

Unclassified

English - Or. English

22 May 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Note by Spain

13 June 2023

This document reproduces a written contribution from Spain submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

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

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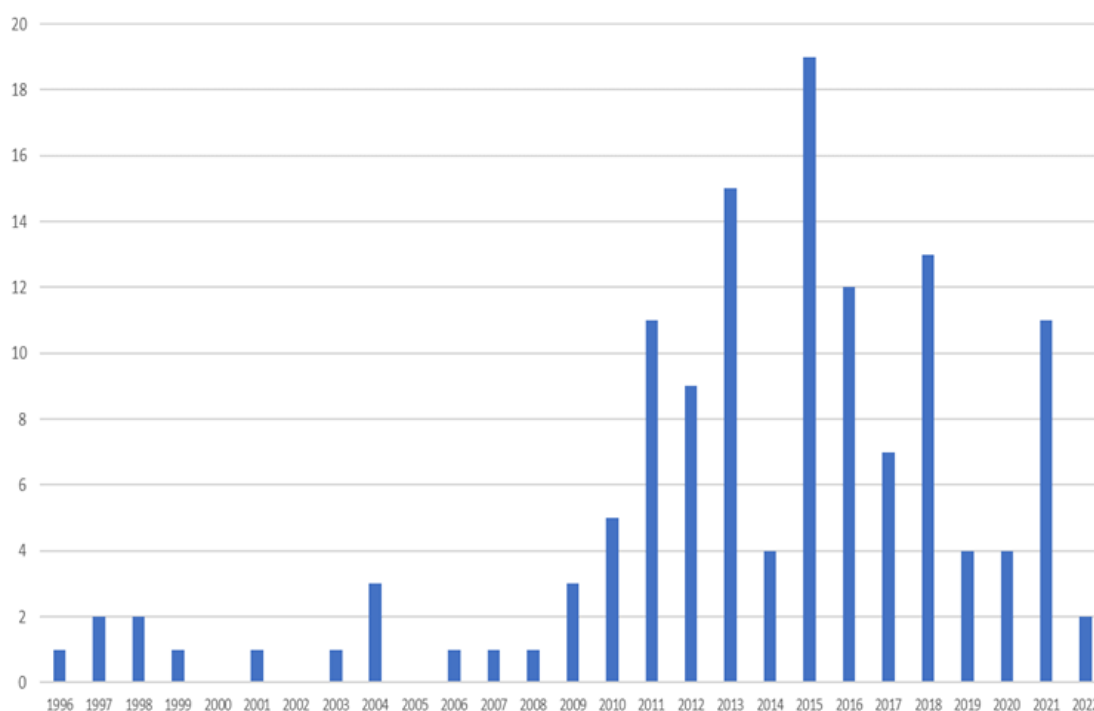
Spain

1. Introduction: The State of Play of the Leniency Programme in Spain After Fifteen Years of Implementation

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 the detection of cartels in Spain, greatly reinforcing the effectiveness of the country's competition policy.

2. 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 121, compared to the 12 sanctioned previously, since the first cartel was sanctioned in 1996:

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



3. 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 (application for immunity from fines) and 66 (application for reduction of fines) of the LDC, Articles 46 to 53 of Royal Decree 261/2008, of 22 February 2008, approving the Reglamento de Defensa de la Competencia [Spanish Competition Regulation], and the Communication on the Leniency Programme of 2013¹.

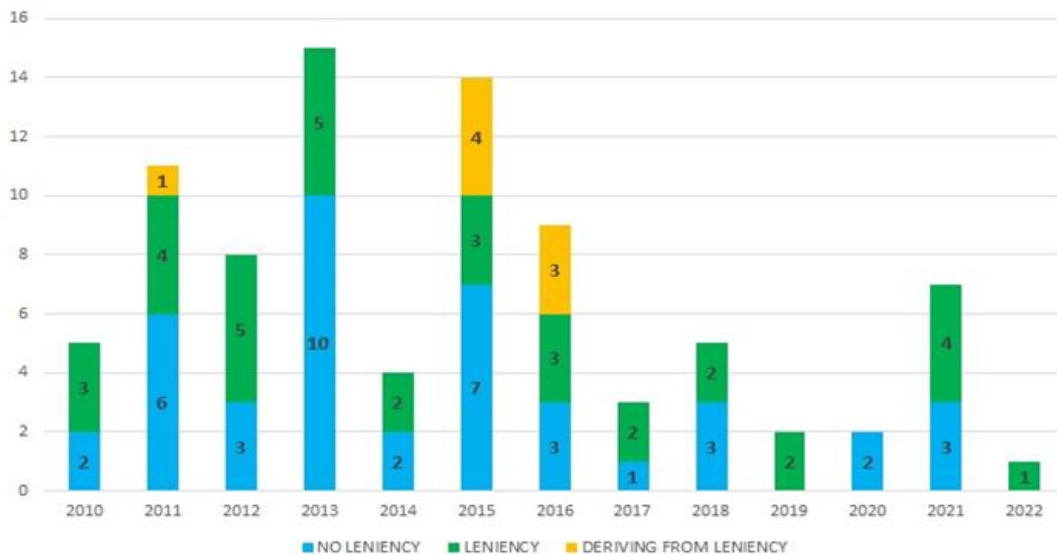
4. The implementation of this programme since its effective entry into force on 28 February 2008 can be considered a real success. The first leniency application decisions

¹ Published in the Official State Gazette of 16 August 2013 and available at <https://www.cnmc.es/file/8558/download>

were published in 2010. From then until now, as can be seen in Figure 2, out of a total of 116 sanctioned cartels, leniency applications have been filed in 53 cases (46% of the total).

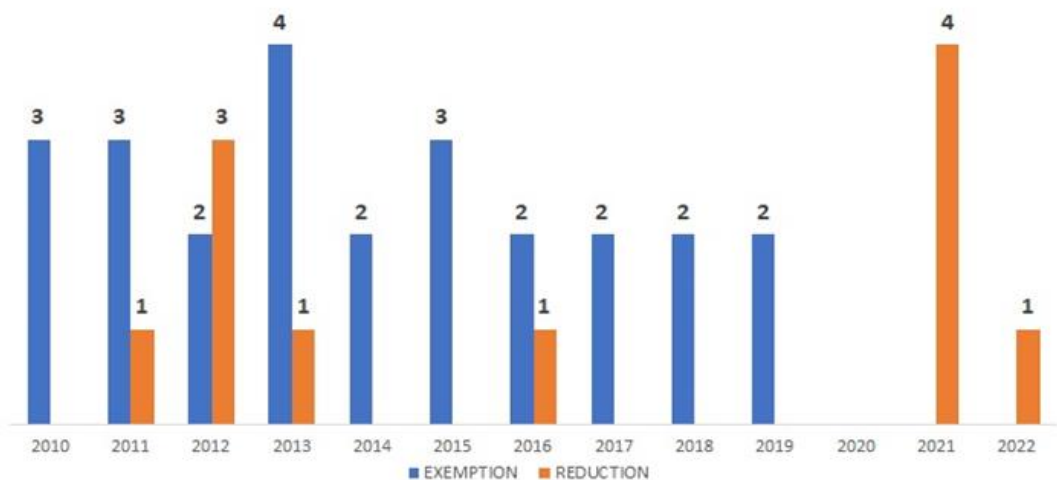
5. To these, a further 8 cartels should be added, originating the information on other offences gathered during inspections carried out following the filing of a leniency application:

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



6. The preponderance of applications for immunity from fines 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 reduction of fines), as can be seen in Figure 3, which shows the weight that each type of application (immunity or reduction) has had in the decisions issued each year. Of the 53 cartels sanctioned under the leniency programme, a total of 39 originated from applications for immunity from fines:

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



7. However, it cannot be ignored, in view of this last figure, that there are a series of indicators that show a decrease in recent years, both in the number of cartels detected and sanctioned by the CNMC and in the number of disciplinary proceedings originating in a leniency application. This fact, however, is not limited to Spain², and when compared to the data on sanctioned cartels it also shows the CNMC's ability to detect and sanction cartels without a leniency programme. Nonetheless, it means that an analysis of the existing tools available to competition authorities for this purpose and the need to maintain the incentives to file a leniency application should be carried out.

8. Another peculiarity of the Spanish antitrust system is the possibility of imposing sanctions not only on the legal persons responsible for the infringement but also on any of their executives who participated in it.

9. In this regard, Article 63.2 of the LDC allows the Spanish competition authority to impose fines of up to 60,000 euros on the persons who make up the management bodies involved in the conduct. This possibility has existed since the entry into force of the LDC, but its widespread implementation is relatively recent, as there are only precedents from 2016, with a total of 11 cases³.

10. Moreover, insofar as the natural persons who are members of the decision-making bodies of the sanctioned companies can be subject to a financial penalty, the Spanish leniency regime also allows them to benefit from immunity from fines or reduction fines through a double channel: either by including these executives in the leniency application submitted by their company, which extends the application filed by the company to its executives⁴, or by the executives on their own behalf, a scenario that has already arisen, although these applications were eventually withdrawn.

11. Including executives as beneficiaries is an important driver of the leniency programme insofar as it contributes to intensifying competition in the race for the highest available incentive (immunity from fines), as an executive or company that successfully files an application for immunity in their own name would be depriving any other potential applicant of it⁵. While a company may, as mentioned above, extend the subjective scope of

² VIDAL MARTÍNEZ, Patricia, “Interacción entre reclamaciones de daños por ilícitos de competencia y las políticas de clemencia y de transacción” [Interaction between claims for antitrust damages and leniency and settlement policies], *Anuario de Derecho de la Competencia* 2022, 1st ed., September 2022; YSEWYN, J. and KAHMANN, S.: “The decline and fall of the leniency programme in Europe”, *Concurrences Review*, no. 1-2018, pp. 44-59.

³ CNMC resolutions of 26 May 2016, case S/DC/0504/14 AIO; 30 June 2016, case S/DC/0519/14 INFRAESTRUCTURAS FERROVIARIAS; 10 November 2016, case S/DC/0555/15 PROSEGUR-LOOMIS; 23 February 2017, case S/DC/0545/15 HORMIGONES DE ASTURIAS; 3 May 2018, case S/DC/0584/16 AGENCIAS DE MEDIOS; 14 March 2019, case S/DC/0598/16 ELECTRIFICACIÓN Y ELECTROMECAÁNICA FERROVIARIAS; 1 October 2019, case S/DC/0612/17 MONTAJE Y MANTENIMIENTO INDUSTRIAL; 22 December 2020, case S/DC/0620/17 COMBUSTIBLES SÓLIDOS; 4 February 2021, case S/0644/18 RADIOFÁRMACOS; 11 May 2021, case S/DC/0627/18 CONSULTORAS and 29 September 2021, case S/DC/0614/17 SEGURIDAD Y COMUNICACIONES FERROVIARIAS.

⁴ This has occurred in cases S/DC/0504/14 AIO, case S/DC/0598/16 ELECTRIFICACIÓN Y ELECTROMECAÁNICA FERROVIARIAS, case S/DC/0612/17 MONTAJE Y MANTENIMIENTO INDUSTRIAL, case S/DC/0627/18 CONSULTORAS and case S/DC/0614/17 SEGURIDAD Y COMUNICACIONES FERROVIARIAS.

⁵ ÁLVAREZ SAN JOSÉ, M.: “Los directivos como beneficiarios del programa de clemencia: retos y oportunidades” [Executives as beneficiaries of the leniency programme: challenges and opportunities], *Anuario de la Competencia*, Fundación ICO, 2018, pp. 253-272.

its application to cover also its executives, the reverse is not true. Hence, a company participating in a cartel is always exposed to the risk that one of its executives (or former executives) will be the first to file an application for immunity in their own name, thus depriving the company of this advantage.

12. In recent years, several legislative reforms have come into force in Spain in many different areas, especially in the areas of public procurement and criminal law, which include specific provisions to safeguard and even promote the effectiveness of the leniency programme. Along with this, the CNMC itself has launched initiatives within its specific sphere of action for the same purpose. These types of measures are analysed in the following section. In addition, and apart from the measures with a direct impact on the leniency programme, in recent years, Spain has also adopted other types of initiatives aimed at ensuring an effective fight against cartels, thereby reducing reliance on the leniency programme without diminishing the CNMC's investigative and sanctioning activity. These types of measures are described in section III.

2. Measures implemented in Spain with potential beneficial effects for the leniency program

2.1. Granting of criminal immunity to leniency applicants.

13. Although participating in a cartel does not expressly constitute a criminal offence under Spanish law, various criminal offences provided for in Organic Law 10/1995 of 23 November 1995 on the Criminal Code can fall within the concept of a cartel, such as altering prices in public tenders and auctions (Article 262 of the Criminal Code), withholding essential commodities or basic consumer goods (Article 281 of the Criminal Code) and altering prices (Article 284 of the Criminal Code).

14. Thus, filing a leniency application entails an increased risk of exposure for the applicant not only under competition law but also under other areas of law, particularly criminal law. Therefore, Article 23.2 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, aimed at providing the competition authorities of the Member States with the means to enforce competition rules more effectively and to ensure the proper functioning of the internal market (the so-called ECN+ Directive), empowers Member States to eliminate or mitigate the criminal consequences that natural persons may suffer as a result of their participation in a cartel, provided that they submit an application for immunity from fines and comply with their duty to cooperate to that effect.⁶

15. Among the available options, Spanish lawmakers have chosen to grant immunity from criminal liability — not just mitigation— when transposing the above-mentioned Directive through Organic Law 14/2022, of 22 December 2022, which transposes European directives and other provisions for the adaptation of Spanish criminal law to European Union law and reforms crimes against moral integrity, public disorder and smuggling of dual-use weapons. Thus, the explanatory memorandum to Organic Law 14/2022 transposing the aforementioned article states that “leniency is an effective and essential mechanism for the fight against anti-competitive practices” and that “the fact that natural persons have the possibility of applying to the national competition authority for leniency in their own name for their participation in a cartel has a fundamental and empowering relevance, as its immediate effect is that natural persons are the top priority of the leniency programme”.

⁶ OJEU L 11 of 14 January 2019.

16. The possibility of criminal immunity is applicable to three specific offences mentioned in the Spanish Criminal Code: the alteration of prices in contests and auctions (article 262), the deduction of raw materials or essential products (article 281) and the alteration of prices (article 284.1.1°). The applicable regime for granting immunity from criminal liability is the same for all three offences (Article 262.3, applicable to the offence of altering prices in public tenders and auctions, and Article 288a, by reference to Articles 281 and 284, corresponding to the offences of withholding essential commodities or basic consumer goods and altering prices) and it extends to current or former executives and members of staff of companies that have engaged in these practices.

17. The cumulative conditions required are as follows:

- To put an end to their participation in the infringement;
- To cooperate fully, on a continuous basis and expeditiously with competition authorities as well as with legal and fiscal authorities, by providing relevant information and evidence that proves to be useful for the investigation, detection and punishment of the persons involved; and
- To file an application for immunity from fines in accordance with the LDC, i.e. within the framework of the leniency programme, before being informed that they are under investigation.

18. The regulation of immunity from criminal liability in relation to these offences is not only tied to a prior leniency application for immunity from fines — not just for a reduction of fines — but it is also shaped and worded in a coherent and very similar way to that provided for in Article 65 of the LDC, which requires “*full, continuous and diligent* [...]” cooperation and to put an end to their participation in the infringement.

2.2. Exclusion of leniency applicants from the ban on contracts with public bodies

19. Another significant measure due to its incentive effects, especially in relation to sectors where public contracting is particularly important, is the exclusion of leniency applicants from the ban on entering into contracts with public administration bodies, which may be imposed on those who seriously infringe competition law, in accordance with Articles 71.1.b) and 72.5 of Law 9/2017, of 8 November 2017, on Public Sector Contracts (LCSP)⁷. The reform of the LDC carried out in 2021, as a consequence of the transposition of the ECN+ Directive into Spanish law, has added 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. This exclusion operates automatically for those applying for immunity from fines but is optional for those applying for a reduction of fines.

20. Since the entry into force of the LCSP, the ban on contracts with public administration bodies has been imposed in 16 sanctioning decisions issued by the CNMC⁸.

21. This measure has a growing potential, insofar as these rulings are confirmed on judicial review and once the duration and scope of the contract ban are determined by the

⁷ Official State Gazette no. 272, of 9 November 2017.

⁸ The first one dates from 2019, CNMC resolution of 14 March 2019, case S/DC/0598/16 ELECTRIFICACIÓN Y ELECTROMECAÁNICA FERROVIARIAS.

Ministry of Finance, as up to now the CNMC's decisions have not specified them, although the regional competition authorities have done so⁹.

22. Precisely in order to reinforce the effectiveness of this measure, in November 2022, the CNMC submitted the *draft communication on the criteria for establishing a ban on contracting on the grounds of distortion of competition*¹⁰ to a public information procedure, with the intention of adopting a set of guidelines that will allow the application of this sanction with maximum legal certainty.

2.3. Adoption of the CNMC guidance on regulatory compliance programmes

23. In 2020, the CNMC published its *Guía sobre los programas de cumplimiento normativo en relación con las normas de defensa de la competencia*¹¹ [Guide on regulatory compliance programmes in relation to antitrust rules] (hereinafter, the “Guide”). The purpose of the Guide is to encourage companies to implement and develop compliance programmes by providing a series of guidelines regarding the basic criteria that the CNMC considers relevant for the effectiveness of such programmes and encouraging companies to cooperate with the CNMC, especially within the framework of the leniency programme. Thus, the Guide has taken into account the possible effects of these guidelines on the leniency programme and contains provisions in this regard, allowing for a reduction of fines in addition to the reduction provided for in the leniency programme itself.

24. Since the adoption of the Guide, it has become common practice for companies involved in disciplinary proceedings to invoke their regulatory compliance programmes, especially *ex post*. The programmes were assessed positively for the first time in the resolution of 11 May 2021 (case S/DC/0627/18 Consultoras), 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 of compliance measures under competition law.

3. Other measures implemented in Spain with potential effects on the *ex officio* Detection of Cartels

25. In recent years, Spain has adopted other types of measures which, although not directly related to the leniency programme, have helped to significantly reinforce the effectiveness of the fight against cartels. This has allowed the CNMC to maintain an intense investigative and sanctioning activity and thus minimise the risk of overreliance on the leniency programme. At the same time, these measures also have a direct impact on the effectiveness of the leniency programme, since the success of the programme depends to a large extent on the perception by cartel participants of the risk of being detected. The more effective detection tools are, the greater the motivation for cartel members to file a leniency

⁹ Resolutions of the Catalan Competition Authority (ACCO) of 23 December 2019, case 94/2018 Licitaciones Servicio Meteorológico de Cataluña and the Galician Competition Authority (CGC) of 21 July 2021, case 102/2019 Aerobús 2 of 15 December 2020 and case R 4/2020 Licitación transporte escolar.

¹⁰ Available at <https://www.cnmc.es/consultas-publicas/competencia/borrador-criterios-prohibicion-contratar>.

¹¹ Available on the CNMC website: https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/Normativas_guias/202006_Guia_Compliance_FINAL.pdf

application. Conversely, the less effective the competition authority's ability to detect cartels *ex officio*, the less incentive for cartel members to file a leniency application.

3.1. Creation of the CNMC Economic Intelligence Unit

26. The need for competition authorities to maintain their ability to effectively detect collusive practices, particularly cartels, has led to the development of resources to reduce reliance on leniency programmes by facilitating the *ex officio* detection of these types of practices. In this regard, it should be noted that in the last two years, the CNMC has issued 8 decisions on cartels¹², 5 of which led to a reduction of the fines imposed through a leniency application¹³. In addition, 75% of the cases referred to anti-competitive practices in public tenders¹⁴.

27. In order to strengthen the capacity to detect anti-competitive practices, 2018 saw the creation of the Economic Intelligence Unit (EIU), integrated within the CNMC's Competition Directorate. This unit, run by a multidisciplinary team, was designed to provide support to the whole Competition Directorate in those areas in need of further data analysis and for the management of the Sistema de Informantes de Competencia Anónimos [Anonymous Competition Informant System (SICA)], created in 2021¹⁵. Among its primary objectives is to strengthen the capacity for *ex officio* detection of cartels.

28. To this end, the EIU has developed different tools to facilitate the analysis of collusive patterns in public tenders.

29. Specifically, the EIU has been working since 2015 on a public procurement database, trying to reduce the problems related to the need to aggregate different sources, and categorising data by quality levels. It is worth noting that some of these sources have an unstructured format, which requires prior data processing and cleaning for its correct use. This has allowed the EIU to develop powerful search tools that leverage the processed data and are immensely helpful for detecting potential bid-rigging cases.

30. It should be borne in mind that tender collusion, or bid rigging, is one of the most common forms of cartels in Spain: 46 of the 116 cartels sanctioned in Spain from 2010 to 2022 correspond to this type of practice. Bid rigging is particularly significant in the current post-pandemic context of EU funding.

¹² CNMC resolutions of 4 February 2021, case S/0644/18 RADIOFÁRMACOS; 11 May 2021, case S/DC/0627/18 CONSULTORAS; 16 June 2021, case S/0011/19 TRANSPORTE CÁNTABRO DE VIAJEROS; 17 August 2021, case S/0013/19 CONSERVACIÓN CARRETERAS; 14 September 2021, case S/0025/19 GESTIÓN DE ARCHIVOS; 29 September 2021, case S/DC/0614/17 SEGURIDAD Y COMUNICACIONES FERROVIARIAS; 25 November 2021 case S/0003/20 PROPTECH and 4 March 2022, case S/0012/19 CHATARRA Y ACERO.

¹³ CNMC resolutions of 11 May 2021, case S/DC/0627/18 CONSULTORAS; 17 August 2021, case S/0013/19 CONSERVACIÓN CARRETERAS; 29 September 2021, case S/DC/0614/17 SEGURIDAD Y COMUNICACIONES FERROVIARIAS; 25 November 2021 case S/0003/20 PROPTECH and 4 March 2022, case S/0012/19 CHATARRA Y ACERO.

¹⁴ CNMC resolutions of 4 February 2021, case S/0644/18 RADIOFÁRMACOS; 11 May 2021, case S/DC/0627/18 CONSULTORAS; 16 June 2021, case S/0011/19 TRANSPORTE CÁNTABRO DE VIAJEROS; 17 August 2021, case S/0013/19 CONSERVACIÓN CARRETERAS; 14 September 2021, case S/0025/19 GESTIÓN DE ARCHIVOS and 29 September 2021, case S/DC/0614/17 SEGURIDAD Y COMUNICACIONES FERROVIARIAS.

¹⁵ Available at <https://edi.cnm.es/buzones-anonimos/sica>.

31. The creation of the EIU has already borne tangible results. Among other cases, this unit contributed directly to the analysis of available data leading to a series of inspections in December 2018 in the case S/0013/19 Conservación Carreteras and to the proper processing of information, exponentially increasing the soundness of the disciplinary proceedings¹⁶.

32. In terms of incorporating new tools and technologies related to the use of Big Data, the CNMC Action Plan for 2021-2022 includes, as a relevant task, the creation of new data screening tools, indicators and algorithms, including AI-based (machine learning) techniques. This involves developing a whole new set of tools to detect subtler clues of collusion, which should be mainly fed with data from public procurement databases.

33. These AI-based tools are yet to be fully implemented. Hence, it is therefore too early to examine any practical results. There are, however, some very promising partial achievements, albeit still preliminary.

34. Another investigative approach at the EIU involves the use of Open-Source Intelligence (OSINT) and Human Intelligence (HUMINT) techniques and tools to accurately identify and locate organisations and persons of interest, the relationships between them, and their degree of control of the companies and organisations under close scrutiny.

3.2. Regulation of whistleblowing in the field of competition

35. The recent Law 2/2023, of 20 February 2023, on the protection of whistleblowers and the fight against corruption (hereinafter, *the Whistleblower Act*)¹⁷, reinforces the protection of informants (where appropriate, anonymous), which is extremely valuable in the fight against cartels, given the inherent desire of whistleblowers to hide their identity. The aim of this Act is to protect those individuals who detect serious or very serious criminal or administrative offences in a work-related context and report them through the mechanisms regulated therein, as well as to regulate the channels for receiving information to this effect.

36. Although the Whistleblower Act is not limited to the sphere of competition, as it applies to informants who report all types of infringements, it cannot be denied that the regulations governing leniency programmes are an obvious source of inspiration, as in its explanatory section it acknowledges that “*the advantages and effectiveness that leniency programmes have demonstrated in certain areas have led to the inclusion of a regulation stipulating the specific conditions for their correct application*”.

37. Thus, Article 40 of the Whistleblower Act sets out a series of requirements that, to a large extent, correspond to the leniency regulation in the LDC: providing truthful and relevant information, putting an end to the infringing conduct, identifying those accountable for the infringement and cooperating “*fully, on a continuous basis and expeditiously [...]*” throughout the proceedings.

38. Consistently, the Whistleblower Act entailed a modification of the LDC with regard to the functioning of the above-mentioned SICA. Thus, the Twelfth Additional Provision of the LDC stresses that a report made by a whistleblower is not considered a complaint, nor a request for immunity from fines or reduction of fines, both of which have their own

¹⁶ CNMC resolution of 17 May 2021, case S/0013/19 Conservación Carreteras, available at <https://www.cnmc.es/expedientes/s001319-0>.

¹⁷ Official State Gazette no. 44, of 21 February 2023.

legal framework in the LDC. Unlike the latter, a whistleblower report may be anonymous and, if not, the whistleblower's identity is to be preserved, so that their identity may only be disclosed to judicial, tax and administrative authorities in the context of a criminal or disciplinary investigation.

39. The new regulation also outlines the procedure for receiving and processing whistleblower reports by the Competition Directorate. These reports are to be stored in a secure, restricted-access database, their receipt must be acknowledged (provided that the whistleblower is not anonymous or has expressly waived the right to receive notifications), the information provided must be examined and, where appropriate, confidentially transferred to the competent authority or body. In addition, the LDC expressly recognises that whistleblowers are protected by the measures provided for in the Whistleblower Act. These measures include prohibiting and declaring null and void any conduct that can be classified as actual or attempted retaliation (e.g. termination of contracts, intimidation, reputational damage, denial of permits or unfair treatment) and presuming that the damage caused to whistleblowers protected by the law is the result of such retaliation. The Whistleblower Act also provides for personal data protection measures, free information and counselling, assistance against retaliation, including legal aid, and financial and psychological support on an exceptional basis. The newly created Autoridad Independiente de Protección del Informante [Independent Whistleblower Protection Authority] is responsible for these protection measures. In addition to these measures, whistleblowers are released from all liability for the information provided under the terms and conditions of the Whistleblower Act, except in the case of criminal liability.

40. The new Spanish regulation on whistleblowers of competition infringements, together with complaints and applications for immunity from or reduction of fines within the framework of the leniency programme, completes the range of communication channels available to competition authorities for the detection and repression of anti-competitive practices.

41. To this end, an attempt has been made to create a legal framework which, while sufficiently ensuring whistleblowers' anonymity and security, encourages greater citizen cooperation and involvement as the main victims of these practices.

4. Conclusion

42. This document has reviewed the state of play and immediate future prospects of the leniency programme of the CNMC, the Spanish Competition Authority. To date, the programme as a whole has been reasonably successful, allowing the detection and dismantling of a number of cartels that were undoubtedly harmful to the Spanish economy. This programme has been complemented by ex officio detection tools, especially in the field of public procurement, which is undeniably crucial for Spain's GDP. This has been possible thanks to a substantial nationwide, horizontal (national, regional and local) database of public tenders.

43. Significant advances are expected in this field once databases using Artificial Intelligence technology are added to the array of detection tools.

44. Attention should be paid to new challenges, such as the possibility for leniency applicants of being exposed to civil actions arising from infringements of competition law, which could reduce the attractiveness of leniency programs.

45. The CNMC has faced this reality through a double initiative, facilitated to a large extent by the legal and material changes described in this note. On the one hand, with a

view to facilitating detection beyond leniency, CNMC has reinforced *ex officio* investigation mechanisms (reinforcement of the role of the informant, automation of detection procedures, particularly regarding bid-rigging practices, or reinforcement of international cooperation). On the other hand, CNMC has also implemented measures aimed at strengthening the attractiveness of leniency, particularly the reinforcement of criminal immunity as well as the exclusion of the leniency applicant from the debarment from public procurement eventually imposed upon infringers of competition law. These are, in short, an example of the commitment of CNMC to face the challenges arising from an ever-changing reality and the new forms of collusion, with special attention to the evolution of claims for damages in order to guarantee a proper balance between the public and private application of competition law.