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– Contribution from Spain –

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The attached document from Spain is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 27 28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session I: Strengthening incentives for leniency agreements

Incentives to strengthen the leniency programme

- Contribution from Spain -

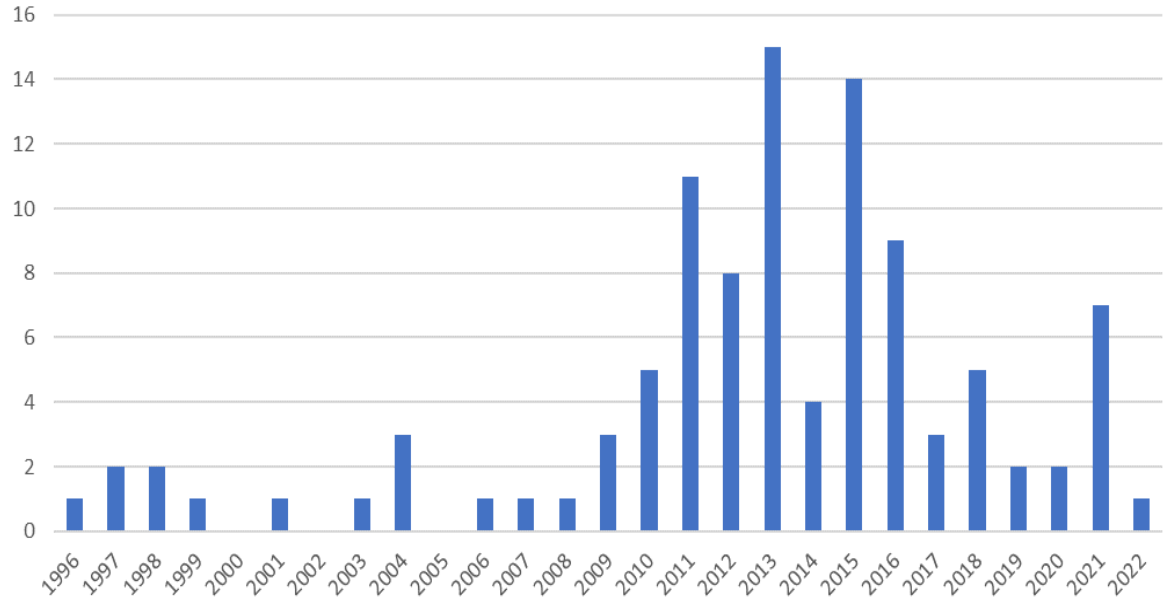
1. Introduction

1. Since it was introduced by Law 15/2007, of 3 July 2007, on the Defence of Competition (LDC), the leniency programme has been a fundamental tool for detecting cartels in Spain, greatly reinforcing the effectiveness of its competition policy.

2. The LDC of 2007 transformed all areas of activity of Spanish competition policy, providing it with an institutional legal framework characterised by the independence of the National Competition Commission (CNC), succeeded in 2013 by the current Spanish National Markets and Competition Commission (CNMC), created by Law 3/2013, of 4 June, as well as by the development of a more efficient and protective procedural framework, with new investigative tools, including, with regard to the prosecution of cartels, home inspections and the leniency programme.

3. This new legal regime led to a radical transformation in competition policy in Spain, which is particularly evident in the detection of cartels. As can be seen in Figure 1, since the entry into force of the LDC in 2007, the number of cartels sanctioned has risen to a total of 91, compared to the 12 sanctioned previously:[1]

Figure 1. Decisions sanctioning cartels in Spain (1996-2022)



[1] The first decision sanctioning a cartel in Spain was issued in 1996.

Source: CNMC.

4. Although this extraordinary development can largely be attributed to the set of measures introduced by the LDC, in the case of cartels, it is necessary to highlight the leniency programme, regulated in Articles 65 (request for a fine exemption) and 66 (application for reduction of the amount of the fine) of the LDC, Articles 46 to 53 of the *Reglamento de Defensa de la Competencia* [Spanish Competition Regulation], and the Communication on Leniency Programme of 2013.[2] The regulations provided for in these regulatory and soft law instruments established from the outset a procedural framework characterised by certainty, respect for due process and flexibility, with the aim of promoting the filing of leniency applications by the entities participating in the cartel, highlighting in this regard provisions such as those indicated below:

- Option to file a leniency application for both companies and natural persons who, being part of a cartel, apply to benefit from the leniency programme by requesting either a fine exemption or a reduction in the amount of the fine.
- Diversity of channels for the submission of leniency applications: in addition to the option to submit oral applications that has been available from the outset, in 2009 an electronic registry was set up exclusively for the receipt of leniency applications[3] and different from the administrative registry provided for other types of procedures.
- Option to submit leniency applications after sanctions proceedings have been initiated and until notification of the *Pliego de Concreción de Hechos* [specification of facts document] has been given. Applications for reduction may be submitted after such notification has been issued when, taking into account the information in the file or the nature or content of the evidence provided, it is justified. In this way, the provision of information and evidence to corroborate the facts is encouraged until practically the end of the investigation phase, just before notification of the proposed decision.
- Establishment of a procedural framework that guarantees, from the outset, the confidentiality of the procedure, security and certainty as to the satisfactory outcome of the application and the flexibility necessary to adapt the different stages of the proceedings to the particular and unavoidable circumstances of the leniency applicant.

5. The implementation of this programme since its effective entry into force on 28 February 2008, coinciding with the entry into force of the Spanish Competition Regulation establishing the procedure for submitting a leniency application, can be considered a real success.

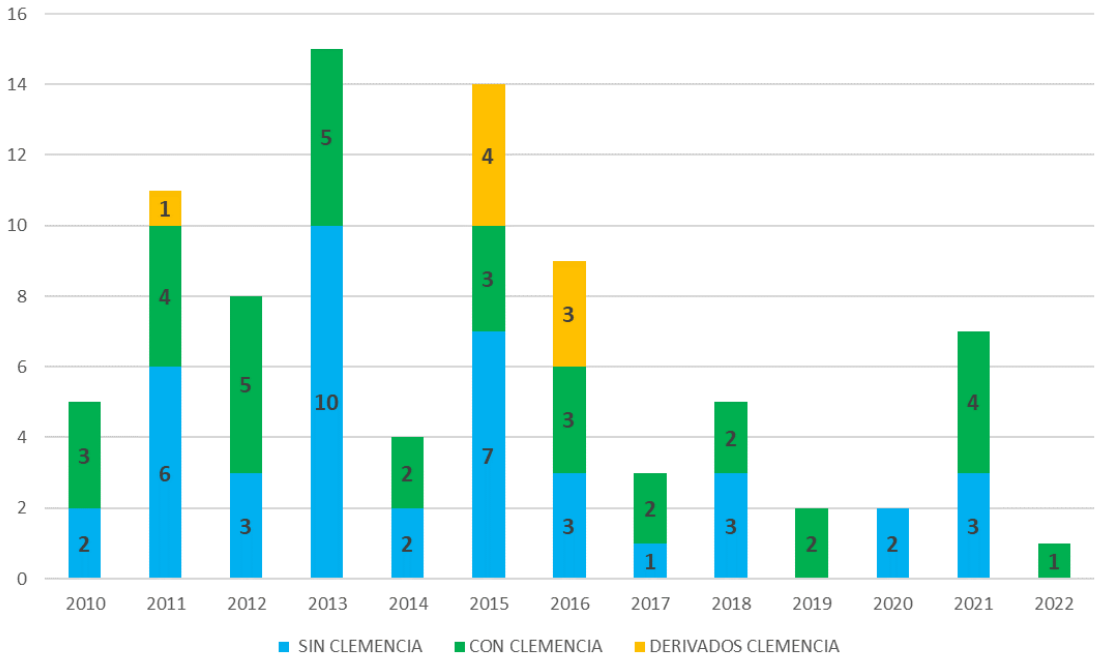
6. The first leniency application decisions were published in 2010. From then until today, as can be seen in Figure 2, out of a total of 86 sanctioned cartels, leniency applications have been filed in 36 cases (42% of the total). To these, a further eight files

[2] Published in the Official State Gazette on 16 August 2013 and available at www.cnmc.es/file/8559/download.

[3] Available at https://sede.cnmc.gob.es/en/tramites/competencia/solicitud-de-clemencia. The distinctive feature of this registry lies in the fact that the information provided is sent directly to the unit of the CNMC Competition Directorate responsible for analysing leniency applications (Subdirectorate of Cartels and Leniency), thus ensuring confidentiality of both the fact that the leniency application has been filed and its content.

should be added, originating from information on other offences gathered during inspections carried out following the filing of a leniency application:

Figure 2. Decisions sanctioning cartels in Spain, by case origin (2010-2022)



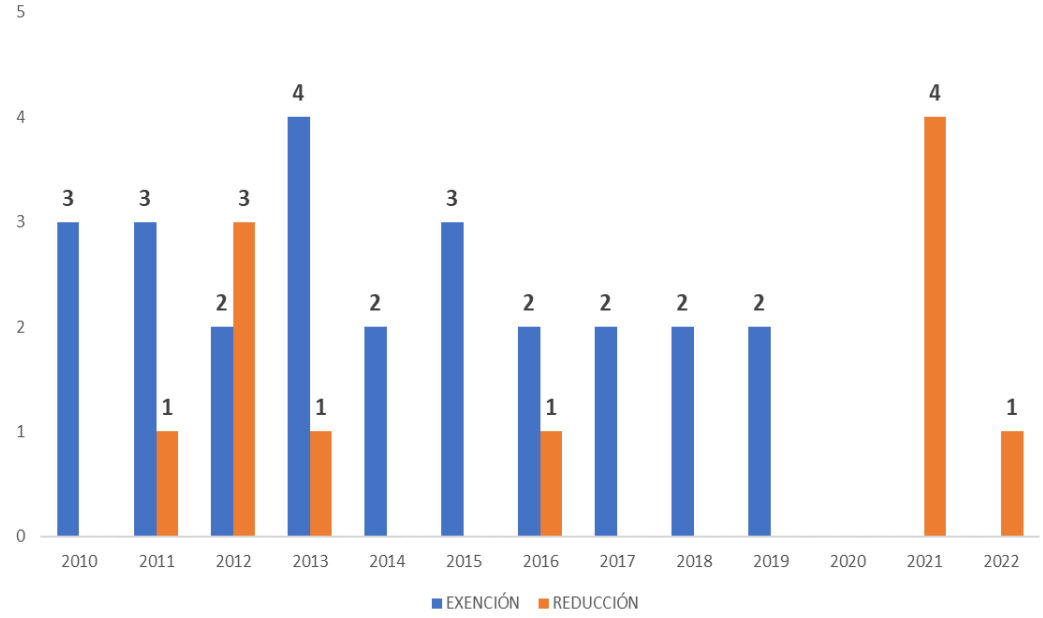
Source: CNMC.

7. Of the 36 cartels sanctioned thanks to the leniency programme, a total of 25 were detected through a request for a fine exemption, without the Competition Authority having prior knowledge of them. This represents the greatest added value that can be generated by the leniency programme. In the remaining 11 cases, applications for reduction of the fine were submitted, generally after inspections by the Competition Authority.

8. The favourable assessment of the leniency programme during this period should be qualified by noting the distinction between requesting a fine exemption (Article 65 of the LDC) and requests for reduction of the amount of the fine (Article 66 of the LDC), with the particularity that only the former involve the Competition Authority not previously being aware of the offence.

9. The preponderance of requesting a fine exemption has been a constant during the years the leniency programme has been in force (the sole exception being 2012, when there were more applications for a reduction), as shown in Figure 3, which shows the weight that each type of application (exemption or reduction) has had in the total number of decisions issued in each year. Since the pandemic, the leniency programme decisions published show an increasing prominence of requests for reduction of the amount of the fine, although looking at the cases currently under investigation, this trend is expected to be balanced out.

Figure 3. Sanctioning decisions originating from leniency applications, by type (2010-2022)



Source: CNMC.

10. The extraordinarily positive assessment that can be made of the 14 years for which the leniency programme has been in place leaves no doubt as to the CNMC's desire to maintain and even increase the incentives of the leniency programme; it is clear that it remains an extremely valuable tool for detecting and subsequently sanctioning cartels.

11. However, it cannot be ignored that there are a series of indicators that show a decrease in the number of cartels detected and sanctioned by the CNMC in recent years with leniency applications. This is not necessarily a bad thing, as it also shows the CNMC's ability to detect and sanction cartels without a leniency programme, but it means that an analysis of the existing tools available to the competition authorities for this purpose should be carried out.

12. Firstly, many people have highlighted the risk that private enforcement of competition law may pose to the leniency programme, as it does not provide for the possibility of exempting the leniency applicant from civil liability arising from the offence, leaving them exposed, despite their co-operation, to possible legal action for damages brought by those affected by the cartel.[4] The European Union's adoption of Directive 2014/104/EU of 26 November 2014 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 (hereinafter the "Damages Directive") was intended to ensure the right to full

[4] Ysewyn, J. and S. Kahmann (2018), "The decline and fall of the leniency programme in Europe", *Concurrences*, No. 1, Paris, pp. 44-59; Archimbaud, A. (2020), ""European leniency programmes and private enforcement: Dangerous liaisons", *Concurrences*, No. 3, Paris; OECD Working Party No. 3 on Co-operation and Enforcement (2015), "*Relationship Between Public and Private Antitrust Enforcement*", OECD Secretariat, Paris, DAF/COMP/WP3(2015)14. Buccirossi, P., C. M. P. Marvão and G., Spagnolo (2020), "Leniency and Damages: Where Is the Conflict?", *The Journal of Legal Studies*, Vol. 29/2, University of Chicago, Chicago, pp. 335-379, https://ssrn.com/abstract=2566774.

compensation for those affected by an infringement of competition law.[5] It guarantees the existence of effective procedural channels in the jurisdictions of Member States and establishes mechanisms to make the exercise of this right (private enforcement of competition law) compatible with the exercise of the public powers conferred to both the European Commission and national competition authorities by virtue of Articles 101 and 102 of the Treaty on the Functioning of the European Union (public enforcement of competition law). This Directive was transposed into Spanish law in 2017 by Royal Decree-Law 9/2017, of 26 May, transposing European Union directives in the financial, commercial and healthcare fields, and on the posting of workers, and incorporating into the LDC a new Title VI "On compensation for damages caused by restrictive competition practices" (Articles 71 to 81).[6]

13. This search for balance between the different interests at play, which is the basis of the Damages Directive, is also reflected in the leniency programmes. The risk of a leniency applicant being exposed to action for damages caused by a cartel increased following adoption of the Damages Directive (and its subsequent transposition) and the gradual strengthening of many of the cartel-sanctioning resolutions issued by the Spanish Competition Authority in recent years.[7] However, the Damages Directive includes a number of guarantees for the leniency applicant, such as limitation of their liability for damage caused exclusively to their suppliers or customers (as opposed to the joint and several liability of the other cartel participants), as well as the confidentiality granted to the statements provided in the leniency proceedings, which may in turn act as incentives encouraging use of the leniency programme.

14. There are other factors that may affect the effectiveness of leniency programmes, such as the increasing complexity of conducting legal assessments, including the very definition of the illicit cartel and the practices that can be included within this concept, as well as the existence of greater difficulties in obtaining and providing evidence of the infringement, due both to innovations in the field of communications and to the refinement of anti-competitive collusion techniques, largely caused by the development of the investigative capacity of the competition authorities.

15. In parallel, and in Spain in particular, it is worth highlighting the adoption of various legislative and administrative measures that are likely to boost the attractiveness and effectiveness of leniency programmes and strengthen the Competition Authority's capacity to detect and sanction cartels.

16. The aim of this work, which is based on the almost 15 years for which the leniency programme has been applied in Spain and its positive outcomes, is precisely to analyse the current main threats to the programme's effectiveness and to present the different measures already adopted to strengthen its effectiveness or to counteract some of the risk factors identified.

[5] Published in the Official Journal of the European Union, L 349, 5 December 2014.

[6] Published in Official State Gazette no. 126 of 27 May 2017.

[7] Such as the media attention and public opinion in Spain with respect to the so-called “car cartel”, sanctioned by CNMC Resolution of 23 July 2015, Case S/0482/13 *Fabricantes de Automóviles* and confirmed by the Supreme Court in its judgments of 20 April (appeal 2681/2020), 6 April (appeals 2227/2020 and 2193/2020), 13 April (appeals 2720/2020, 2745/2020 and 3907/2020), 17 April (appeal 2218/020), 19 April (appeal 3019/2020) and 31 May 2021 (appeal 2181/2020).

2. Risk factors for the effectiveness of the leniency programme

2.1. Growing complexity of the cartel concept

17. Given that, prior to submitting a leniency application, participants in cartels – both individuals and legal entities in Spain, as mentioned above – must weigh up the risks and benefits that could come from it, the existence of certainty as to its admissibility can be considered a strong incentive.

18. This certainty not only affects compliance with the requirements set forth, in Spain, in Articles 65 (fine exemption) and 66 (reduction of the amount of the fine) of the LDC, with regard to the prior knowledge that the Competition Authority may have of the facts to be reported, a matter on which the leniency applicant cannot be certain; it also affects whether the conduct not detected by the Competition Authority will be classified as a cartel, a *conditio sine qua non* for obtaining any benefit under the leniency programme in Spain, and whether the evidence provided is sufficient to benefit from an exemption (i.e. it allows an inspection to be arranged) or a reduction in the amount of the fine (i.e. it provides significant added value to the evidence already held by the Competition Authority).

19. As such, the existence of factors that make it difficult to identify a practice as constituting a cartel may be a deterrent to submitting a leniency application.

20. In Spanish law, the definition of a cartel is contained in the Fourth Additional Provision of the LDC (hereinafter, AP 4).

21. This definition has been in the LDC since its adoption in 2007 and was amended in 2017 to adopt the definition contained in the Damages Directive.[8] This was the first EU regulation to contain a definition of the aforementioned concept in Article 2, paragraph 14, and more recently in Article 2, paragraph 11 of the Directive of 11 December 2018, aimed at providing Member State competition authorities with the means to enforce competition rules more effectively and ensure the proper functioning of the domestic market[9] (known as the ECN+ Directive).

22. The legal establishment of the concept of cartel has provided legal certainty to the activity of the detection and sanctioning of this practice by the competition authorities, without prejudice to the flexibility required in its application in view of the complexity of the context in which these practices take place.

[8] Section 2 of former paragraph 2 of AP 4, in its original wording of 2007, defined a cartel as follows:

"2. For the purposes of the provisions of this Law, a cartel is understood to be any secret agreement between two or more competitors with the aim of fixing prices, production or sales quotas, the sharing of markets, including fraudulent bids, or the restriction of imports or exports."

The current wording of AP 4, contained in the Damages Directive, defines cartel as:

"*any agreement or collusive practice between two or more competitors whose objective is to coordinate their competitive behaviour in the market or to influence the parameters of competition through practices such as, among others: the fixing or coordination of purchase or selling prices or other commercial conditions, including in relation to intellectual and industrial property rights; the allocation of production or sales quotas; the sharing of markets and customers, including collusive bidding, restrictions on imports or exports and anti-competitive measures against other competitors*."

[9] Official Journal of the European Union L 11 of 14 January 2019.

23. Other EU soft law instruments, such as the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements[10] (hereinafter referred to as the "Guidelines on Horizontal Agreements"), share this spirit. They contain indications that make it possible to outline the characteristics of some of the most common manifestations of cartels today (such as exchanging information between competitors[11]).

24. The amendment made in 2017 aligns the LDC definition of cartel with the legal and jurisprudential concept enshrined in the EU, according to which a cartel can take the form of both an agreement and a collusive practice. In this regard, the case law of the EU courts points out that it is not necessary to classify the conduct exclusively as one of these forms of unlawful behaviour (agreement or collusive practice) since the concepts of the two are fluid and may overlap, and it may not even be possible to make such a distinction, since an infringement may simultaneously present characteristics of both forms of prohibited conduct.[12] In any case, for the purposes of Article 1 of the LDC, this change allows for the possibility that a cartel does not necessarily have to take the form of an agreement between companies, as proof of the existence of a collusive practice (defined by EU case law as any "form of coordination between companies that, without having led to the signing of an agreement as such, consciously replaces the risks of competition with practical co-operation between them"[13]) is enough. In other words, the parameters for defining a cartel are broadened.

25. In addition, the new wording of AP 4 is characterised by its greater flexibility, allowing practices that include vertical elements, such as hub-and-spoke co-ordination schemes, which involve the participation of agents located at different stages of the production chain[14], to be integrated into the concept of a cartel. It also lists *in fine* a series of practices that could constitute a cartel on a merely exemplary and non-exhaustive basis (as opposed to the potentially closed list contained in the LDC prior to the 2017 reform).

26. Without prejudice to the fact that on many occasions "traditional" cartels fit with relative ease into the mould defined by the exemplary list of practices contained in both Article 1 of the LDC and Article 101 of the Treaty on the Functioning of the European Union (price-fixing, market-sharing or production-limitation agreements), it is nevertheless true that cartels also cover practices that are more complex or common today, or for which detection and sanctioning requires complex work to analyse and interpret the evidence, without which it is difficult or impossible to consider them a cartel.

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[10] Official Journal of the European Union C 11 of 14 January 2011.

[11] Paragraphs 55 to 94.

[12] Joined Cases 40-48/73, Suiker Unie and others v. Commission; Case T-7/89, Hércules v. Commission; Case C-49/92, Commission v. Anic Partecipazioni; Case C-199/92, P Hüls v Commission; Joined Cases T-305/94 etc., Limburgse Vinyl Maatschappij N.V. and others v. Commission (PVC II) and Cases T-147/89, T-148/89 and T-151/89, respectively Société Métallurgique de Normandie v. Commission, Trefilunion v. Commission and Société des Treillis et Panneaux Soudés v. Commission.

[13] Joined Cases 40-48/73, Suiker Unie and others v. Commission; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. Ahlström Osakeyhtiö and others v. Commission.

[14] An analysis of the treatment of this model at the community level can be found in OECD (2019), "Hub-and-spoke arrangements – Note by the European Union", Organisation for Economic Co-operation and Development, Paris, https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf (accessed on 03 August 2022).

27. The new wording of AP 4, therefore, aims precisely to respond to the growing complexity of the practices that constitute a cartel, preventing an overly rigid definition of the concept from hindering the adequate prosecution of more sophisticated practices, fostered by the emergence of new business models, the competition authorities developing new detection capabilities, or the use of new communication technologies that greatly facilitate contact between companies in multiple ways, some of them without leaving obvious or easily detectable traces for the competition authorities.

28. As such, both in the EU[15] and in Spain[16], practices consisting of the exchange of strategic information between competitors have been sanctioned as cartels, without prejudice to the fact that not every exchange of information between competitors may constitute an unlawful act. This is pointed out in the Guidelines on Horizontal Agreements, which insist in particular on the need for careful analysis of the context in which the exchange takes place and the nature of the information exchanged for the purpose of deciding on its alleged anti-competitive nature.

29. In short, at least in the EU, thanks to the aforementioned regulations and case law, there is now more certainty as to the legal definition of the concept of a cartel.

30. In spite of this, the legal and economic reality is changing, and recent cases show that the collusion mechanisms devised by companies are being adapted according to the various technical possibilities that are easy to implement, especially in the field of public tenders.

31. Cartel participants therefore are increasingly designing enormously complex forms of collaboration, making it more difficult for the competition authorities to detect them.

32. One example of this is the CNMC Resolution of 17 August 2021 (Case S/0013/19 *Conservación de Carreteras*), which sanctioned a cartel made up of 13 companies that, from 2014 to 2018, agreed on the co-ordination of the economic offers to be submitted in a total of 101 public tenders for the completion of road network maintenance works. By artificially creating groups of bids and allocating pockets of locations among themselves that were used in accordance with sophisticated formulas created for this purpose, the companies participating in the cartel concentrated their competitive bids on a limited number of tenders. In addition, by limiting to a minimum the discounts to be offered by all companies in all tenders (even those that were for coverage), they distorted normal low thresholds and were able to expel from the bidding processes those companies outside the cartel that made truly competitive bids.

33. In this case, the presentation by one of these companies of an application for a reduction of the amount of the fine just the day after the end of the inspection of its headquarters allowed the CNMC to complete its evidence of contact and direct communication between the companies in the cartel. The leniency applicant's statements clarifying and interpreting the meaning of the formulas, collected in handwritten notes and

[15] Judgments of the Court of Justice of the European Union of 4 June 2009 (C-8/08, T-Mobile) and 19 March 2015 (C-286/13 Bananas).

[16] CNC Resolution of 2 March 2011, Case S/0086/08 *Peluquería Profesional*, confirmed by Supreme Court judgment of 8 June 2015 (appeal 3253/2014); CNC Resolution of 19 January 2012, Case S/0280/10 Suzuki-Honda, confirmed by Supreme Court judgment of 25 July 2018 (appeal 2917/2016); and CNMC Resolution of 23 July 2015, Case S/0482/13 *Fabricantes de Automóviles*, confirmed by Supreme Court judgments of 20 April 2021 (appeal 2681/2020), 6 May 2021 (appeals 2227/2020 and 2193/2020), 13 May 2021 (appeals 2720/2020, 2745/2020 and 3907/2020), 17 May 2021 (appeal 2218/2020) and 31 May 2021 (appeal 2181/2020).

internal documents in the inspections carried out and explaining the *modus operandi* of the cartel were decisive in declaring and sanctioning this infringement.

2.2. Difficulties in the provision of evidence

34. Another factor that may have an impact on the filing of leniency applications is the difficulty in gathering evidence of the existence of a cartel, even for a potential leniency applicant, which may result from the development of new technologies that have significantly modified methods of communication.

35. The very nature of the communications provided by the development of these new technologies (such as instant messaging systems, video calls) allows immediate communication between competitors, even on a multilateral basis, making it much easier for companies to exchange information or communicate with each other without leaving any trace of the content of these conversations.

36. Communication by means of messaging and videoconferencing systems is characterised by its volatility, as it makes it easier to delete evidence, both because of the features of these systems (automatic deletion of messages, easy deletion of chats or messages, even on the device of the message recipients), and because of the nature of both the software applications that enable conversations (requiring constant updates) and the devices that host these systems (susceptible to frequent renewal with the risk of the information contained therein being deleted). Other communication systems, such as e-mail, have systems where deletion requires more effort, as they lack deletion features such as those offered by many instant messaging applications. They also guarantee the survival of the information exchanged even if the device through which the e-mail was accessed is replaced, since the information is stored outside the device on external servers or in "the cloud", for example. We therefore find ourselves in a context that is characterised not only by the ease of communication (instant, cheap, multilateral), which in turn facilitates contact between competitors (a breeding ground for collusion), but also by the difficulty of obtaining evidence, due both to the greater volatility of this type of communication (as discussed above), and to the impossibility of accessing the communications once the device (usually mobile) through which they were made is discarded. All this contributes to making it more difficult to obtain evidence, not only for the competition authorities in the exercise of their investigative powers, but also for a potential leniency applicant, for whom the provision of evidence to support its statements may be impossible or so limited as to jeopardise the viability of its application, particularly in cases where it requests a reduction in the amount of the fine and it is not possible to satisfy the requirement relating to the added value of the information provided (Article 66 of the LDC).

37. The CNMC's experience shows the growing importance of the WhatsApp instant messaging system as a tool to facilitate communication and, therefore, collusion between competing companies, with a recent cartel-sanctioning resolution being based exclusively on evidence obtained through this system and corroborated by the leniency application submitted after the first round of inspections.[17]

38. This, in any case, demonstrates the ability of the competition authorities, including the CNMC, to adapt to the new reality arising from technological change, helping to minimise the risk that this could pose to leniency programmes. Specifically in order to strengthen capacity for obtaining evidence, collaboration is becoming increasingly important when it comes to leniency for the executives involved in the events under investigation, especially in

[17] CNMC Resolution of 4 March 2022, Case S/0012/19 *Chatarra y Acero*.

a jurisdiction such as Spain, where these executives may also be subject to sanctions.[18] As indicated above, executives may submit a leniency application for themselves or together with the company.[19] This has been reinforced by the Supreme Court, which has confirmed that the CNMC may publicise the names of individuals sanctioned for competition infringements.[20] The reputational impact of this publication may also have an effect on leniency programmes.

39. The recent practice of the CNMC highlights the need for the leniency applicant company to have the collaboration of the company executives that participated in the cartel, as their absence can be a major obstacle to the success of the application, which requires information with significant added value to be provided.[21] This same need for the company to seek the collaboration of the executives involved is also found in compliance programmes, where it can also bring the company additional advantages in the form of a reduction of any fines, as will be seen later on.

40. Sometimes, difficulties obtaining evidence also stem from the possible existence of cases of inadequate implementation of the compliance programmes adopted by economic operators. While it is true that solvent programmes may be helping to reduce anti-competitive practices within companies – an outcome that is obviously desirable for the competition authorities – it cannot be denied that there are merely formal or cosmetic compliance programmes that may lead not only to the maintenance of such practices but also to their sophistication, avoiding leaving a trace and circumventing internal control mechanisms.

41. It is not only that it is not admissible for the company to incentivise co-operation through direct rewards or other types of advantages (e.g., the promise of a job in exchange for co-operation in the leniency application) for those directly responsible for the infringement[22]; it also means that when an entity is aware of the risks of co-ordination between competitors and of the illegality of certain behaviours, evidence to detect such practices is either not generated in the first place or is destroyed afterwards, which makes it impossible for the company to provide evidence in its leniency application.

42. On the contrary, a well-implemented compliance programme can help the company to submit a leniency application and adequately put an end to the illegal conduct.

[18] Article 63.2 of the LDC establishes that "a fine of up to 60 000 euros may be imposed on each of their legal representatives or on the persons that make up the management bodies involved in the conduct".

[19] Articles 65 and 66 of the LDC stipulate that the leniency application may be submitted not only by companies but also by individuals on their own behalf.

[20] Supreme Court judgment of 28 March 2019 (appeal 6360/2017), in connection with Case S/DC/0519/14 *Infraestructuras Ferroviarias*.

[21] See CNMC Resolution of 29 September 2021, Case S/DC/0614/17 *Seguridad y comunicaciones ferroviarias*.

[22] Polley, R (2015), "Is the continued success of leniency in cartel cases in danger? Some comments from a private practitioner's perspective", *Antitrust Chronicle*, No. 1, Competition Policy International, Boston.

2.3. Development of private enforcement of competition law (actions for damages)

43. As indicated above, the development, under the Damages Directive, of an EU legal framework regulating actions for compensation for damage arising from an anti-competitive infringement has had a significant impact on the public enforcement of competition law.

44. To the extent that competition policy must be compatible with the obligation to repair damage arising from an infringement of competition law, the regime provided for in the Damages Directive and incorporated into Spanish law stipulates that the benefit of the leniency programme is limited exclusively to the penalties imposed as part of a sanctioning proceeding, without extending to the consequences that may arise from the private application of competition law, which could dissuade potential leniency applicants. In addition, it should be remembered that in the case of damage caused by a cartel, a regime that is particularly favourable for the claimant has been established, as the burden of proof is reversed, with the presumption that cartels always cause compensable damage, unless the contrary can be demonstrated (Article 76.3 of the LDC).

45. Another possible impact is the increased exposure of the leniency applicant to damages claims, particularly in the case of follow-on actions (those based on a prior sanctioning decision issued by the Competition Authority), insofar as the leniency applicant not appealing the sanctioning decision (which is an entirely possible outcome) may make the decision final sooner and thus make the applicant the first target of damages claims.[23]

46. It is therefore necessary to find a balance that guarantees both the effectiveness of the leniency programmes and the right to effective compensation for damage resulting from an infringement of competition law.

47. The current legal framework is in line with this, which, as mentioned above, seeks to reconcile the implications of the public and private enforcement of competition law in search of a balance that guarantees both i) the effectiveness of leniency programmes, through the limitation of the liability of the leniency applicant, and ii) the proper exercise of the right to compensation for damage resulting from an infringement of competition law, while at the same time guaranteeing to the applicant the confidentiality of the statements provided within the framework of the leniency programme.

2.3.1. Limitation of liability of the leniency applicant

48. Conscious of the need to maintain the attractiveness of leniency programmes, the Directive provides for limitation of the applicant's liability compared to that of the other participants in the cartel. In contrast to the general principle of joint and several liability of the participants in a cartel for the damage caused by the infringement (Article 73.1 of the LDC), Article 73.4 establishes a particular regime for the leniency applicant, limiting its liability to the damage caused "to its direct or indirect customers or suppliers", except when no compensation can be obtained from the other companies involved in the cartel, in which case the leniency applicant shall be jointly and severally liable for the damage caused by the infringement.

[23] OECD Working Party No. 3 on Co-operation and Enforcement (2015), "Relationship Between Public and Private Antitrust Enforcement", OECD Secretariat, Paris, DAF/COMP/WP3(2015)14.

49. It is worth highlighting the additional guarantee introduced in the LDC in 2017 with its new Article 73.5, as a consequence of the transposition into Spanish law of the Damages Directive. This article expressly recognises the right of recourse of the party applying for exemption against the rest of the participants in the cartel, in those cases where it has been held jointly and severally liable for the damage caused by the cartel, in order to ensure that the liability borne by it does not exceed the damage caused exclusively to its direct or indirect customers or suppliers. The current regime in Spain, therefore, gives the leniency applicant a relative advantage over the rest of the cartel members who are not part of the leniency programme, with special protection for the party applying for exemption due to the provisions of the aforementioned Article 73.5 of the LDC.[24]

2.3.2. Limits on access to information provided by the leniency applicant

50. In order to ensure effective exercise of the right to full compensation for damage arising from an infringement of competition law, compatible with its public enforcement, Article 6 of the Damages Directive limits access by damages claimants to the documentation provided by the leniency applicant.

51. Several people have pointed out that this issue constitutes the Gordian knot in the balance between public and private enforcement of competition law.[25]

52. Preventing access to the information provided by the leniency applicant risks depriving the right to compensation for damage caused by the infringement of significance.

53. On the contrary, removing the information provided by the leniency applicant from any kind of protection would further reduce any incentive to use the leniency programme, as such information would form the basis of any potential claims for damages.

54. For this reason, the regime in force in Spain on this issue since the transposition of the Damages Directive in 2017, provided for in the rules of civil judicial proceedings, seeks to strike a balance between the two objectives, excluding from such access any statements made under the leniency programme, which would be excluded from any disclosure obligation (paragraph 6 of Article 283 bis i) of Law 1/2000, of 7 January, on Civil Procedure[26]), but not the rest of the information provided by the applicant, access to which

[24] There are opinions that advocate for further limiting the liability of the leniency applicant, raising the possibility of further extending the benefit provided by the Damages Directive, to completely exempt the leniency applicant from liability in those cases where damage can be compensated by the rest of the cartel participants, in exchange for imposing on the leniency applicant specific duties of co-operation with any damages actions. See Buccirossi, P., C. M. P. Marvão and G. Spagnolo (2020), "Leniency and damages: Where is the conflict?", *The Journal of Legal Studies*, Vol. 29/2, University of Chicago, Chicago, pp. 335-379, https://ssrn.com/abstract=2566774; Ysewyn, J and S. Kahmann (2018), "The decline and fall of the leniency programme in Europe", *Concurrences*, No. 1, Paris, pp. 44-59; Halvorsen Barlund, I. M. (2020), "Access to leniency evidence and the liability of an immunity recipient under EU competition law", *Rapport 5/2*, Norwegian Competition Authority, Bergen, https://konkurransetilsynet.no/wp-content/uploads/2020/07/Rapport-5-2020-Access-to-Leniency-Evidence-and-the-Liability-of-an-Immunity-Recipient-under-EU-Competition-Law.pdf.

[25] Migani, C. (2014), "Directive 2014/104/EU: In search of a balance between the protection of leniency corporate statements and effective private competition law enforcement", *Global Antitrust Review*, Queen Mary University of London, London, pp. 83-88; Álvarez San José, M. (2017), "Las acciones de reclamación de daños derivados de infracción de cártel como elemento dinamizador del programa de clemencia" [Actions for damages resulting from cartel infringement revitalising the leniency programme], *Anuario de la Competencia*, No. 1, Fundación ICO, Madrid, pp. 189-214.

[26] Added by Royal Decree-Law 9/2017, of 26 May in Official State Gazette No. 126 of 27 May 2017.

may be claimed in the framework of action for damages. In this sense, recital 26 of the Directive itself recognises the need to preserve the allegedly self-incriminating statements, in order to continuously guarantee the willingness of the companies to co-operate with the competition authorities.[27]

3. Measures implemented in Spain with potential beneficial effects for the leniency programme

55. In parallel to the successful implementation of the leniency programme in Spain, but with awareness of the impact that the transposition of the Damages Directive could have on the filing of requests for a fine exemption, it is important to highlight the implementation of a series of complementary measures, some of them of a normative and regulatory nature, that are helping to maintain and/or reinforce the attractiveness of the leniency programme.

3.1. Exclusion of the leniency applicant from the ban on contracts with public bodies (2017)

56. One of the main measures in this regard is the exclusion of leniency applicants from the ban on entering into contracts with public administration bodies that may be imposed on those who seriously infringe competition law, in accordance with Article 72.5 of Law 9/2017, of 8 November, on Public Sector Contracts (LCSP).

57. This provision, in connection with Article 71.1.b, provides for the exclusion of leniency applicants from the ban on entering into contracts with public administration bodies that may be imposed on those who have committed a serious infringement of competition law. The reform of the LDC carried out in 2021, as a consequence of the transposition into Spanish law of the ECN+ Directive, has made it possible to add paragraphs to Articles 65 and 66 of the LDC that include the exclusion of leniency applicants from the contract ban provided for in the LCSP, automatically for those applying for a fine exemption and on an optional basis ("may include") for those applying for reduction of the amount of the fine (with respect to which, in any case, it must be verified that payment of the fine is authorised, in accordance with the LCSP).

58. Since the entry into force of the LCSP, the ban on contracts with public administration bodies, which has been configured in Spanish law as *ex lege*, has been referred to in 12 sanctioning resolutions of the CNMC.[28] This measure has had an enormous dissuasive effect with a growing potential, insofar as such resolutions are confirmed in a judicial review and once the duration and scope of such a contract ban has been determined by the Ministry of Finance, since up to now the resolutions of the CNMC have not determined them.[29]

[27] However, there are differing opinions on the matter: some also believe that access to this information is irrelevant, since it rarely deals with issues related to a counterfactual analysis or the quantification of the cost overrun linked to the existence of the cartel, which is usually the most interesting data in the context of a damages claim. Ysewyn, J. and S. Kahmann (2018), "The decline and fall of the leniency programme in Europe", *Concurrences*, No. 1, Paris, pp. 44-59.

[28] The first of these dates from 2019, CNMC Resolution of 14 March 2019, Case S/DC/0598/16 *electrificación y electromecánica ferroviarias*.

[29] Resolutions of the Catalan Competition Authority and the Galician Competition Commission have determined them: Catalan Competition Authority Resolutions of 23 December 2019, Case 94/2018

59. What is clear is that the express exclusion of the leniency applicant is a clear incentive to submit an application, particularly in the many sectors where public procurement is an important source of business.

3.2. Creation of the CNMC Economic Intelligence Unit (2018)

60. In order to strengthen capacity for detecting anti-competitive practices, 2018 saw the creation of the Economic Intelligence Unit, integrated within the CNMC's Competition Directorate. This unit was designed to provide support to the whole of the Competition Directorate in those areas in need of further data analysis and for the management of the *Sistema de Informantes de Competencia Anónimos* [System of Anonymous Competition Informants (SICA)] created in 2021.[30] Among its primary objectives is to strengthen capacity for detection of cartels by virtue of the office held.

61. To this end, the EIU has developed tools to facilitate analysis of the enormous amount of information available in relation to tenders issued by the different public administrations in Spain (state, regional, local), as bid-rigging is one of the most common forms of cartels in Spain.[31]

62. The creation of the EIU has already borne tangible fruit. Among other cases, the unit contributed directly to the analysis of the available data, which led to a series of inspections in December 2018 in the previously explained file S/0012/19 *Conservación de Carreteras* and to proper processing of the information, exponentially increasing the soundness of the sanctioning proceedings.

3.3. Adoption of the CNMC guidance on regulatory compliance programmes (2020)

63. In 2020, the CNMC published its *Guía sobre los programas de cumplimiento normativo en relación con las normas de defensa de la competencia* [Guide on regulatory compliance programmes in relation to antitrust rules][32] (hereinafter, the "Guide"). Its purpose is to encourage companies to implement and develop regulatory compliance programmes, for which it provides a series of guidelines on the basic criteria that the CNMC considers key for the effectiveness of such programmes.

64. The Guide also sets out a series of incentives to encourage both the implementation of such programmes and the collaboration of companies with the CNMC, especially within the framework of the leniency programme.

65. The effect of the guidelines on the leniency programme is, by its very nature, ambivalent. Firstly, the ultimate objective of the guidelines is to promote behaviours that comply with competition law, which will result in less infringing conduct and, therefore, fewer leniency applications.

Licitaciones Servicio Meteorológico de Cataluña and 21 July 2021, Case 102/2019, *Aerobús 2* and Galician Competition Commission Resolution of 15 December 2020, Case R 4/2020 *Licitación transporte escolar*.

[30] Available in Spanish at https://edi.cnmc.es/buzones-anonimos/sica.

[31] 30 of the 83 cartels sanctioned in Spain between 2010 and 2022 consisted of this type of practice (Source: CNMC).

[32] Available in Spanish at www.cnmc.es/sites/default/files/editor_contenidos/Competencia/Normativas_guias/202006_Guia_Compliance_FINAL.pdf.

66. However, the Guide establishes a system of incentives both for those cases in which the company already had a regulatory compliance programme in place prior to the initiation of the CNMC's sanctioning proceedings (*ex ante* programmes) and for those in which the company implements it after the CNMC's sanctioning proceedings (*ex post* programmes). With regard to the former, the Guide expressly states that, in order to benefit from the incentives provided for therein, the company must avail itself of the leniency programme in the event that the infringement in question constitutes a cartel. In this way, the company will be able to benefit from a reduction of any fine awarded, which will be added to the reduction provided for by the leniency programme. Obviously, this reduction will not be possible in cases where the company has obtained a fine exemption as a result of its leniency application.

67. The benefit of the provisions of the Guide for the leniency programme is therefore twofold. In addition to the obvious incentive provided by an additional reduction in the amount of any fine awarded, there is also the symbolic reinforcement of the leniency programme, since the provisions of paragraph 4.1.A of the Guide appear to conclude that the credibility of the regulatory compliance programme implemented by the company in the framework of sanctioning proceedings is directly linked to its participation in the leniency programme where applicable. In this sense, the Guide establishes that "bringing the cartel or its collaboration to the attention of the authority through the leniency programme in accordance with the provisions of Articles 65 and 66 of the LDC constitutes evidence of the company's commitment to compliance with the antitrust rules".

68. In this sense, the Guide reflects the spirit of the aforementioned Article 72.5 of the LCSP, since it sets out that the exclusion from the contract ban shall also apply to those companies that demonstrate "the adoption of appropriate technical, organisational and personnel measures to prevent future administrative infringements, including the use of the leniency programme for distortion of competition".

69. Thus, the combined effect of the provisions of the LCSP and the CNMC Guide helps to strengthen the leniency programme, insofar as inclusion in the regulatory compliance programmes seems to be an essential condition for the company to obtain all the advantages in the event of a competition-related sanctioning proceeding.

70. Since the adoption of the CNMC Guide, it has become common practice for companies involved in sanctioning proceedings to invoke their regulatory compliance programmes. The programmes were assessed positively for the first time in the resolution of 11 May 2021, in which it was agreed to apply a 10% reduction of the fine imposed on one of the participants in the cartel, for the adoption, *ex ante* and *ex post*, of measures to comply with competition regulations.[33]

[33] Case S/DC/0627/18 *Consultoras*.

4. Conclusion

71. The implementation of the leniency programme in 2008 and its enforcement since then has radically transformed capacity to detect and sanction cartels in Spain. The programme has proven to be a flexible, reliable and attractive tool for companies and individuals, which explains its enormous success throughout its 14 years of existence.

72. However, an analysis of the data from recent years reveals a certain slowdown in the effectiveness of this tool, in parallel with the decrease in the number of cartels sanctioned in Spain from 2015 onwards.

73. This slowdown, which could be due to the various factors described, has in no way prevented the CNMC, with support from the leniency programme, from maintaining stable sanctioning activity in recent years, even in extraordinary circumstances such as those caused by the COVID-19 pandemic.

74. In line with this approach, in recent years, a series of legal and administrative measures have been implemented that are expected to have a positive effect on the CNMC's sanctioning activity and the effectiveness of the leniency programme.

75. In this sense, the adoption of future measures with a similar aim cannot be ruled out, such as the introduction in the Spanish legal system of a settlement procedure like those that exist in other jurisdictions.[34]

76. At present, the CNMC is investigating and/or deciding on numerous cartel cases, particularly in relation to bid-rigging, a practice that is particularly harmful to general welfare due to its impact on the quality of services and public finances. This highlights the need to continue to adapt the legal and administrative framework in which the leniency programme is implemented, not only to the reality of the markets and technological development, but also to the experience gained by both the authorities and the economic operators after 14 years of the programme being in place.

[34] For example, the settlement procedure launched by the European Commission: https://ec.europa.eu/competition-policy/cartels/settlement_en.