

## **IV JORNADAS LUSO-ESPAÑOLAS DE DERECHO DE LA COMPETENCIA Lisboa, 25 y 26 de enero 2018**

Good afternoon. First of all, I would like to thank the Portuguese Association of Competition Lawyers for an excellent organization of this Conference, with a well-designed set of panels that have allowed competition practitioners and officials to exchange views on issues that have become extremely relevant for all of us.

Much has already been said during this conference about recent developments in our jurisdictions regarding vertical agreements, merger control and abuse cases. And today's sessions on private enforcement and rights of defense have highlighted many aspects that differ between jurisdictions, some of the sources for concern as well as the challenges ahead for competition enforcers.

On the latter (challenges ahead), I would like to share with you today a few reflections and why I believe it is not all doom and gloom regarding **the future of leniency programs and the effectiveness of competition law**.

The introduction of the Antitrust Damages Directive has clearly stimulated the **debate on the interplay between public and private enforcement**, and particularly on the effect that damages actions might have on the incentives of firms to apply for leniency.

In my opinion, to evaluate such potential risk, the first thing we should ask ourselves is if our leniency programs are being effective to detect and sanction cartels.

On this, I think that everyone in this room will agree with me that, in our 10 year-experience, **the Spanish leniency program has proved to be very effective with over 100 leniency applications**. The first cartel decision with leniency dates from 2010 and since then **25 out of 51 cartels** sanctioned by the Spanish Competition Authority were investigated under the leniency program.

Regarding judicial review, and as far as the infringement of competition law is concerned, **the courts have upheld all decisions of cases with leniency applications**. Unfortunately, the Courts in many cases reduced the fines imposed but, as I said, there were no doubts on the existence of an infringement and the obligation for the undertakings to cease its participation in the cartel.

Moreover, the leniency program has spurred our institution to carry out **more inspections** in an increasingly effective manner, and in 7 cases it even allowed us to **detect additional competition infringements in neighboring markets**.

The benefits for leniency applicants have also been high: total fine immunity amounts to around €200 million and fine reductions have reached €24 million so far.

Therefore, **it is clear that the leniency program is working successfully in Spain**.

Now, what are the **risks and challenges for successful leniency programs** (like ours) in the *new era* of the Antitrust Damages Directive?

According to the economic literature, there is no doubt that immunity and fine reduction can be outweighed by the risk of liability for damages. In such circumstances, two key elements may help strike the right balance:

- 1) **The probability of uncovering a cartel (in other words, for a cartel, the risk of being discovered):** the higher the probability, the bigger the incentives are to apply for leniency in spite of potential damages actions.
- 2) **The protection of the leniency applicant:** if the applicant receives more protection than the rest of cartel members in a damages action, it might have some incentives to apply for leniency.

Let me reflect a bit more on these two elements.

Regarding the first one (the probability of detection), I believe that ex officio investigations are crucial to keep up the incentives for leniency. In the last 8 years, the CNMC has investigated **29 ex officio cartels**. In some of these cases (6), following the dawn raids, several firms applied for leniency and benefitted from fine reductions. The fact that a competition authority is very active is undoubtedly a factor of instability that may lead members of a cartel to apply for leniency at a specific moment.

This is probably one of the reasons laying behind the decision of many competition authorities, including the CNMC, to create economic intelligence units dedicated to boost ex officio investigations. At the CNMC, we are dedicating special resources to train our staff in IT techniques, such as data mining and screening to detect bid rigging cases (collusion in public procurement).

We intend to reinforce the team by creating a specific unit within the Competition Directorate focused on cartel detection that will build on the necessary skills to develop market knowledge through economic evidence, especially in public procurement, but also in the digital economy (algorithms, big data, etc.).

Another element that should be taken into account is the **ECN+ proposal** adopted by the European Commission last year. This Directive envisages a more efficient interplay between different leniency programs within the ECN by avoiding divergences in core principles such as the treatment of summary applications or the access to leniency statements.

And this takes me to the second element. If the risk of a cartel being uncovered is relatively high, the second factor (level of protection granted to the leniency applicant) becomes particularly relevant to perceive the benefits of a leniency program.

Indeed, to safeguard the effectiveness of leniency programs, the Damages Directive provides that infringers which obtained immunity from fines, in return for their voluntary cooperation with a competition authority during an investigation, will normally be obliged to compensate only their (direct and indirect) customers.

Furthermore, **the settlements procedure** envisages another type of protection for leniency applicants, which consists of a short and concise statement of objections that gives less detail on the damage caused by the infringement and therefore increases the cost of claiming compensation for victims.

Additional incentives in terms of protection could include **exceptions to debarment in public procurement**. In fact, this approach has been recently adopted in Spain through the new Law on Public Sector Contracts, which exempts leniency applicants (both immunity and reduction) from being debarred in public tenders after being found guilty in a cartel decision.

All in all, I think that **we can expect leniency programs to remain relevant and effective despite private damages actions**. What is true is that the Directive will have a direct deterrent effect and will probably discourage many firms from engaging in a cartel. At the end of the day, this is our main goal: to refrain companies from engaging in anticompetitive practices.

Thank you for your attention.