

SPANISH COMPETITION LAW UPDATE

Spanish Leniency Program Enters Into Force

BRUSSELS
February 28, 2008

The new Spanish leniency program entered into force on February 28, 2008 after publication of an implementing regulation under Law 15/2007 for the Defense of Competition (“LDC”), which was adopted on July 3, 2007.¹ The new LDC introduced a leniency program, *i.e.*, a system of total or partial exoneration of fines for cartel offenders. The LDC entered into force on September 1, 2007. However, the implementation of the provisions dealing with leniency was postponed until the adoption of the enabling regulation by the Spanish government.² The enabling regulation was finally adopted on February 22, 2008.³

The Spanish leniency regime closely mirrors those already in force at the EU level and in other EU Member States and will be operated by the new body for the enforcement of competition law, the *Comisión Nacional de la Competencia* (“CNC”), which replaces the two existing bodies, the *Servicio de Defensa de la Competencia* (“SDC”) and the *Tribunal de Defensa de la Competencia* (“TDC”).

I. IMMUNITY FROM FINES

Pursuant to Article 65 LDC, immunity from fines will be granted to an undertaking or person who is the first to submit evidence that, in the CNC’s view, will enable it to:

- (a) conduct an investigation, provided that at the time of submitting the evidence the CNC did not have itself sufficient evidence to do so; or

¹ *Ley 15/2007, de 3 de julio, de Defensa de la Competencia.*

² See *Disposición Final 2ª* LDC.

³ Real Decreto 261/2008, de 22 de febrero, por el que se aprueba el Reglamento de Defensa de la Competencia <http://www.boe.es/boe/dias/2008/02/27/pdfs/A11575-11604.pdf>

- (b) find an infringement of Article 1 LDC provided that at the time of its submission the CNC did not have sufficient evidence to do so and that no other company had been granted immunity by virtue of the provision laid down under (a) above.

In addition, in order to benefit from immunity, the leniency applicant will have to meet the following requirements:

- (a) that it cooperates fully, continuously and expeditiously with the CNC, under such terms as will be established by the said enabling regulations, throughout the administrative investigation.
- (b) that it ceases its participation in the alleged infringement at the time of providing the evidence referred to in this article, except in those cases where the CNC deems it necessary for this participation to continue in order to preserve the effectiveness of the investigation.
- (c) that it has not destroyed evidence related to the application for leniency or has disclosed, directly or indirectly, to third parties other than the European Commission or other Competition Authorities, the fact that it has contemplated an application for leniency or any of the contents of that application.
- (d) that it has not taken measures compelling other undertakings to participate in the infringement.

II. REDUCTION OF FINES

Pursuant to Article 66 LDC, a leniency applicant who does not fulfill the criteria laid down in the above section, may still benefit from a reduction of its fine provided that it:

- (a) submits evidence of the infringement which is of significant added value to the information already in possession of the CNC, and
- (b) meets the requirements set out in points (a), (b) and (c) above.

The level of reduction of the amount of the fine will be calculated pursuant to the following rules:

1. The first leniency applicant fulfilling the criteria to apply for a reduction of the fine will benefit from a reduction ranging from 30 to 50%;

2. The second leniency applicant fulfilling the criteria to apply for a reduction of the fine will benefit from a reduction ranging from 20 to 30%;
3. All other successive applicants may benefit from a reduction of the fine of up to 20 %.
4. Finally, the LDC states generally that any information submitted by a leniency applicant, which enables the CNC to establish additional facts that have a direct impact on the amount of the fine, will be taken into account by the CNC when determining the fine of the leniency applicant at hand.

III. OTHER SIGNIFICANT PROVISIONS

Leniency for individuals. Both the immunity and the fine reduction regimes applicable to a leniency applicant will also be applicable to its legal representatives or to the members of its executive board, provided they have collaborated with the CNC in the terms described above. This is a particularity of the Spanish antitrust enforcement regime existing under the previous Law 19/1989 for the Defense of Competition: the CNC can impose fines, not only on undertakings, but also on their legal representatives or directors who have participated in the illegal agreement or practice. Under Law 19/1989, legal representatives could be fined up to €30,000. Under the LDC, the maximum fine that can be imposed on representatives of undertakings will be €60,000. Both the previous Law 19/1989 and the LDC exclude the members of the executive boards from the possibility of being fined if they did not attend the meetings or if they did not vote in favour (or voted against) the concerned agreement or decision.

Confidentiality of the evidence submitted. In line with the European leniency program, the LDC does not contain any specific provision concerning the legal consequences of a leniency application in relation to private actions for damages in connection with its participation in an antitrust infringement. However, the LDC does contain one safeguard. According to the 2nd Supplemental Provision⁴ of the LDC, competition authorities may not provide information, submitted under Articles 65 and 66 LDC (the leniency provisions), to Spanish Commercial Courts⁵ when they intervene in judicial proceedings relating to the application of Articles 81 and 82 EC Treaty or Articles 1 and 2 of the LDC. In addition, oral applications are also accepted.

⁴ *Disposición Adicional 2ª.*

⁵ Spanish Commercial Courts have jurisdiction *inter alia* to apply Articles 81 and 82 EC Treaty and, since the enactment of the LDC, also their equivalent at the national level, Articles 1 and 2 LDC.

IV. THE LENIENCY GUIDELINES

The Spanish Competition authority has also recently published leniency guidelines. The CNC will publish an English version in the following days. The following aspects of the guidelines may be underlined:

A. CARTEL UNIT

The Spanish Competition Authority has set up a Cartel and Leniency Unit, responsible for the Leniency Program. The CNC has also published two telephone numbers for information regarding the leniency program.

Telephone numbers Leniency Program

+34 91 536 9058 and

+34 91 536 9024

B. SUBMISSION OF THE APPLICATION

Leniency applications may be submitted by company representatives or outside counsel.

The leniency application must be submitted, together with a copy, to the CNC registry, or to any other public registry. Note however that the valid date and time of submission will be that of entry to the CNC registry in Madrid (C/ Barquillo, 5 – 28004). The application should be addressed to the Cartel and Leniency Unity of the Directorate for investigations.

1. Oral Applications

According to the guidelines, leniency applicants may request the CNC to accept oral applications. Oral statements should be accompanied by evidence and be recorded at the CNC facilities. The guidelines state that after recording the oral application, the applicant can submit the tape to the Registry.

C. QUALIFICATION FOR IMMUNITY

The CNC will grant immunity from fines to the applicant who submits the first application coupled with evidence of cartel activity. The evidence must enable the CNC to conduct an investigation and/or to find a cartel infringement in light of article 65

above. Should the conditions provided for article 65 have not been fulfilled, the applicant can still request a reduction of the fine pursuant to article 66 LDC.

The applicant for immunity who has taken measures to coerce other companies to participate in the cartel or to remain part of it will be disqualified to obtain the exemption of the fine, it may still apply for a reduction of the fine.

D. ACCOMPANYING INFORMATION

The leniency guidelines laid down a detailed list of information to be provided together with the leniency application.

E. MARKER?

Article 48 of the implementing legislation provides that in the event that the leniency applicant has already submitted, or intends to submit, a leniency application with the European Commission (it does not say other national competition authorities), it may submit a short form leniency application in compliance with Article 65,1.a) above that is, the applicant must be the first to submit evidence that enables the CNC to conduct an investigation, provided that at the time of submitting the evidence the CNC did not have itself sufficient evidence to do so.

Short form applications must contain at least the following information:

1. Leniency applicant details: name or corporate name and address.
2. Cartel participants: name or corporate name and addresses of cartel participants.
3. Cartel description: products and geographic markets affected, approximate cartel duration and nature.
4. Member States where evidence of the cartel may be found.
5. List of leniency applications submitted to the European Commission and/or to other National Competition Authorities of the European Union.

Just as in the case of standard applications, the CNC registry will set the date and time of entry of the short form applications. Short form leniency applicants may require a receipt from the CNC registry.

Should the European Commission finally decide that the Spanish competition authority is best suited to deal with the case, the applicant will have ten (10) days to

complete the short form leniency application from the reception of the Commission decision allocating the case to the Spanish authority.

Pending the required enabling regulations (expected within the next six months), which will mostly deal with the leniency application procedure (e.g. application forms, summary applications, marker system, etc.), the substantive alignment of the Spanish leniency program with the regime existing at the EU level will contribute to the global effectiveness of this type of antitrust enforcement measures. In particular, participants in cartels that only operate within the Spanish territory with no effects in intra-Community trade will now be able to apply for leniency before the Spanish competition authority.

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For additional information, please do not hesitate to contact F. Enrique González Díaz and Romano Subiotto in the firm's Brussels office (+32 2 287 2000).

CLEARY GOTTLIEB STEEN & HAMILTON LLP

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

MOSCOW

Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE

Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax