

## **The Leniency Programs and the Creation of a One-Stop Shop for Markers**

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### **ABSTRACT**

This paper analyses the function of a marker system as well as the advantages of adopting one. Also, the paper briefly describes the Brazilian marker system. Finally, it discusses the possibility of a global “one-stop shop” for leniency markers, given the world-wide spread of leniency programs.

Key words: Marker System, Brazil, one-stop shop for leniency markers.

### **RESUMO**

O presente artigo analisa a função do sistema de senhas (marker system), bem como as vantagens em adotá-lo. Ademais, o trabalho descreve sucintamente o sistema de senhas vigente no Brasil. Por fim, é discutida a possibilidade da criação de um guichê único mundial para “markers”, considerando a difusão global dos programas de leniência.

Palavras-chave: Sistema de senhas, Brasil, guichê único mundial para “markers”.

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## **1. The Function and the Advantages of a Marker System**

The marker system plays a special role within an enforcement policy to fight cartels, as sometimes a company or individual willing denounce a cartel may not have gathered all the documentation and evidence required for an ordinary leniency application. The function of a marker system is to make possible for them to claim a place in the queue even without all the required documentation for a leniency application. It is a declaration issued by the competition authority stating that someone is the first to offer cooperation and granting a period of time in which the applicant must gather all the evidence and provide all the documentation in order to perfect the marker, i.e. fulfill the requirements of the leniency application.

There are several advantages in having a marker system. First, it makes less burdensome for participants in cartels to self report. It makes the cartel more instable and tends to stimulate the race between the members of the cartel to be “first in the door”, considering that is simpler to apply for immunity or for a lenient treatment. By doing that, it discourages a “wait-and-see” corporate strategy for reporting wrongdoing to authorities. Cartels are inherently unstable and a marker system contributes to make it even more.

On the other hand, it is in the interest of the competition authority to maintain the race between the members of a cartel to apply for immunity. Thus, the time period granted to perfect the market must be short in order to stimulate the company to conduct investigations and gather all the evidences as soon as possible. Usually, competition authorities establish the maximum period of one month.

Another benefit of the marker system is that the applicant can carry out investigations and produce evidences unhurried, given that he has a guarantee from the

competition authority that he is the first in the line within the granted time period. Hence, it may have effect in the quality of the evidence provided by the applicant. In a “race scenario”, especially after a crisis of trust between the cartelists, the companies would rush to gather some evidence and the required documents just to apply for immunity before the others, not being concerned about the quality of the evidence provided. So, a marker system can lead to better evidence for the authority.

In the next section we will detail how the marker system works in Brazil. First we will provide an overview of our leniency program and then address 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 for the applicant to perfect the marker.

## **2. The Marker System in Brazil**

### **2.1. Brazil’s Leniency Program**

Since 2000, Brazil has a leniency program. It was inspired by the American program and it adopts the “winner-takes-all approach”. It is an important tool to discover and punish cartels, although the program is not restricted to cartel conduct. The scope of application also includes bid rigging and the crime of participating in a criminal organization connected to antitrust infringements<sup>2</sup>.

The leniency agreement may lead to full immunity both in administrative and criminal prosecution. It is important to note that 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 depend on the stage of the investigations.

According to the Brazilian Competition Law, in order to benefit from the leniency agreement, the following requirements must be fulfilled<sup>3</sup>:

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<sup>2</sup> MARTINEZ, Ana Paula. Brazil’s Leniency Program: Challenges Ahead. International Bar Association 15<sup>th</sup> Annual Competition Conference. 2011.

<sup>3</sup> The requirements can be found in article 86, § 1, of the Brazilian Competition Law (Act n° 12.529/2011).

- (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 offenders and;
- (iv) The applicant must recognize his guilt in the infringement and fully cooperate with the investigation.

If the applicant is not eligible to immunity, either for not being the first one to apply or because the authority has already started investigating the infringement, he may still be granted a lenient treatment, by reduction of fines, depending on the extent of his cooperation. Thus, in Brazil the possibility of subsequent applicants for a lenient treatment is accepted, although it is not formally included in the leniency program, but in a settlement program<sup>4</sup>. It is important to notice that both companies and individuals can benefit from the leniency agreement<sup>5</sup>.

When the 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 agreement and, if it is the case, confirm the benefit, which can be full immunity or a fine reduction.

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 cases. The last one is really important for CADE because it was the first case of conviction that started with a leniency application. This cartel was carried out from 2003 to 2005 and the air freight companies fixed prices and date of fuel surcharges<sup>6</sup>.

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<sup>4</sup> Act n° 12.529/2011 - 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.

<sup>5</sup> FORGIONI, Paula. Os Fundamentos do Antitruste. 6ª Edição. Revista dos Tribunais. 2013.

<sup>6</sup> SILVEIRA, Paulo Burnier and TOLLINI, Priscila Tardelli. "International Cartels in Brazil: An Overview and a Look Forward" in International Cooperation and Competition Enforcement: Brazilian and European Experiences from the Enforcers' Perspective. Wolters Kluwer. 2014

Moreover, a number of cases initiated by a leniency application have lead to subsequent settlements requested by other defendants that can offer new evidences<sup>7</sup>.

In the next section we will deal with the details of the Brazilian marker system.

## **2.2. How to Obtain a Marker in Brazil**

The General Superintendence, which is investigative body of the Brazilian Competition Authority, may issue a marker in benefit of a potential applicant for the leniency program, in order to guarantee its position in the queue. Being the first is very important, given that in Brazil we adopt the “winner-takes-all approach” for the leniency program.

The Brazilian Marker System is not established by our Competition Act (enacted by Congress). Instead, it was created by the authority’s internal regulation<sup>8</sup>. This matter is included in the section concerning the leniency program. The regulation states that if the potential leniency applicant has not gathered all the required information and documentation for a formal leniency application it may request the General Superintendence to issue a declaration (marker) certifying that he is the first in the queue for leniency agreement regarding a particular anticompetitive practice.

The requirements for issuing marker are much less rigid than the ones for the leniency agreement. That is why this system is useful. It gives the possibility of a company willing to self report to do that even without all the documentation that a formal leniency application requires.

The requirements for a marker are the following: the first-in applicant must provide his complete identification and appoint the other participants of the cartel. Also, he must state the products, services and geographical area affected by the anticompetitive practice and, if possible, the duration of the cartel<sup>9</sup>.

After the request, if all requirements are fulfilled, the General Superintendence has three days to issue the marker. It is important to notice that the grant of the marker is automatic upon meeting these requirements. However, the authority has discretion in

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<sup>7</sup> CADE’s Website: <http://www.cade.gov.br/Default.aspx?15151719e726e643113209>

<sup>8</sup> CADE’s Resolution n° 1/2012 and amended by Resolution n° 5/2013 and by Resolution n° 7/2014.

<sup>9</sup> Article 199 of CADE’s Resolution n° 1/2012 and amended by Resolution n° 5/2013 and by Resolution n° 7/2014.

deciding whether it signs the leniency agreement that will be requested after the marker is granted.

The marker will contain the time period given by the General Superintendence for the applicant to perfect it, i.e. to provide all the documentation and information required for a formal leniency application. According to the CADE's internal regulation, this period shall never exceed 30 (thirty) days.

Regarding the confidentiality of the marker request, Brazilian regime does not have any specific provisions. However, it is regulated by the rules of the leniency program. Hence, according to Brazilian Competition Law (Act nº 12.529/2011)<sup>10</sup> and to the CADE's internal regulation, the leniency application shall be treated confidentially. Only the individuals expressly authorized by the General Superintendent shall have access to the application. Thus, the same applies to the marker system.

### **2.3- Brazilian Experience with the Marker System**

The Brazilian Leniency Program was created in 2000. The first leniency agreement was concluded in 2003, in a private security cartel case. Only in January 2006, with Ordinance of the Ministry of Justice No. 04/2006, a marker system was introduced in Brazil. Nowadays, our marker system is regulated by article 199 of CADE's internal regulation, enacted in 2012.

In 2013, the General Superintendence received 10 leniency applications in total, signed 2 leniency agreements, had 10 second-in requests and concluded 1 second-in agreement<sup>11</sup>.

In conclusion, the Brazilian Leniency Program has evolved significantly in recent years. The creation of a marker system represents an important improvement in CADE's program.

Now we are going to address another important issue concerning marker systems, which is the possibility and the feasibility of creating a global one-stop shop for markers.

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<sup>10</sup> 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.

<sup>11</sup> OECD - 2014 Annual Report on Competition Policy Developments in Brazil. p.7.

### **3. One-Stop Shop for Leniency Markers<sup>12</sup>**

There is a growing consensus among competition lawyers and enforcers that the leniency program is the most effective tool for detection and punishment of hard core cartels. The program helps to avoid cartels even when no agreement is concluded. The mere threat and distrust induced by the program among possible cartelists might have helped to deter a number of potential cartels. Even in cases where a cartel already exists, it induces more instability. Cartels are inherently unstable. There are substantial benefits in betraying the other cartelists. It can be explained by “the prisoner’s dilemma”, using game theory. What a leniency program does is to magnify these incentives even more. Thus, it is certainly a very important tool for competition authorities.

#### **3.1. The Spread of Leniency Programs**

The positive experience of United States and European countries with their leniency programs, combined with strong encouragement by international organizations, such as OECD and ICN, and by the US Department of Justice, has caused a rapid spread of leniency programs around the world. Today, more than fifty jurisdictions have leniency programs, and a lot of them include a marker system. Most of them are inspired and modeled on the United States’ program, restructured in 1993. Hence, it is now possible and advisable for a cartelist to apply for immunity in various jurisdictions simultaneously, in relation to a single illegal behavior.

The current scenario demands a more active international cooperation policy between competition authorities. Exchanging information and experience is beneficial in the sense that every agency can adjudicate and investigate and adjudicate antitrust infringements better informed. On the other hand, the proliferation of leniency programs raises the risks and the costs of seeking leniency for a particular illegal conduct.

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<sup>12</sup> The ideas in this section are based on the suggestion given by John Taladay in the paper “Time for a Global “One-Stop Shop” for Leniency Markers”. *ANTITRUST*, VOL 27, Fall 2012.

### **3.2. The Problems in Having Too Many Leniency Programs**

The key issue is that investigating and getting comprehensive information about the details of the anticompetitive conduct, its territorial scope and its potential effects in different jurisdictions takes time and the process of requesting a leniency marker is a race against time. Thus, this situation increases the burden of self-reporting. There is always a risk involved in self-reporting in a jurisdiction and being prosecuted in another because it was not possible to foresee the real effects of the conduct by the time of the application. Determining the geographic scope and the real effects of a cartel is hardly ever a black-and-white assessment. Even when adjudicating cartel cases, judges and competition authorities often disagree about the geographic effects of a given conduct. This uncertainty might deter cartelists willing to self report from doing it. Indeed, uncertainty weakens leniency programs. For instance, the US Department of Justice program became successful only after reducing drastically the prosecutor's discretion in signing the leniency agreement<sup>13</sup>.

Hence, the possibility of having the evidences that you provided in one jurisdiction under a leniency agreement being used against you in other jurisdiction is a risk that weakens the leniency programs around the world.

Another problem partially caused by the wide spread of leniency programs around the globe is the possibility of different leniency beneficiaries in different jurisdictions. This situation may result from the uncertainty by the initial applicant about the actual geographic scope of the cartel or even from the applicant being outmaneuvered by the other cartelist that engaged in a "marker race" around the world.

Regardless of the reason, this scenario spoils the main benefit of a leniency agreement. The concept that underpins the program is to give the applicant immunity so he will feel free to entirely cooperate with the investigation and admit the infringement. When the evidence and information that it provide under the leniency agreement will be used to enhance its exposure to punishment in another country, the incentive framework that underpin the program will be totally defaced. The quality and the extent of the evidence and of the information provided will be undermined. The applicant will cooperate to a minimum extent with the authority, albeit the obligation to fully cooperate.

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<sup>13</sup> LYNCH, Niall E. Immunity in Criminal Cartel Investigations: A US Perspective. p. 3.



On the other hand, this scenario may be interesting for enforcers, provided that will be easier to convict the defendants that have participated in the cartel and it may sound fair because all members of the cartel will be punished somewhere in the world. However, the apparent benefits are outweighed by the harm that this situation causes to leniency programs. It weakens the leniency programs, which is the most important tool in detecting, investigating and prosecuting cartels.

A possible solution for this problem is the creation of a global one-stop shop for leniency markers. It is important to note that this is different from a one-stop shop for leniency agreements.

### **3.3. How Could a One-Stop Shop for Markers Help and How it Would Work?**

The one-stop shop for markers would simply preserve the applicant's first place in line in all the participating jurisdictions. The formal leniency application is the next step for the applicant and it will continue to be requested independently in every country. Every jurisdiction has its own requirements, conditions and policies regarding leniency agreements, so it would be practically impossible to unify the leniency granting process.

What should be unified is the granting of a marker. The international organization would simply declare that the applicant is the first in the line for cooperation regarding a particular alleged conduct<sup>14</sup>. After that, the applicant will have enough time investigate deeply the conduct, specially its geographic scope and effects and gather all the documentation and evidence required by formal leniency programs. It will be better informed to decide in which jurisdictions apply for leniency. Again, the process of signing a leniency agreement would continue to be conducted nationally, under national law.

The adoption of a one-stop shop for markers is permissible under most laws. National competition authorities would use the declaration issued by the international organization as a valid marker in the case the applicant starts a leniency application

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<sup>14</sup> Filippo Amato, Leonardo Armati, Massimo Merola and Eric Morgan de Rivery have suggested a similar approach regarding European marker applications in the paper "Relationship Between EC Competition Law and National Competition Law" available on <http://www.concurrences.com/>.

proceeding in the country. The authority would always have to check the international agency's database before granting a marker or receiving a leniency application.

No substantive competition law would be modified. This would represent a convergence of process, not of substantive legal provisions about cartels.

There is no sacrifice of sovereignty in recognizing the markers issued by an international agency. In most jurisdictions, the authority has no discretion when issuing a marker. The discretion may exist in signing a leniency agreement. Thus, it would not transfer power or authority to the international agency. Again, it means a convergence of process. The national authority would only have to check if there is a pending marker issued by the international agency when someone requests a marker or wants to apply for leniency.

There is a precedent of this procedural convergence regarding patents. The World Intellectual Property Organization (WIPO) is in charge of administering the Paris Convention Treaty (PTC). This treaty is signed by 175 countries and it provides a procedural tool that helps to ease the burden of filing a patent request world-wide. It is beneficial to regulators and to inventors seeking patent protection internationally and helps patent offices in many jurisdictions by providing a unified and comprehensive database. With this system, an inventor can file a single patent application and be recognized as the first to file in more than 150 countries. Participating jurisdictions do not sacrifice sovereignty because of this treaty. The process of granting a patent remains under national offices' control. The function of the international agency is to protect the first filer. So, national authorities just have to relate-back to the WIPO data. In fact, the international application can be filed with the national/regional office or directly with the international office. In the former case, the national patent offices would send the application to WIPO's international bureau. After that, WIPO publishes the application on "Patentscope" and communicates to the national authorities from all the participating jurisdictions, which may grant the patent if that is the case<sup>15</sup>. Thus, this system illustrates a procedural convergence among different countries that reduces the bureaucratic burden imposed to companies, although it is not the exactly the same system we are suggesting to leniency markers.

The global one-stop shop for leniency markers would be similar. The system could be implemented and administered by international organizations such as the Organization

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<sup>15</sup> All the information is available on WIPO's website. <http://www.wipo.int/pct/en/>

for Economic Cooperation and Development (OECD) or the International Competition Network (ICN).

The time period that the agency would grant for the applicant to perfect the markers is an issue that must be addressed. It ought to be unified. However, this should not be a problem, considering that the time frame is very similar in most jurisdictions (around a month to perfect the marker).

The agency's discretion in granting a marker, as well as the information required, is another topic that would have to be standardized. In some jurisdictions, the granting of a marker is discretionary, while in others the discretion is limited to the decision to sign the leniency agreement, after the applicant perfects the marker. The second model seems more appropriate to an international agency. This option would give less power to the agency. The national authorities would maintain their discretion in granting immunity. Also, the information required by the one-stop shop should take into account the requirements of the participating jurisdiction. It should satisfy the jurisdictions' current requirements, such as the applicant's name and address, the participants of the alleged cartel, the affected product, the geographic scope and the duration of the alleged conduct. These requirements satisfy most of jurisdictions, including Brazil.

In conclusion, a One-Stop Shop for leniency markers is feasible and would not represent a substantial sacrifice of sovereignty by participating jurisdictions. Leniency programs must be framed taking into account the international scenario. To keep the incentives that make it so efficient in deterring cartels, a procedural mechanism should be created to align marker systems and ease the burden on parties when applying for leniency markers. A possible solution is the creation of a One-Stop shop for markers, which could be administered by an international organization such as the OECD or the ICN. This would be the next step in international cooperation for competition enforcement.

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