complemented with a range of proactive detection tools and investigative approaches in order to increase the likelihood of cartel detection.

²⁸ Available at <https://extranet.concorrenca.pt/Denuncias/Home.aspx?IsEnglish=True>.

²⁹ Directive (EU) 2019/1937 of the European Parliament and of the Council, of 23 October 2019, on the protection of persons who report breaches of European Union Law.

³⁰ Available at <https://concorrenca.whispli.com/lp/external?locale=en>.

³¹ For instance, in 2017, the AdC concluded the Memorandum of Understanding with IMPIC, granting the AdC unfettered direct and permanent access to the national public procurement database.

45. These include cartel screening, outreach initiatives, better interaction with complainants, and strengthening relationship with sectorial regulators. This mixed approach appears to be key to achieve a vigorous enforcement activity of competition agencies.