

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by  
Spain****5 June 2018**

This document reproduces a written contribution from Spain submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm](http://www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm)

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**JT03431072**

## *Spain*

### 1. Introduction

1. Since entering into force on 28 February 2008, with six leniency applications submitted on the very first day, the Spanish leniency program has displayed very positive results in terms of the number of leniency applications filed, and in the results obtained from the investigation and valuation of the leniency requests submitted since then.
2. In Spain, leniency is the single most effective tool for detecting cartels, as stated in the Secretariat survey on experiences with the OECD Recommendation concerning Effective Action against Hard Core Cartels, together with the increased powers to carry out dawn raids.
3. Prior to the introduction of the Spanish Leniency Programme (1989-2007), the Spanish Competition Authority was only able to detect and fine around 10 cartels. Between 2010 and 2017, due largely to the leniency programme, 54 cartels were detected and sanctioned, 27 of them with leniency application, and 8 thanks to the information collected in dawn raids ordered thanks to leniency applications (Annex I, number of undertakings dawn raided and Annex II, cartels sanctioned since 2010). The rest of the cartels uncovered (19) owed much to the leniency program as well, considering that sanctions and media coverage increased awareness and help to gather relevant information of potential infringements that, thanks to investigative work, was latter proved.
4. Since February 2008, more than 100 leniency applications have been presented, resulting in 27 direct cartels uncovered and sanctioned with total fines amounting almost 935 € millions. The leniency programme allowed a more effective use of resources by helping to reduce investigative work, reinforce the strength of the cases and increase significantly the number of inspections performed by the CNMC.
5. Inspections have also led to the opening of new proceedings, other than that relating to the original leniency application, thanks to collateral information obtained during the investigations.
6. Nowadays, CNMC has two defined objectives in the fight against cartels:
  - First, to strengthen the antitrust action and increase the effectiveness of the fight against cartels, by reinforcing the work done at the judicial revisión level in order to defend our cases at higher instances where some decisions may not be well understood.
  - second, to reinforce cartel detection by continuing with a proactive approach. This includes initiatives such as a whistle-blowing mailbox; specific training to public procurement officials to detect bid-rigging cases; screening of public procurement data; formal/informal exchange of information with other public Authorities and improving the implementation of the Leniency Programme.
7. In spite of the leniency programme success, CNMC is aware of the need to keep it permanently updated and attractive to companies that want to collaborate with us, something that is not easy considering the very many new developments surrounding antitrust in recent years.

## 2. Challenges

8. In this regard, and after 5 years of practical experience, the Authority published in June 2013 a Communication on Leniency Program that intended to clarify many of the questions that had arisen in its practical application.
9. Three years later, in 2016, CNMC opened a public assessment consultation of the program in order to better know which were the main concerns that it may pose and introduce the necessary reforms, if needed, to keep it going.
10. With this in mind, a questionnaire was prepared and sent to law firms with a rich experience in terms of submission of a greater number of leniency applications, both at the national and European level.
11. Among others, the most relevant issues covered in this questionnaire were
  - the identification of the key elements that determine whether to submit a leniency application,
  - the analysis of operational issues related to the submission, processing and analysis of leniency applications
  - and the general assessment of the program and possible improvements to introduce.
12. This exercise had three goals:
  - First, to explore the incentives and disincentives for the presentation of leniency applications;
  - Second, to know how the system was viewed from the practice perspective once the submission had been made, specially its predictability, transparency and protection of confidential documents
  - Third, getting ideas from the private practice on how to improve and strengthen the leniency program, in particular in relation to new developments such as private enforcement, damages, disqualification, sanctions on individuals, cooperation with other competition agencies, etc.
13. The responses received agreed, overall, on the correct design of the program and its good implementation, confirming that the Spanish Leniency Program have proved very positive, facilitating cartel detection and increasing the instability of cartels agreements.
14. This general assessment is shared by the CNMC, connecting this success with the reinforced power inspections; the transparency, certainty and predictability of its application and expected benefits (trust of leniency applicant); the strong deterrence through considerable fines and the increased social awareness about cartel fight thanks to press releases, web posts, etc.
15. In fact, review Courts have upheld all decisions of cases with leniency applications
16. A part from fines calculation methodology which we will refer to later on, Courts have confirmed that interested parties in the administrative proceeding only have access to leniency documents once the statement of objections is notified and that

leniency statements can only be seen or taken notes from, but not copied by the parties. This protects leniency applicants and favor the proper function of the program

17. Taking into account the practical experience gained, the opinion of private practitioners, our internal discussions and the jurisprudence of our Courts, the following are some of the specific challenges for the Spanish leniency program identified.

## **2.1. Exposure to damage claims**

18. The interplay of leniency programs and damages actions have been discussed not only in a number of recent papers<sup>1</sup>, but between Competition Authorities and NGAs. The exposure to private enforcement is a decisive disincentive for leniency applications. However, some of those papers and discussions also outlined that private damages actions may increase the deterrent effect of competition law and incentive undertakings to present leniency applications.

19. Under these circumstances, the level of protection of the leniency applicant becomes particularly relevant to maintain the incentives of the leniency program; therefore the more protection is given to the leniency applicant in comparison to the rest of cartel members in relation to damages actions, the more effective the program will be.

20. In this respect, how Competition Authorities handle third-party access to file requests and how national courts handle disclosure of those incriminating documents is also key.

21. In Spain, after the implementation of the EU Damages Directive into Spanish law, CNMC will not provide copies of the leniency submissions, as such disclosure would impair the effectiveness of the leniency program and weaken the fight against cartels. Further, as a legal safeguard to protect leniency statements and prevent further dissemination of that information, if those leniency statements are provided, these will not be accepted in the civil damages actions.

22. Indeed, to safeguard the effectiveness of leniency programs, infringers that obtained immunity from fines will compensate only their (direct and indirect) customers.

23. These are some of the elements that could help not to discourage leniency applicants in a context of broader application of private damage claims, but are far from solving the impact that these claims may have in the future, considering that the expected savings from leniency application in terms of exempted fines could be offset by far with damage compensations. The paradox is that damage claims will be difficult to get if there are no public administrative decisions (follow on actions) and these will not happened unless the leniency program works.

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<sup>1</sup> For example, Romina Polley (Cleary Gottlieb Steen & Hamilton LLP), “Is the continued success of Leniency in cartel cases in danger? Some comments from a private practitioner’s perspective”, CPI Antitrust Chronicle September 2015 (I); Miriam C. Buiten, Peter van Wijck & Jan Kees Winters, “Does the European damages directive make consumers better off? Journal of competition Law & Economics, 1-24, 2018.

## 2.2. Fines calculation methodology

24. In February 2015 our Supreme Court annulled the 2009 Communication on fines calculation. This represented a major setback for the effectiveness of the system, both for the effective protection of the competition and for the proper functioning of the leniency program.

25. In order to avoid the appearance of illicit conducts that favor price increases, quality reductions or any other result negative to consumers it is of utmost importance the undertakings are well aware of the implications in terms of penalties and fines that can suffered in case they are detected and sanction. When our Supreme Court declared the nonconformity of the 2009 communication on fines with the Spanish legislation, a period of uncertainty was open and the thread of heavy fines against competition offenders remained unclear. This affected lawyers on how to advise their clients when asked about leniency implications (pros and cons) and may have had a chilling effect on applications

26. Even when Supreme's Court jurisprudence did not denied the substance of the cases, it ordered a recalculation of the fines, raising uncertainty on the possible effective amount and therefore reducing the deterrent effect for the companies that could expect a softer treatment in case of being detected in a cartel offense.

27. In the meantime, the CNMC developed a new methodology that complied with Supreme Courts jurisprudence and that it has been applied both to new cases (14 cartel decisions in 2015 with fines amounting 506 million €, 9 cartels in 2016 218 € and 3 cartel decisions in 2017 €47.3 million €) and to old cases revised by the higher Court since January 2015 and that had to be recalculated according to the new jurisprudence<sup>2</sup>

28. The problem with the new methodology was that CNMC could not be sure about its validity until revision Courts give their approval to the new method. Fortunately, two recent decisions<sup>3</sup> by the first instance revision court (Audiencia Nacional) have fully confirmed the calculation system adopted by the CNMC since 2015 and this will bring about predictability on fine setting in Spain and a renewed trust on the benefits of the leniency program.

## 2.3. Individual sanctions/individual leniency applications

29. Although the Spanish competition system as a whole follows the European one, it has also its own specificities, being sanctions on individuals one of them.

30. According to Article 63.2 of the Competition Act, legal representatives or managers that have participated in the cartel may be fined up to 60,000€. The Spanish Leniency Program provides undertakings and individuals with the benefit of immunity or a reduction for fines in the leniency applications presented by undertakings and also the

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<sup>2</sup> Session IV of the Global Forum on Competition – Sanctions in Antitrust Cases Contribution of the Spanish Competition Authority 28 October 2016. [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)73/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)73/en/pdf)

<sup>3</sup> Audiencia Nacional, Sala de lo Contencioso-Administrativo Sección sexta, 20 de marzo de dos mil dieciocho. LABORATORIOS HARTMANN S.A. Y PAUL HARTMANN, ESPAÑA, S.L.U. and A.N. Sala de lo Contencioso-Administrativo Sección sexta, 19 de marzo de dos mil dieciocho. GONZÁLEZ BYASS, S.A.

possibility of leniency applications presented by individuals (current or former managers) on his own behalf.

31. However, although the possibility to sanction individuals entered into force in 1989, was not put in place until recently, with the first fines on managers imposed in 2016. In particular, 15 individuals were fined (€147,150) in 3 cartel decisions during 2016. In fact, one of the managers sanctioned benefited from the leniency program and exempted from paying a fine of 15,000€.

32. It may be the case that an individual applies for leniency first on an individual basis and the undertaking he works for does it afterwards, making contradictory declarations. This potentially could weaken the case and discourage companies to present leniency applications. On the other hand, extending the immunity to individuals could also become a trigger to increase leniency applications and therefore should not be discharged unless evidence shows that the net effect can be counterproductive for the program

## **2.4. Disqualification from public contracts**

33. Disqualification from public tenders as a new sanction for the infringement of the Competition law, undoubtedly raises the deterrence effect and makes companies much more cautious when deciding to set up or enter a cartel, considering the importance of public contracting in sectors of the economy

34. Disqualification has been introduced in the Spanish regime through the Spanish Public Procurement Act in October 2015 and it can be applied not only for competition offences but also for many other infringements of public law (environment, illicit association, corruption in international economic transactions, influence peddling, bribery, crimes against the Public Treasury, etc.)

35. The appreciation of the infringement lays on the contracting body and the effective sanctioning (disqualification) correspond to a special body of the Treasury. The consequence is that the legal framework for its application in the case of competition infringements is not yet clearly developed (which administrative body will be entitled to decide it? in which cases (only bid rigging? other infringements?), for how many years? will leniency applicants be exempted?, etc.)

36. All these questions introduce uncertainty in companies and lawyers as to what extent the benefits of the leniency application will apply and therefore it remains to be seen if the new penalty will work for or against the incentive of undertakings to inform the competition authority of existing cartels.

## **3. Co-ordination of leniency programs**

37. Globalisation increases the international character of cartel activity. Investigating international cartels poses many challenges to Competition Authorities, highlighting the importance of increased cooperation on both procedural and substantive issues. A successful international cooperation could be a very effective tool to detect and dismantle global cartels and a valuable tool to share experiences, including cartel cases with leniency applications.

38. International co-ordination and cooperation in anti-cartel enforcement is important for the CNMC, participating actively in the OECD, the ICN (especially within the Cartels Working Group) and through bilateral contacts with other National

Competition Authorities (NCAs), especially with our neighbors, the Portuguese and the French Competition Authorities.

39. Nonetheless, as members of the EU, cartels that we tackled are of European nature in most of the cases and the coordination is between other European countries within the ECN. The coordination and cooperation in case of cartels of supra European dimension is left to the European Commission and therefore we have little experience in coordination of leniency programs with countries outside the EU

40. At European level, however, our experience is rich. In practice, continuous and close cooperation between the CNMC and the EU and with other European NCAs, particularly within the European Competition Network (ECN), is regular and highly necessary to tackle effectively with cross-border cartels

41. It is perhaps on this specific matter where we will be willing to go further, intensifying close co-ordination and information exchange for network purposes in order to avoid lack of efficiency and misuse of resources, considering that cooperation is a key part of a successful enforcement tool against cartels, in particular in the ECN scope.

42. Taking into account the Spanish experience, co-ordination through information sharing and permanent updating of the information submitted by the leniency applicant has been key (for example, foam case).

43. In this respect, CNMC facilitates this cooperation and exchange information if the level of protection does not vary across jurisdictions, something that occurs at EU level, thanks to a common legal framework (Regulation 1/2003 and Commission Cooperation Notice within ECN), that enables it and that contributes to its effectiveness as enforcement tool in the fight against cartels.

44. The existence of a network of contact points as well as a common electronic database with basic information on cases is essential for collaboration in different ways as for example; to coordinate investigative steps, identify issues of common interest, experience sharing, or even, evidence sharing.

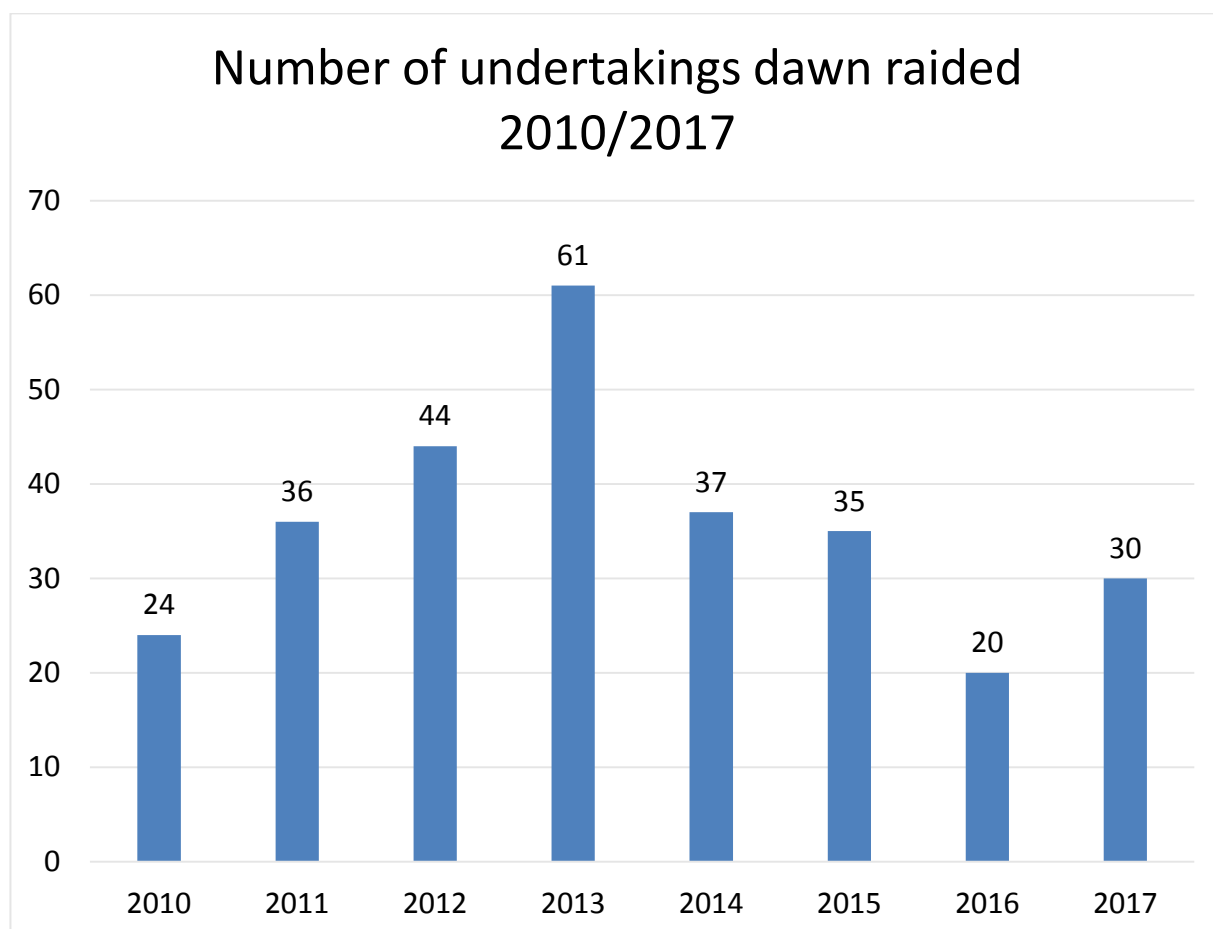
45. For that, it is necessary to establish effective formal or informal procedures and clarify the legal limits about the information to be exchanged, especially when it can have implications for the leniency program and/or criminal procedure.

46. Taking into account all these issues, CNMC is currently considering some amendments in the leniency program based on the experience of the past 10 years and the current discussion on the ECN + Directive

47. Precisely, one the objectives of this new regulation is the harmonization of the leniency program across Europe to avoid possible divergences that could discourage undertakings from presenting leniency applications. Among others; the treatment of summary applications; case allocation and the consideration of the particularly well placed Competition Authority to deal with that leniency application (especially in cases with different leniency applicants before the European Commission and the NCAs); parallel cases (EU-wide scheme with national related cartels) or the access to leniency statements.

48. For the CNMC, convergence is needed not only in procedures, but also on the scope and the determination of the authority best place to deal with leniency applications submitted before the European Commission, in order to bring security to the leniency applicant and not jeopardize its efficiency.

## ANNEX I





## ANNEX II

