

Immunity, Sanctions & Settlements 2018

Spain

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Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

Preliminary considerations

The main legislative provision prohibiting cartel conduct in Spain is article 1 Law 15/2007, of 3 July (the Spanish Competition Act (SCA)).

The Defence of Competition Regulation, approved by Royal Decree 261/2008, of 22 February, RD), elaborates on a number of specific points of the SCA including, inter alia, articles 65 and 66 SCA, which contain the fundamentals of Spain's leniency programme. The Spanish Leniency Notice (9 June 2013 (the CsC)) contains further detail on the leniency programme under the SCA. The CsC has the objective of enhancing the "transparency and predictability" of Spain's Leniency Programme (article 1(1)(2) CsC).

Law 3/2013, of 4 June, provides for the creation of a single regulatory body in Spain, combining the functions of the former National Competition Commission and Spain's regulators on energy, telecommunications, media, post and transport sectors into the National Markets and Competition Commission (CNMC).

Under EU Regulation 1/2003, the CNMC is entitled to apply article 101 of the Treaty on the Functioning of the European Union (the TFEU) to cases in which restrictive practices potentially affect trade between EU member states. Article 3(2) of (EU) Regulation 1/2003 prohibits the application of article 1 SCA in a more stringent manner than article 101 TFEU to restrictive practices having an effect on trade between member states. The SCA's Leniency Programme applies also to the scenarios where the CNMC applies article 101 TFEU (article 1(2)(9) CsC). The leniency programme has been applied in 25 cases since its entry into force in Spain in 2008. In 2017, the CNMC issued five decisions for cartel conduct (Cases S/DC/0545/15, concrete Manufacturers in Asturias; S/DC/0511/14 RENFE; S/DC/0512/14 Balearic passenger transport; S/DC/0558/15 Association of Spanish Basketball Clubs and S/DC/562/15 Wires BT/MT). On 13 February 2018, the Spanish Competition Authority imposed fines on Caixabank, Banco Santander, BBVA and Banco Sabadell for colluding on the price of certain derivatives used to hedge risks deriving from syndicated loans (Case S/DC/0579/16 Derivados financieros).

Finally, Law 1/2002, of 21 February, establishes the principles governing the allocation of competences between the CNMC and Spain's regional competition authorities. Spain's regional competition authorities may only exercise their enforcement powers in relation to infringements whose effects are limited to its specific jurisdiction. The SCA Leniency Programme has been applied once (Expte. S/DC/0538/14 Servicios Fotográficos) to a leniency request submitted before the Madrid Competition authority, which referred the case to the CNMC.

The first qualifying applicant will obtain full immunity from the fines that would otherwise be imposed by the CNMC for the cartel behaviour it has reported (article 65(1), SCA).

2 Do the protections extend to current and former officers, directors and employees?

Yes.

Unlike its EU counterpart, Spanish cartel law provides penalties for individuals. Consequently, and also unlike the EU Leniency Program, the SCA's Leniency Programme encompasses penalties to individuals.

More precisely, article 63(2) SCA awards the CNMC the power to impose fines of up to €60,000 to the individuals being part of the management or the legal representatives of the entities having participated in the unlawful conduct. Although the CNMC traditionally made a very scarce use of this provision, it has changed its practice and imposed sanctions on legal representatives and managers in three recent decisions. The fines, imposed on several executives and legal representatives of companies involved in anticompetitive practices, ranged between €4,000 and €32,000 (CNMC Decisions in Cases S/DC/0504/14 Adult diapers; S/DC/0519/14 Rail infrastructures; and in Case S/555/15 Cash transport).

Pursuant to article 65(3) SCA, any immunity granted under the SCA to a corporation / group ("undertaking" in EU / Spanish Competition law terms) is automatically extended, if the entity seeking immunity so requests it, to the individuals having participated in the cartel affiliated to the entity seeking immunity, "provided they have collaborated with the National Markets and Competition Commission" (see also article 1(3)(12) CsC). In Adult diapers the leniency benefits extended to a former employee no longer working for the entity seeking leniency.

Spain's Criminal Code provides custodial sentences and fines for certain instances of "altering prices" (article 284 of the Spanish Criminal Code). This provision is almost never applied to price fixing. The SCA's Leniency Programme does not cover infringements of the Criminal Code or of related non-Competition law infringements (eg, infringements of Spanish financial regulation).

3 Is immunity available after an investigation begins?

Yes. The SCA's Leniency Programme has as its objective not only the detection of new cartels but also to "make progress" in the investigation of those cartels that have already been detected and "support the investigatory activity of the CNMC" (article 1(2)(6) CsC).

If the CNMC has already launched an investigation, an undertaking may still obtain full immunity from fines provided that:

- no other undertaking has already applied for or been granted immunity;
- the applicant is the first to provide the CNMC with information and evidence that, in the CNMC's view, will enable it to: (a) carry out an inspection in connection with an alleged cartel (irrespective of whether the inspection actually takes place or of the success thereof (article 3(1)(36) CsC)); or (b) establish an infringement of article 1 SCA in connection with the alleged cartel; and
- the applicant meets the requirements of cooperation that are common to applicants for immunity or reduction in fines (see articles 65(1) and 65(2) SCA, and 1(2)(7) and 3(1)(36) CsC – for more detail on the requirements see response to question 27).

Article 47(2) RDC precludes the CNMC from accepting a request for immunity after it has issued its formal accusations against an undertaking (the statement of objections, SO). Article 47(3) SCA allows the CNMC to accept requests for reduction in fines (see questions 44ff) after the issuance of an SO.

4 What are the eligibility requirements before an investigation begins?

To be eligible for immunity in these circumstances an applicant must be the first to supply the CNMC with information and evidence that allows the CNMC to carry out an inspection of the alleged cartel or information enabling the CNMC to establish an infringement of article 1 SCA.

For the CNMC to be able to carry out a targeted inspection, the immunity applicant must provide the CNMC with the information and evidence listed below:

- A formal request for exemption (article 46(1) RDC), which can be submitted orally (article 46(2) RDC) and which shall include (article 46(3) RDC):
 - A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the market structure for that product or service (article 2(2)(21) CsC) the geographic scope, the duration of and the nature of the alleged cartel.
 - The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel.
 - The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf.
 - A description of the measures adopted to put an end to the participation in the cartel and to ascertain that no evidence has been destroyed prior to the request for immunity; and
 - Information on which other competition authorities have been approached or are intended to be approached in relation to the alleged cartel.
- Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

Further detail on the content of an immunity request can be found at article 2(2)(21) CsC).

5 What are the eligibility requirements after an investigation begins?

See question 4.

Article 47(2) RDC precludes the CNMC from accepting a request for immunity after it has issued its formal accusations against an undertaking (the SO). Article 47(3) SCA allows the CNMC to accept requests for reduction in fines (see questions 44 ff) after the issuance of an SO.

6 Will the applicant have to admit to a violation of law?

Yes. Pursuant to article 3(3)(44)(5) CsC, an immunity request can be rejected if the entity requesting immunity indicates it did not participate in the cartel. Spanish law departs in this point from the EU Leniency Programme, where no provision expressly requires an immunity applicant to admit to having violated the law (ie, to admit to an infringement of the EU competition rules).

However, the admission can be oral (article 2(2)(21) CsC).

7 Are ringleaders or initiators of the conduct eligible?

Yes. Pursuant to article 3(3)(44)(5) CsC, an immunity request can be rejected if the entity requesting immunity indicates it did not participate in the cartel. Spanish law departs in this point from the EU Leniency Programme, where no provision expressly requires an immunity applicant to admit to having violated the law (ie, to admit to an infringement of the EU competition rules).

However, the admission can be oral (article 2(2)(21) CsC).

8 When must the applicant terminate its involvement in the conduct?

The immunity applicant must have terminated, or declare its intention to terminate, its involvement in the alleged cartel immediately following the submission of its application (article 5(67)CsC), except where the CNMC considers that it is necessary “to preserve the integrity of the inspections” for the applicant to continue with the alleged misconduct (article 65(2)(b) SCA). In these scenarios, and pursuant to article 5(68) CsC, the behaviour is reputed to be terminated at the time of the submission of the request for immunity.

9 What constitutes termination of the conduct?

An applicant must refrain from participating further in the infringing conduct. However, complete and abrupt withdrawal without an obvious explanation, from the cartel may compromise the effectiveness of a potential on-the-spot inspection by the CNMC. Therefore, the CNMC may require an undertaking continuing its active participation when this would, in the opinion of the CNMC, be necessary to “preserve the integrity of the inspections” (see (article 65(2)(b) SCA).

10 Will the applicant be required to make restitution to victims?

No. The SCA Leniency Programme does not require an immunity applicant to make restitution to the victims of a cartel.

Article 72(1) SCA indicates that any citizen or business who has suffered harm as a result of breaches of “competition law” is entitled to “full compensation” (including from loss of profit plus the payment of interests, see article 72(3) SCA) from the infringers before the “ordinary civil courts” (in practice, the Juzgados de lo Mercantil).

Similarly, the European Court of Justice (the ECJ) awards a similar right to those having suffered a harm due to a breach of article 101 TFEU (see Case C-453/99 *Courage and Crehan* [2001] ECR 2001 p. I-6297). While such victims may issue civil proceedings in member state national courts, the exact rules of standing, procedure and calculation of quantum vary between the different member states. The European Commission believes that this may, in certain circumstances, act as a disincentive to victims wishing to bring claims. As such, Directive 2014/104/EU on antitrust damages actions for breaches of competition law was signed into law on 26 November 2014, after final adoption by Council on 10 November 2014 (the Damages Directive). The Damages Directive intends to “avoid the divergence of applicable [damages] rules, which could jeopardise the proper functioning of the internal market”. Spain incorporated the Damages Directive into Spanish law by Royal Decree-Law 9/2017, of 26 May, the new provisions entered into force on 27 May 2017.

Pursuant to article 73(1) SCA, an in a modification introduced by article 11 of the Damages Directive, “the undertakings or associations of undertakings that have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law”. In order to minimise the impact of article 73(1) SCA on the leniency programme, article 73(5) SCA provides that an immunity recipient is jointly

and severally liable only for the harm suffered by its own direct and indirect customers (ie, it will not be liable for the harm caused to the customers of the other cartel members). An exception to this takes place where victims cannot obtain full compensation from the other undertakings involved in the cartel.

11 Can more than one applicant qualify for immunity?

No. There can only be one successful immunity applicant per cartel (article 65(1) SCA).

Accordingly, if the CNMC has already granted conditional immunity to an applicant pre-inspection, no subsequent applicant can obtain immunity.

However, a subsequent applicant may still be eligible for a reduction of up to 50 per cent of the fine.

12 Can an applicant qualify if one of its employees reports the conduct to the authority first?

Pursuant to articles 65 and 66 SCA and 1(2)(9) and 2(1)(14) and 2(1)(15) CsC, individuals can also apply for immunity and leniency pursuant to the SCA's Leniency Programme.

If an employee reports a cartel to the CNMC in his or her individual capacity as "informant" or "whistle-blower", the entity that employs that individual does not benefit from the report. In addition, if the individual has provided sufficient information to the CNMC to enable it to grant immunity, immunity will no longer be available.

13 Does the afforded protection extend to any non-antitrust infringements?

No. Non-antitrust infringements are beyond the scope of the SCA's leniency programme.

14 What confidentiality assurances are given to the first applicant to report?

Spanish law provides a relatively wide access to file by interested parties, including third parties (see, inter alia, articles 13(d) and 53(a) Act 39/2015, of 1 October, of Common Administrative Procedure and Act 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance).

Pursuant to article 51(1) RDC, the CNMC will treat the immunity or leniency request as confidential and will create a separate confidential file with the data and documents considered confidential, including the identity of the person or entity seeking immunity or leniency.

Interested entities, including other cartel members being immunity will have access to those data and documents "necessary to reply to the accusation" (articles 51(2) RDC and 6(72) CsC). However, it will be impossible to make copies of those declarations specifically made for the purpose of seeking immunity (article 51(3) RDC) and the publicly available version of the final decision will not contain a reference to those declarations 6(73) CsC).

The RDC and CsC specify that the request for immunity can be provided orally to the CNMC (articles 46(2) RDC and 2(2)(20) CsC). The statement will be recorded and transcribed on the CNMC's premises and resorting to material means (tape recorders, etc) of the CNMC. As indicated in the preceding paragraph, copies of these statements are not made available to other investigated entities immunity (article 51(3) RDC).

Other than to EU member state competition authorities, the CNMC will not disclose an immunity applicant's identity to any third party without first obtaining the applicant's permission. This is the case at least until the CNMC issues the SO. At that point, the applicant's identity will become known to the other addressees of the SO (ie, the other cartel members). The applicant's identity will become publicly known when the CNMC issues the final infringement decision.

Prior to the issuance of the SO, if an undertaking seeks immunity and is informed that it is no longer available, the CNMC will not disclose to the undertaking the identity of the first-in applicant.

A frequently discussed concern is the potential for corporate statements to be subject to a disclosure or discovery order in follow-on civil litigation. In its 2011 Ruling in *Pfleiderer AG v Bundeskartellamt*, the EU Court of Justice held that national courts should carry out a case-by-case assessment of whether access to leniency documents should be required in damages actions.

To address concerns that the possibility of future disclosure of leniency documents could significantly reduce incentives for companies to apply for immunity, the that the Damages Directive and its transposition into Spanish law (article 283 bis i) Act 1/2000, of 7 January, on Civil Procedure, the LEC) exclude the disclosure of leniency corporate statements (article 283bis(i)(6) LEC).

15 Does the authority publish guidance regarding the application of the programme?

Yes.

The CNMC has published Spanish and English versions of the CsC (both available here).

In addition, article 1(1)(4) CsC expressly indicates Spain's Leniency Programme is "inspired" in (i) the EU Leniency Programme "set out in the [EU 2006] Leniency Notice" (available at: http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html); and (ii) the 2012 European Competition Network Model Leniency Programme (available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf).

16 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

As noted in the response of question 16, Spain's Leniency Programme is "inspired" in the EU Leniency Programme and in the 2012 European Competition Network Model Leniency Programme (article 1(1)(4) CsC). Moreover, the CsC is to be interpreted in the light of national and European "practice and jurisprudence" (article 1(1)(5) CsC).

However, the EU does not provide a one-stop-shop for leniency. Those members of a cartel with effects on trade between member states have to apply to any competition authority in the EU that might have standing in any particular case to apply article 101 TFEU or other applicable provisions. The European Competition Network Model Leniency Programme sets out the treatment all applicants can expect in any ECN jurisdiction and, in doing so, seeks to minimise the burden and bureaucracy associated with multiple applications by introducing a "summary leniency application".

On 20 January 2016, the ECJ held that:

- (i) *the instruments adopted in the context of the European Competition Network, such as the Model Leniency Programme, are not binding on the National Competition Authorities of the EU Member States (the NCAs);*
- (ii) *there is no legal link between the application for immunity which an undertaking submits to the CNMC and the summary application submitted to an NCA in respect of the same cartel.*

As a result:

- (i) the NCA is not required to assess the summary application in the light of the application for immunity or contact the European Commission in order to obtain information on the purpose and results of the leniency procedure carried out at the European level; and
- (ii) EU law does not preclude NCAs from accepting a summary application for immunity from an undertaking that had not submitted an application for full immunity to the European Commission, but rather an application for reduction of the fine (see Case C-428/14 *DHL Express (Italy) and DHL Global Forwarding (Italy)* [2016] not yet reported). In practice, this might lead to scenarios where the first entity to go in with a NCA might reap full immunity, even if it had not been the first one to contact the CNMC, if the case ends up being investigated at the national level.

Pursuant to article 48 RDC, if an entity intends to request immunity to the European Commission it can keep its place as first in in Spain by submitting an “abbreviated request for exemption” indicating:

- the name and contact details of all the entities participating in the cartel;
- the products and territories affected by the cartel;
- the estimate duration and nature of the cartel;
- the member states in whose territory one can find evidence in relation to the cartel; and
- information in relation to other leniency applications the immunity applicant intends to make.

If the CNMC ends up having jurisdiction over the cartel, the applicant has 10 days to complete a full immunity application (cf. articles 48(5) RDC and 2(5) (35) CsC); for the content of the full immunity application see question 5).

Immunity application and marker process

17 What is the initial process for making an application?

A company seeking immunity must contact the CNMC’s Directorate for Competition law (DI) (directly or through an authorised legal representative) and submit a formal application for leniency.

Before submitting a formal application, the applicant may first seek assistance from a CNMC official by calling a dedicated telephone number (+34 91 787 68 44 – more information available here). The DI will notify the applicant if immunity is not available (article 2(1)(18) CsC). Conversely, and upon request of the immunity applicant, the DI can also issue a receipt with the time of the immunity application (article 2(2)(24) CsC).

An immunity applicant can indicate in its request that, were immunity no longer available, the request should be considered as a request for a reduction of fines (article 2(3)(30) CsC).

18 What information is required to secure a marker?

The Spanish Leniency Programme does not provide a system of markers as such. However, pursuant to article 46(5) RDC, and 2(3)(29) CsC, the CNMC may grant, upon request of the immunity applicant, an extension, protecting an immunity applicant’s place in the queue for a period to be specified on a case-by-case basis in order to allow time for the gathering of the necessary information and evidence.

The applicant must (i) make a reasoned request to that effect and must (ii) provide the CNMC with information detailing:

- A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the nature of the alleged cartel.
- The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel.
- The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant’s knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant’s behalf.

19 How much time will an applicant have to perfect its marker?

As noted in the reply to question 29, the SCA Leniency Programme provides for extensions rather than “markers”. Where an extension is granted, the CNMC will determine the period within which the immunity application must be completed on a case-by-case basis. Extension periods tend to be short, usually 10 working days.

20 Can the deadline for perfecting the marker be extended?

Yes.

As noted in the reply to question 29, the SCA Leniency Programme provides for extensions rather than “markers”. An undertaking may request the CNMC to extend the deadline for perfecting the marker. Such a request should be submitted before the expiration of the extension and include sufficient detail to enable the CNMC to make an informed decision. The CNMC has discretion to accept or reject the request. Extensions are usually extended for another five working days, up to a total of 15 working days.

21 What is required to perfect the marker?

A “marker” is perfected when the applicant submits the information and evidence (2(3)(29) CsC) required for a formal immunity application within the given deadline (or extended deadline, article 46(5) CsC).

22 Can the scope of the marker be expanded if additional information is discovered by the applicant?

The conditional immunity granted by the CNMC will cover the alleged cartel that has been reported to it (which entails a delineation of the affected products, geographical coverage, participants and duration). If an applicant discovers evidence of additional wrongdoing that relates to the same cartel, it may apply to the CNMC to extend the scope of its initial application. The CNMC may extend the scope of the immunity accordingly.

If the immunity applicant discovers information regarding a separate cartel, it can (but is not obliged, as a matter of law, to) make a separate immunity application covering that cartel.

23 Can an applicant lose its marker if a second applicant comes forward with better information?

The CNMC will not consider other immunity applications before it has taken a position on an existing application in relation to the same alleged infringement (article 47(3) RDC). Whether the immunity applicant receives immunity will therefore be assessed on the basis of whether it has met the conditions under the SCA programme before the expiration of the deadline for perfection of the marker, not on the basis of a comparison with another application (2(3)(29) CsC).

24 What if the applicant’s investigation reveals that no violation exists?

An application for immunity under the SCA Leniency Programme is voluntary. If the immunity applicant considers that its own investigative steps reveal that no violation has taken place, the applicant can choose to withdraw its application.

However, that does not necessarily mean that the CNMC will not continue to investigate. In the event that the applicant withdraws the evidence it has submitted for the purpose of its application, the CNMC may use its own powers of investigation to obtain the information.

25 What if the authority decides not to investigate?

The CNMC cannot decide not to investigate an infringement when there are rational indicia thereof. If there are indicia of an infringement, the CNMC is under an obligation to investigate. A decision by the CNMC not to investigate can be challenged before the Spanish courts. The Spanish courts can reject the appeal, inter alia, if there are no rational indicia of an infringement.

Immunity cooperation obligations

26 What is the applicant required to produce?

In addition to providing the CNMC with a formal request and the relevant evidence (see question 5), an immunity applicant has a continuing duty to: a cooperate “fully, on a continuous basis and expeditiously” throughout the investigation (article 65(2)(a) SCA, articles 1(2)(7) and 5(66) ff CsC). Pursuant to article 52 RDC, the duty to cooperate includes providing the CNMC promptly with:

- all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it,

including any new information that might become available as the investigation progresses (article 2(2)(26)CNMC);

- prompt answers to any request from the CNMC that may contribute to the establishment of the facts (including 5(66)(e) the translation of documents which are not in Spanish); and
 - access to current (and, “if applicable”, former) employees and directors whom the CNMC may wish to interview.
- b Terminate its participation in the infringement (article 65(2)(b) SCA and questions 8 and 9);
- c Not to have destroyed (modified or hid(ed) evidence related to the immunity application; and
- d Not to have revealed to third parties “different from the European Commission or other competition authorities” its intention to apply for leniency and the content of its application (article 65(2) (c) SCA) before the notification of the SO. However, article 5(66) (e) CsC allows the CNMC to authorise the immunity applicant to authorise the disclosure of the leniency application to those people or entity to which it is justified to do so, provided the recipients undertake to keep that information confidential.

27 Will the applicant be required to make a written confession?

The applicant will be required to admit its participation in the cartel but not in writing.

As noted above in relation to question 7, although the immunity applicant must admit its participation to the cartel, the CNMC will accept oral corporate statements (article 2(2)(21) CsC).

28 Can third parties obtain access to the materials provided by the applicant?

See response to question 15 as regards the corporate statement provided by the immunity applicant.

As regards the supporting evidence, access to these materials will also be provided to the other cartel members during the access to file process after an SO has been issued, to the extent they are necessary for them to reply to the SO (article 6(73) CsC).

As regards the potential for subsequent disclosure orders in follow-on litigation, it is important to note that the Damages Directive and its transposition into Spanish law (article 283 bis i) Act 1/2000, of 7 January, on Civil Procedure, the LEC) does not exclude the disclosure of the supporting evidence in the CNMC’s file (unlike the corporate statement itself which is protected see article 283 bis(i)(6) LEC).

29 Will the applicant lose its protection if one or more of its employees refuses to cooperate?

No, as long as the applicant has used its best efforts for its employees to cooperate.

The requirement of full and continuous cooperation set out in article 65(2)(a) SCA and article 5(66) CsC requires the immunity applicant to make current (and, “if applicable”, former) employees and directors available for interviews with the CNMC and to not destroy, falsify or conceal relevant information or evidence. The undertaking must use its best efforts to ensure that its employees do cooperate with the CNMC (for instance, by giving employees individual assurances that cooperation will not lead to disciplinary action being taken against them). If the employees do not comply with the duty of full and complete cooperation, the CNMC may withdraw the immunity in relation to those employees.

30 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

See response to question 29.

31 Will the applicant be required to provide materials protected by attorney-client privileges or work-product doctrine?

It is a general principle of Spanish law that an undertaking cannot be required to provide the CNMC with communications that are protected by legal professional privilege (LPP).

However, the European courts have ruled that only communications between an undertaking and external counsel benefit from LPP. Therefore, communications with in-house legal counsel do not benefit from privilege from inspection in the context of antitrust investigations (AM&S Europe Ltd [1982] and Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd [2010]). That said, the courts have held that communications between an in-house lawyer and the undertaking that relay the content or nature of privileged communications with external counsel will be privileged (an extension of LPP), although file notes prepared by employees or in-house counsel will not be protected (Hilti [1990]).

The CNMC has followed European law in relation to the exclusion of LPP of inside counsel. This position, whose compatibility with the Spanish Constitution is dubious, has been confirmed by the Spanish courts. However, the CNMC tends not to ask for communications between an investigated entity and its in-house counsel.

Granting immunity

32 How does the authority announce its promise not to charge or sanction?

The CNMC grants conditional immunity, which is formally notified to the applicant (article 47(1) RDC). The decision is addressed to the applicant only and is not published.

At the end of the administrative process, the CNMC will confirm the decision to grant conditional immunity if all of the conditions under the SCA remain fulfilled at the time that the CNMC adopts its infringement decision imposing fines (article 47(4) RDC). A non-confidential version of the infringement decision is published on the CNMC’s website (article 37(1) Act 3/2013).

33 Does the authority put its commitment in writing?

See question 33.

34 Who is given access to the document?

See question 33.

35 Does the authority publish a model letter for conferring immunity?

No.

Individual immunity or leniency

36 Is there an individual immunity programme?

Yes.

As indicated in question 3, article 63(2) SCA awards the CNMC the power to impose fines of up to €60,000 to the individuals being part of the management or the legal representatives of the entities having participated in the unlawful conduct.

Pursuant to article 65(1) SCA, and articles 2(1)(14) and 2(1)(15) CSC, individuals which can be held responsible for cartel conduct under the SCA can submit an immunity request of their own.

Pursuant to article 65(3) SCA, any immunity granted under the SCA to a corporation / group (“undertaking” in EU / Spanish Competition law terms) is automatically extended, if the entity seeking immunity so requests it, to the individuals having responsibility for the cartel conduct and affiliated to the entity seeking immunity, “provided they have collaborated with the National Markets and Competition Commission” (see also article 1(3)(12) CsC).

37 What is the process for applying?

See responses above in relation to corporate immunity.

38 What are the criteria for qualifying?

See responses above in relation to corporate immunity.

Revocation of immunity**39 On what basis can corporate immunity be revoked?**

Immunity is not formally granted until the conditional immunity is confirmed at the end of the administrative procedure through an infringement decision. If, at the end of the administrative procedure, the applicant has not complied with the duty to cooperate under article 65(2) SCA, the CNMC may decide not to grant final immunity (articles 47(4) RDC and 3(4)(59) CsC. Thus, as a technical matter, the CNMC's decision is one not to grant final immunity. However, in practical terms it amounts to a "withdrawal" or "revocation]" of conditional immunity (see question 41).

In addition, articles 65(2(d)SCA and 3(2)(39) CSC also specifies that immunity will not be granted if the CNMC ultimately finds out that the applicant has acted as a coercer.

In several cases in which the information provided by the undertaking had added value, the CNMC nevertheless withheld the benefits of the leniency programme from undertakings on the basis that it considered that they had not complied with their collaboration obligations under the programme. In such cases the CNMC will grant the investigated undertakings the possibility of reply to the accusations against them (article 51(4) SCA, see further CNMC decisions of 2 March 2011 in Case S/0086/08 Professional Hairdressing, and of 23 February 2011 in Case S/244/10 Balearic Ship Operators).

40 When can it be revoked?

See response to question 40. If, during the investigation, it becomes apparent that immunity is not available or that the applicant has not met the conditions for grant of immunity, the CNMC will inform the applicant and the applicant may withdraw the evidence it has submitted. The DI will indicate in the SO whether, in its opinion, the immunity applicant is complying with its duties to cooperate under article 65 SCA (article 3(4)(51) CsC).

41 What notice is required to revoke?

See response to question 41 as regards conditional immunity. At the end of the administrative procedure, the CNMC's final infringement decision will set out the CNMC's decision as to whether to grant or refuse formal immunity.

42 Can the applicant file a judicial challenge to a decision to revoke?

Yes, against a final decision not granting the immunity requested (article 24 of the Spanish Constitution).

The Spanish High Court has jurisdiction to review the legality of all CNMC final decisions, including the final infringement decision in which the CNMC will, if it considers it appropriate, decide not to grant immunity and instead impose a fine on the applicant undertaking.

Reduction in sanctions**43 Does the leniency programme allow for reductions in sanctions?**

Yes. Undertakings that do not meet the conditions for full immunity may still be eligible to benefit from a partial reduction in any fine that would otherwise have been imposed on them provided that they:

- provide evidence representing "significant added value" to that already in the CNMC's possession; and
- comply with the conditions under article 65(2) SCA (ie, the same as is the case for immunity applicants, with the exception that fine reductions are available for entities that coerced other entities to participate in the infringements; see for more detail, the reply to question 27).

Article 47(3) SCA allows the CNMC to accept requests for reduction in fines after the issuance of an SO. However, pursuant to article 2(4)(33) CsC, it will be extraordinary for the CNMC to take into account requests for fine reductions after the end of the investigative phase.

44 What is the process for seeking a reduction in sanctions?

The applicant must make a formal application to the CNMC, together with sufficient evidence of the alleged cartel which represents "significant added value" with respect to the evidence that the CNMC already has (article 66(1) SCA).

At the applicant's request, the CNMC will provide an acknowledgment of receipt confirming the date and, where appropriate, the time of each submission.

The CNMC will set out in the SO whether it intends to apply a fine reduction and will indicate in which band the reduction falls (see response to question 47).

45 Is there a marker process similar to immunity applications?

No.

46 Are the reductions in sanctions fixed or discretionary?

The reduction in sanctions is discretionary within certain "bands" that the SCA establishes (article 66(2) SCA, see question 48).

47 How are the reductions in sanctions calculated?

Once the CNMC has determined that the applicant satisfies the conditions for a reduction in its fine, the level of the reduction will be calculated by reference to three bands (which often turn on the point in the process at which the applicant provides the evidence):

- reductions of 30–50 per cent for the first applicant company to provide significant added value;
- reductions of 20–30 per cent for the second applicant company to provide significant added value; and
- reductions of up to 20 per cent for any subsequent applicant company that provides significant added value (articles 66(2) SCA and 4(61) CsC).

The band reduction which applies depends on the order of arrival of the requests for leniency at the Registrar of the CNMC (article 2(4)(33) and 4(55) CsC).

The band reductions set out above mirror those applicable under the EU Leniency Programme.

48 Are there sentencing guidelines?

In 2009, the CNMC issued Guidance on the method of setting fines for anticompetitive practices. However, on 29 January 2015, the Spanish Supreme Court issued a ruling declaring the Guidance contrary to Spanish Constitutional law (see Judgment of 29 January 2015, appeal number 2872/2015, BCN Aduanas y Transportes SA.).

According to the Spanish Supreme Court the final amount of the fine will be established taking into account the following criteria mentioned in Article 64(1) SCA:

- the size and characteristics of the market affected by the infringement;
- the market shares of the undertakings responsible for the infringement;
- the scope of the infringement;
- the duration of the infringement;
- the effect of the infringement on the rights and legitimate interests of consumers or on other economic operators;
- the illicit benefits obtained from the infringement; and

aggravating and mitigating circumstances in relation to each undertaking.

The CNMC has announced its intention of issuing new guidelines detailing its application of these criteria but has not yet done so.

49 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

Where the undertaking is the first applicant to submit "compelling evidence" that the CNMC later relies upon, the CNMC will not take the additional information into account when setting the fine to be imposed upon the undertaking that provided the information that provided the information (article 4(62) CsC).

See further question 53 in relation to Immunity Plus.

50 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

See response to question 48.

51 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

As a general matter, no. However, if the immunity applicant's conditional immunity is withdrawn, the CNMC may grant conditional immunity to the first non-immunity applicant, particularly if there have not yet been any on-the-spot inspections.

52 Does the competition authority publish guidance regarding sentencing reductions?

The CsC (English and Spanish versions available here) contains useful guidance in relation to fine reductions under the SCA's Leniency Programme.

See response to question 49 in relation to general guidance on the general methodology of setting fines under the SCA.

53 Does the authority provide for "Amnesty Plus" benefits?

No.

The SCA does not provide for "Amnesty Plus" as provided under, for example, US law.

54 How is the Amnesty Plus discount calculated?

Not applicable (see response to question 53).

Cooperation obligations for sentencing reductions

55 Are the cooperation obligations similar to those for immunity applicants?

Undertakings that apply for a reduction in fines must meet the same cumulative and continuing cooperation conditions as immunity applicants (ie, the conditions set out in article 65(2) SCA with the exception of not having coerced another undertaking to participate in an infringement, similarly to EU law, coercing entities are eligible for fine reductions but not for immunity, see response to question 7).

56 Will the applicant be required to make a written confession?

No. See questions 7 and 28.

57 Can third parties obtain access to the materials provided by the applicant?

The position is the same as for materials provided by the immunity applicant. See question 15.

58 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

The requirements for cooperation are the same as for immunity applicants. See question 30.

59 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

The effect of obstructive conduct by an employee is the same as for immunity applicants. See response to question 31.

60 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

The position is the same as for immunity applicants. See response to question 32.

61 Can an applicant challenge the amount of the reduction of sanctions?

Yes. The amount of the reduction will be set out in the CNMC's infringement decision, which can be challenged before the courts (article 24 Spanish Constitution).

Settlements

62 How is the settlement process initiated?

Spain provides a settlement procedure for anticompetitive practices but it does not include cartel conduct. The Spanish settlement procedure is different from the EU settlement programme in that it does not involve a formal acknowledgement by the investigated entity of its participation in an infringement.

63 Is the amount of the sanction always fixed in the settlement agreement?

Not applicable.

64 What role, if any, do the courts play in the settlement process?

Not applicable.

65 Are the settlement documents, including any factual admissions, made public?

Not applicable.

66 Is an admission of wrongdoing required?

Not applicable.

67 Do companies that enter into settlement agreements receive an automatic sentencing discount?

Not applicable.

68 Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?

Not applicable.

69 Will the authority settle with subjects who refuse to cooperate?

Not applicable.

70 If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

Not applicable.

71 May a party to the settlement agreement void the agreement after it is entered?

Not applicable.

72 Does the competition authority publish guidance regarding settlements?

Not applicable.

* The author is grateful to the Sub Directorate of Cartels and Leniency of the CNMC for its comments to this text. However, this text does not represent the view of the CNMC or of Gibson Dunn or its clients.

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