

Leniency Policies in Spain - an Overview

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The 2007 Competition Act

- Law 15/2007, of Competition, of 3 July (**Competition Act**) introduces a Leniency Policy in Spain
- This is one of the most expected legislative innovations in Spain. No such policy existed in Spain prior to the Competition Act
- Competition Act entered into force September 2007
- Only the main aspects of the application of the Leniency Regime were set out in the Competition Act

The 2007 Competition Act (ii)

- Leniency regime did not effectively entered into force until an Implementing Regulation was put in place by the Government (following the delegation contained in the Competition Act)
- Implementing Regulation (and with it the Leniency Regime) entered into force on February 28, 2008
- Provisional guidelines published with the Implementing Regulation. Today definitive guidelines in force setting out the applicable law and some practical recommendations

The Regulation of the Leniency Policy under the Competition Act and Implementing Regulation. Rules common to Immunity / Reduction

- The applications are considered in the order received. Applicants are provided with a receipt indicating the date and time of the filing
- In order for the petitioner to benefit from the leniency he must (i) cooperate fully, continuously and diligently with the NCC throughout the investigation procedure; (ii) end participation except when otherwise required; (iii) not have destroyed evidence. Implementing Reg develops concept of full, continuous, effective co-op:
 - (a), (b) expediently addressing info requests and quickly facilitating information and remaining available to clarify any factual issues
 - (c) facilitate contacts with company employees (including past employees when required)
 - (d) keep confidentiality of application until notification of the SO
 - (e) Not have destroyed/hidden elements of evidence related to the petition

The Regulation of the Leniency Policy under the Competition Act and Implementing Regulation. Rules common to Immunity / Reduction (ii)

- The leniency applicant may be a company or an individual
- NCC has recently stated in a recent session of the AEDC that individuals are assuming an increasingly active role. Likewise apparently some actors are misusing the leniency application procedure (e.g., members of associations who are not potential members of a cartel but have notice of the cartel; instigators of cartels etc.)
- The fact of the leniency application must be kept confidential until the SO. The identity of company execs making a declaration must be kept anonymous by the NCC, up to the moment the SO is notified to the parties (NCC Decision of 22 May 2009, *Vinos de Jerez*, exp. 0020/09 relying on Community case law, GC Decision of 8 July 2008, BPB, case T-53/03)
- Parties interested in the procedure (and therefore with rights of access to the file) may access the leniency application and take notes, although they may not take copies

The Regulation of the Leniency Policy under the Competition Act and Implementing Regulation. Rules specific to Immunity

- Immunity is afforded to the company that:
 - Is the first one to provide evidence (previously unavailable to the NCC) that, in the judgement of the NCC, enables the latter to order an inspection in connection with a cartel
 - Is the first one to provide evidence (previously unavailable to the NCC) that, in the judgement of the NCC, enables it to establish the existence of a cartel
- On top of the common requirements described above, to benefit from the immunity the applicant **must not have obliged/instigated other companies to participate**
- Reduced applications are regulated for cases where an immunity application has been submitted to the European Commission. If the NCC ends up being the responsible Authority, the application must be completed with the necessary evidence (reduced applications require submission of limited information of the application before the European Commission)
- Also verbal applications are allowed. The transcript of the verbal application will be deposited with the NCC and the time of registration of the transcript is the relevant time

The Regulation of the Leniency Policy under the Competition Act and Implementing Regulation. Rules specific to Reduction

- Reduction of fines is afforded to the company that provides evidence which provides a 'significant added value' to the information already known to the NCC
- 'Significant added value' = evidence that, due to its nature or to the degree of detail, enables the NCC to increase its ability to prove the facts of the case
- In order to benefit from the reduction, applicants must comply with the common requirements described above
- In principle it is expected that applications for reduction take place prior to the SO
- The NCC may, if the evidence submitted so warrants, decide to accept reduction applications after the SO. In that case the proposed reduction will be included in the decision Proposal referred by the Investigation Directorate to the Council of the NCC

The Regulation of the Leniency Policy under the Competition Act and Implementing Regulation. Rules specific to Reduction (ii)

- The level of reduction follows this schedule:
 - The first applicant that files an application for reduction complying with the regulated requirements may benefit from a reduction of **30-50%** of the amount of the fine
 - The second applicant may benefit from a reduction of between **20-30%**
 - Successive applicants may benefit from a reduction of up to **20%**
 - Successive applicants providing substantial additional evidence with repercussion in the amount of the fine will be taken into account by the NCC when determining the fine

Administrative case law on Leniency in Spain

- Few reported cases
- The *soap manufacturers* case (Decision of 21 January 2010, *fabricantes de gel*, case 84/08)
 - Case displays difference of ten minutes in the application (Henkel, 9:04 AM; Sara Lee, 9:14 AM)
 - Henkel was exempted from fines. Sara Lee gained a 40% reduction of fine
 - Dissenting vote: neither Henkel nor Sara Lee should have benefited from their leniency applications since both were instigators
- *Vinos de Jerez* case, cited, decides that the identity of persons making declarations must be disclosed with the SO
- NCC has made public its satisfaction with the leniency programme and has expressed an increase of the investigations although has provided no hard stats

Questions?

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