

---

**THE COMPETITION LAW REVIEW**

---

Volume 12 Issue 1 pp 95-114

September 2016

## Leniency in the Iberian Peninsula: Two Worlds Apart

*Miguel Sousa Ferro & Evelyne Ameje\**

---

This paper describes and contrasts the characteristics of the Spanish and Portuguese antitrust leniency programmes. Given the relative similitude between the letter of the law and the markets and economies to which they apply, it is surprising to observe the stark differences in the success of these two policies. The paper discusses some of the possible explanations for these differences.

---

**1. INTRODUCTION**

On the day the Spanish Leniency Act came into effect, a queue of lawyers was waiting by the door of the Spanish NCA. Some had been keeping the spot for over a day, to make sure their client would be first in line. On the day the Portuguese Leniency Act came into effect, nothing happened. Much later, when a major foreign financial institution applied for leniency with the Portuguese NCA, leading to an extensive dawn raid, Portuguese banks seemed rather unconcerned.

The contrast described in this anecdotal evidence is largely confirmed by the available data on the implementation of the Iberian leniency policies. Despite the legal and cultural similarities between the two jurisdictions, leniency policy has known a much larger degree of success in Spain than in Portugal.

This paper will first analyse, quantitatively and qualitatively, the use and results of leniency policy in both countries, from its inception to the present, so as to demonstrate, empirically, the reality and extent of the “leniency gap”.

We will then discuss the potential reasons for this gap, including factors such as: (i) the drafting of the leniency provisions and the differing legal requirements, both for immunity and for a reduction of the fine; (ii) the number of restrictive practices decisions adopted by the NCAs; (iii) the level of fines imposed by the NCAs in cartel cases and their judicial review; (iv) the NCA’s approach to the application of leniency rules in practice; (v) the type and length of the conduct for which leniency is requested; (vi) the dimension of the markets and its impact on competition compliance and risk assessment; (vii) the influence of the compliance culture of multinational, non-Iberian undertakings; etc.

By identifying the factors which have led the leniency policies of these two relatively similar countries to arrive at widely different results, we will be able to extract what we

---

\* Professor at the University of Lisbon Law School and at the European University of Lisbon, Counsel at Eduardo Paz Ferreira & Associados, miguelferro@fd.ul.pt, and Lawyer, Evelyne Ameje Legal Services, evelyne@ameje.com

hope will be valuable lessons and conclusions for the optimization of antitrust leniency policies in general.

## 2. LENIENCY POLICY IN THE IBERIAN PENINSULA

### 2.1. Leniency policy in Spain

#### 2.1.1. Spanish Leniency: When and which Applicable Legal Framework

Even though leniency was introduced in Spain by the 2007 Spanish Competition Act (Act 15/2007, of 3 July), it only entered into force in 2008, with the entry into force of its implementing legislation (Royal Decree 261/2008, of 22 February). On the first day of its entry into force, on 28 February 2008, 7 firms were queuing outside the Spanish NCA's offices in order to apply for leniency. It seems safe to say that, for most, this was an unexpected, surprising development. First in the queue came various whistle-blowers about to reveal the same cartel. Interestingly, the first and second whistle-blowers (Henkel and Sara Lee) both revealed the very same liquid soap cartel with a delay of 10 minutes. The first Decision taken following a leniency application was *Fabricantes de Gel S/0084/08*, on 21 January 2010. Given the steady progress in leniency applications, the Spanish NCA issued a soft Leniency Notice<sup>1</sup> in 2013, which clarified many procedural issues, taking stock of the acquired experience and providing, *inter alia*, for a model Short Leniency Application Form. Recently, the Spanish NCA also posted a practical leaflet on its website<sup>2</sup> aimed at explaining leniency in a nutshell to the business world.

#### 2.1.2. Spanish Leniency in a Nutshell

Spanish leniency rules have been drafted to closely reflect EU leniency rules. However, their wording appears to be somehow more restrictive when defining the cartels to which leniency can be applied (see below). Moreover, unlike the EU system, no marker system is available to applicants to reserve a spot in the leniency queue prior to providing all necessary information.<sup>3</sup>

In Spain, total immunity is granted to the first company or individual who, in the NCA's opinion, provides data that is necessary to allow the Authority either to initiate a cartel investigation or to confirm the existence of a cartel. Total immunity is only conceded if whistle-blowing occurs prior to the Statement of Objections. A reduction of the fine is granted to companies or individuals who, even though they are not the first applying for leniency, provide data or proof of the cartel of a significant added value compared to the data that the Authority already has in its possession (*de officio* or through a first whistle-blower). Once the first whistle-blower has been granted

---

<sup>1</sup> Available at: <http://www.cnmc.es/Portals/0/Ficheros/Competencia/clemencia/ComunicacionClemenciaAnexo2013.pdf?timestamp=1397478388740>

<sup>2</sup> Available at: <http://www.cnmc.es/Portals/0/Ficheros/Competencia/clemencia/diptico%20programa%20de%20clemencia.pdf?timestamp=1397478425762>

<sup>3</sup> MARTÍN, E. y PELAYO, E. (2009): «Reflexiones tras un año de vigencia del programa español de clemencia», *Boletín Económico de ICE*, 2975, pp. 63-72. OECD, *Leniency for Subsequent Applicants*, Policy Roundtables – DAF/COMP(2012)25, 2012, p. 134.

immunity, fine reduction is dealt with on a first-come first-served basis: between 30% and 50% for the second leniency applicant, between 20% and 30% for the third applicant and up to 20% for the remaining applicants. Importantly, the law guarantees that the Authority will take leniency applications into account when setting the amount of the fine (this is to avoid that the reduction of a leniency application, e.g. providing proof of 5 additional cartel years, triggers an increase in the fine exceeding any leniency benefits). Also, when a leniency application is filed by a company, its benefit extends to the companies' legal representatives and executive staff. The 2013 Leniency Notice also clarifies that parent companies are allowed to whistle-blow for their subsidiaries' conduct.

Four additional requirements apply in order to benefit from full immunity or fine reduction: the whistle-blower (i) should fully and continuously collaborate in good faith; (ii) should immediately stop its participation in the cartel (unless the Authority asks the whistle-blower to stay its participation for ease of the investigation); (iii) should not destroy any data; and (iv) should not disclose the fact that he asks for leniency to any third party. Finally, total immunity is not granted to those who coerced others to participate in the cartel. Only fine reductions are available in these cases.

In Spain, leniency applications are made in writing or verbally (in such case, the NCA records the application and subsequently issues a transcript of the recordings). As such, the very first leniency application filed by Henkel in *Fabricantes de Gel* was read out to the NCA. Verbal leniency applications are seen as a way for multinational companies to circumvent US disclosure obligations.

Leniency applications are confidential and the Authority guarantees the whistle-blower's anonymity throughout the proceedings until the Statement of Objections. Also, the Spanish NCA has been very strict regarding non-disclosure of leniency applications in relation to appeals of cartel decisions or in the context of private enforcement.

Since the 2013 Leniency Notice, it has become clear that the Spanish NCA is able to ask whistle-blowers to carry out "undercover agent" activities. The Notice states that "in order to preserve the cartel investigation and to avoid alerting other cartel members", the Spanish NCA can ask the whistle-blower to continue participating in the cartel in order to keep up appearances during the time needed for the Authority to carry out necessary investigatory measures. The 2013 Leniency Notice provides for a model Short Form Leniency Application. Both immunity and fine reduction can be solicited in a short form procedure when the whistle-blower has or will file a leniency application before the European Commission.

### 2.1.3. Spanish Leniency – Case-Law

Up to 31 July 2015, the Spanish NCA issued 22 Decisions in which leniency applications were filed, as is shown in Table 1 below.

Table 1 - List of all Spanish Decisions following Leniency Applications at 31 July 2015

<i>Case</i>	<i>Nr. of Infringers</i>	<i>Decision Date</i>	<i>Full Immunity<sup>+</sup></i>	<i>Fine Reduction<sup>++</sup></i>	<i>Cartel Duration (years)</i>	<i>Type of Cartel</i>
<b>1.Dentifricos S/0085/08</b>	4	10/12/2009	<b>Not applicable.</b>	<b>Not applicable.</b>	4	Statute of Limitations. Agreement to increase toothpaste prices.
<b>2.Fabricantes de Gel S/0084/08</b>	5	21/01/2010	<b>No.1 YES</b>	<b>No. 2 YES 40%</b>	3	Price-fixing of soap through a reduction of packaging formats whilst maintaining the price of the former, larger packages.
<b>3.Vinos Finos de Jerez S/0091/08</b>	9	28/07/2010	<b>No.1 YES</b>	<b>No.2 NO (no added value)</b>	7	Agreement to control the production and increase prices of Jerez wine exports.
<b>4.Transitarios S/0120/08</b>	11	31/07/2011	<b>No.1 YES</b>	<b>No.2 NO (no added value) No.3 YES 40%</b>	8	Agreement to coordinate the commercial strategy and fix tariff increases of road freight forwarding services.
<b>5.Peluquería Profesional S/0086/08</b>	9	02/03/2011	<b>No.1 YES</b>	<b>No.2 NO (no added value)</b>	19	Exchange of sensitive information on future prices of professional hairdressing products
<b>6.Bombas de Fluidos S/0185/09</b>	21	24/06/2011	<b>No.1 YES</b>	<b>Not applicable</b>	4	Agreement to fix commercial conditions and to restrict competition through the approval of a standard model fluid fire- fighting pump within the trade association and a restrictive qualification procedure.
<b>7.Navieras Ceuta 2 S/0241/10</b>	3	10/11/2011	<b>No.1 NO</b>	<b>No.1 YES 50%</b>	2	Price-fixing agreement for maritime transport services of passengers and vehicles on the Algeciras-Ceuta Line.
<b>8.Envases Hortofrutícolas S/0251/10</b>	3	02/12/2011	<b>No.1 YES</b>	<b>Not applicable</b>	6	Price-fixing of vegetable packaging.
<b>9.Navieras Baleares S/0244/10</b>	4	23/02/2012	<b>No.1 NO</b>	<b>No.1 NO</b>	6	Market-sharing and price- fixing agreements and fixing of commercial conditions, as well as the imposition of unfair tariffs and commercial conditions for passenger and cargo

						maritime transport between the Spanish Peninsula and Balears.
10. Postensado y Geotecnia S/0287/10	7	02/08/2012	No.1. YES	N/A	14	Price-fixing and market-sharing agreements through the allocation of post-tensioning works and geotechnical tensioning clients.
11. Exportación de Sobres S/0318/10	6	15/10/2012	No.1 NO (no added value <sup>i</sup> )	No.2 YES 40%	30	Price-fixing and market-sharing agreements for the export of envelopes.
12. Navieras Marruecos S/0331/11	6	07/11/2012	No.1 NO	No.1 YES 40%	8	Agreements to fix fares, commissions, commercial conditions and schedules of passenger and cargo shipping lines between the Iberian Peninsula and Morocco.
13. Material de Archivo S/0317/10	4	21/11/2012	No.1 YES	No.2 YES 50%	5	Price-fixing and client-sharing agreements for storage material.
14. Manipulado de Papel S/0343/11	3	15/02/2013	No.1 YES	No.2 YES 35%	15	Price-fixing and client-sharing agreements for paper processing material.
15. Espuma de Poliuretano S/0342/11	10	28/02/2013	No.1 YES	No.2 YES 40% No.3 NO (no added value)	19	Price-fixing and market-sharing agreements regarding polyurethane foam for the comfort sector
16. Sobres de Papel S/0316/10	15	25/03/2013	No.1 YES	No.2 YES 40% No.3 NO (no added value) No.4 YES 30% <sup>ii</sup>	34	Price-fixing, market-sharing and limitation of technological development in the paper envelopes market
17. Distribuidores Saneamiento S/0303/10	21	23/05/2013	No.1 YES	See table note <sup>iii</sup>	3	Price-fixing and fixing of commercial conditions for the distribution and sale of all types of material for the installation, maintenance and repair of water pipes, conducts, sanitary services, heating and cooling systems.
18. Coches de Alquiler S/0380/11	18	30/07/2013	No.1 YES	No.2 NO (no added value)	6	Price-fixing and fixing of commercial conditions in the rental market of driverless vehicles.
19. Equipos Contra Incendios S/0445/12	6	26/07/2014	No.1 YES	No.2 NO (no added value)	2	Price-fixing and market-sharing agreements in the firefighting equipment sector.
20. Rodamientos	3	04/12/2014	No.1 YES	Not	7	Price-fixing and market-

<b>Ferrovios S/0453/12</b>				<b>Applicable</b>		sharing of industrial bearings for the railway sector.
<b>21. Concesionarios Audi/Seat/VW S/0471/13</b>	99	28/05/2015	No.1 YES	<b>Not Applicable</b>	2 to 7 <sup>iv</sup>	Price-fixing and fixing of commercial conditions, as well as exchanging commercially sensitive information by branded car dealers and manufacturers.
<b>22. Fabricantes y Distribuidores Automóviles S/0482/13</b>	23	28/07/2015	No.1 YES	<b>Not Applicable</b>	7	Exchange of confidential and commercially sensitive information, both current and future, in the distribution and marketing of motor vehicles market and/or the provision of after-sales services.

Source: The authors' drafting based on Spanish NCA information.

+ Full Immunity to the First Leniency Applicant (No.1)

++ Fine Reduction to the Second, Third and Subsequent Leniency Applicants (No.2, No.3, No.4, etc.)

<sup>i</sup> The First Leniency Applicant did not provide data of added value and therefore did neither benefit from immunity nor from a fine reduction.

<sup>ii</sup> Given that the Third Leniency Applicant did not provide data of added value, the Fourth Leniency Applicant became the third company to benefit from a reduction (in the amount of 30%).

<sup>iii</sup> In this case, some companies merely asked that "the benefits of the leniency rules be applied to them", which, formally, was obviously not sufficient to qualify as a leniency application.

<sup>iv</sup> This case concerns various regional cartels, the shorter of which lasted about 2 years and the longer of which lasted about 7 years.

Most of the leniency applications were the trigger that prompted the Spanish NCA's investigation. However, in some cases, leniency applications were received by the NCA after it had opened a *de officio* investigation. None of the above leniency applications have been filed by individuals. In approximately half of all 22 cases, a trade association, sector association or consultant acted as a cartel facilitator and is fined in a less severe fashion than its members. Finally, it is worth noting that in many cases, Spanish leniency applications follow prior enforcement action or a leniency application in other national jurisdictions or before the European Commission, e.g. Case S/0085/08 *Dentífricos*, Case S/0084/08 *Fabricantes de Gel* and Case S/0086/08 *Peluquería Profesional* were triggered by Henkel's multi-jurisdictional leniency applications in the EU and Case S/0342/11 *Espuma de Poliuretano* was initiated following Recticel's multi-jurisdictional leniency applications throughout the EU.

The Spanish NCA has strictly applied the "added value" test irrespectively of whether the leniency applicant was the first, second or third company to blow the whistle. Hence, total immunity has not always been granted to 1<sup>st</sup> whistle-blowers. Consistently, 2<sup>nd</sup> whistle-blowers have frequently not been awarded any benefit because their leniency application did not provide proof of added value. When granted, the reduction to the 2<sup>nd</sup> whistle-blower has usually been in the amount of approximately 40%. There is only one case where a 3<sup>rd</sup> whistle-blower was granted a fine reduction. Indeed, in Case S/036/10 *Sobres de Papel*, the 4<sup>th</sup> whistle-blower was granted a 3<sup>rd</sup> position and benefited from a 30% fine reduction.

The Authority's reason to refuse leniency has nearly always been based on a lack of added value. When assessing the "added value", the Spanish NCA has not been formalistic.<sup>4</sup> In very limited instances the Authority's reason to refuse leniency has been based on a lack of collaboration in good faith.<sup>5</sup>

Generally, leniency applications are more prone to be successful when filed prior to any dawn raid (e.g., in Case S/0241/10 *Navieras Centa 2*, where the filing occurred after dawn raids, the 1<sup>st</sup> whistle-blower was not granted immunity). However, when sufficient added value is contributed, the Authority values such applications positively. In Case S/0120/08 *Transitarios*, the Spanish NCA granted a 40% reduction to the 3<sup>rd</sup> leniency applicant, who blew the whistle after dawn raids had been carried out, because the information provided contained valuable information for the file.

#### 2.1.4. Spanish Leniency: a Success Story

In a survey of the leniency policy in Spain in 2012, the General Director of the Spanish NCA's Investigations Directorate, Clara Guzmán Zapater,<sup>6</sup> positively valued the Spanish Leniency experience "*given the continuous stream of leniency applications that have been accepted*". Leniency allowed the Authority to dramatically raise the number of dawn raids. Dawn raids were, in addition, eased by the Authority's increased investigatory powers provided by the 2007 Competition Act. In her opinion, this success is mainly due to the high level of potential fines for cartel infringements, on the one hand, and the procedural guarantees enjoyed by whistle-blowers, on the other hand<sup>7</sup>.

In 2013, after 5 years of leniency enforcement, the Spanish NCA had fined cartels in a total amount of approximately €400 million by virtue of leniency applications. Of this amount, approximately €100 million remained unapplied because it was exempted due to the immunity or fine reductions that were granted to the whistle-blowers. Yet on balance, this means that whistleblowing allowed the Spanish NCA to impose about €300 million of sanctions, which would probably not have been possible in the absence of a leniency programme.<sup>8</sup> It paradoxically must be noted, however, that only a small percentage of fines imposed by the Spanish NCA have actually been paid, largely due to annulment and fine reduction during judicial review.

<sup>4</sup> In Case S/0185/09 *Bombas de Fluido*, the fact that the Authority's Decision-Taking Council qualified the facts put forward by the leniency application in a different manner than the leniency applicant and the Authority's Investigatory Team was not considered to be a hindrance to grant total immunity.

<sup>5</sup> In Case S/0244/10 *Navieras Baleares*, the 1<sup>st</sup> whistle-blower was denied any benefit of immunity or fine reduction due to a patent lack of cooperation with the Spanish NCA, as it had adopted a drop-by-drop leniency strategy lacking the necessary good faith (the company presented 10 verbal leniency declarations in the course of a full year, adding new elements on-the-go, as it suited its case).

<sup>6</sup> GUZMÁN ZAPATER, C. (2012): «El Programa de Clemencia en el Sistema Español de Defensa de la Competencia», available at: <http://hayderecho.com/2012/01/17/el-programa-de-clemencia-en-el-sistema-espanol-de-defensa-de-la-competencia/>

<sup>7</sup> For further doctrinal analysis of the Spanish leniency program, see: MAILLO, J., «El programa de clemencia español a examen»; and LÓPEZ GÁLVEZ, I., «La aplicación del programa de clemencia en España: valoración y desafíos actuales», both in BENEYTO PÉREZ, J. M., MAILLO, J. (dirs.), *La lucha contra los cárteles en España*, Aranzadi, 2015, p. 251 and p. 1021.

<sup>8</sup> [http://economia.elpais.com/economia/2013/05/08/actualidad/1368038970\\_425088.htm](http://economia.elpais.com/economia/2013/05/08/actualidad/1368038970_425088.htm)

In its 2012-2013 Annual Report, the Spanish NCA positively values leniency in Spain, both in terms of the number of leniency applications and in terms of the number of cartels that were unveiled and subsequently sanctioned. According to the Authority, the leniency rules have also had the effect of destabilising existing cartel behaviour and dissuading future cartel behaviour in Spain.

## 2.2. Leniency policy in Portugal

### 2.2.1. Portuguese Leniency: When and which Applicable Legal Framework

Leniency was introduced in Portugal by the 2006 Leniency Act (Act 39/2006, of 25 August), implemented by the Portuguese NCA's Regulation 214/2006, of 22 November. This Act was later revoked and the leniency policy was integrated into the new Portuguese Competition Act (Act 19/2012, of 8 May), in Chapter VIII (articles 75 to 82). A new implementing Regulation was adopted (NCA Regulation 1/2013, of 3 January), accompanied by an Informative Notice<sup>9</sup> (this new Regulation was preceded by a public consultation, the report of which is also available).<sup>10</sup> The Portuguese NCA has also published a leaflet concerning the leniency policy, aimed at the business community, as part of a recent awareness raising roadshow through the country.<sup>11</sup>

It seems fair to say there was far from being any rush to use the new mechanism. The first investigation arising from a leniency application was opened on 2 February 2007, and it was filed by a former manager, not an undertaking. According to publicly available information, the first investigation arising from a leniency application filed by an undertaking begun on 3 November 2010, almost 4 years after the leniency mechanism was first regulated.

### 2.2.2. Portuguese Leniency in a Nutshell

Portuguese leniency rules closely mirror the ECN Model Leniency Programme<sup>12</sup> and the EU's leniency regime. The original regime was published days before the publication of the ECN's 2006 Model and, although clearly influenced by its drafting works, showed some non-negligible differences. The 2012 regime largely completed the harmonisation process.

The main differences between the 2006 and the 2012 regimes are the following: (i) it is now clear that leniency is only available for horizontal agreements (the previous phrasing seemed to allow for leniency in the context of vertical agreements);<sup>13</sup> (ii) the

---

<sup>9</sup> Available at: [http://www.concorrenca.pt/vPT/Praticas\\_Proibidas/O\\_programa\\_de\\_clemencia/Documents/Relatorio\\_NotaInformativa\\_Clemencia2012.pdf](http://www.concorrenca.pt/vPT/Praticas_Proibidas/O_programa_de_clemencia/Documents/Relatorio_NotaInformativa_Clemencia2012.pdf)

<sup>10</sup> Available at: [http://www.concorrenca.pt/vPT/Praticas\\_Proibidas/O\\_programa\\_de\\_clemencia/Documents/Relatorio\\_Preambular\\_Regulamento\\_Clemencia2012.pdf](http://www.concorrenca.pt/vPT/Praticas_Proibidas/O_programa_de_clemencia/Documents/Relatorio_Preambular_Regulamento_Clemencia2012.pdf)

<sup>11</sup> Available at: <http://www.concorrenca.pt/fairplay/assets/brochuraclemencia.pdf>.

<sup>12</sup> See the 2006 version, available at: [http://ec.europa.eu/competition/ecn/model\\_leniency\\_en.pdf](http://ec.europa.eu/competition/ecn/model_leniency_en.pdf).

<sup>13</sup> It has also been argued that Article 75 of the PCA, which defines the material scope of the leniency regime, may come to be interpreted as limiting this option to hardcore cartels, but this is a matter of doctrinal dispute (see XAREPE SILVEIRO, F. (2012): «O regime jurídico da clemência na nova lei da concorrência: novas valências, novos desafios», *Revista de Concorrência e Regulação*, 3(10), pp. 251-281, at 262-263).

phrasing of the material conditions for immunity was revised to bring it closer to the EU regime;<sup>14</sup> (iii) leniency and fine reduction are now (also) available after the initiation of an investigation by the Portuguese NCA into those specific practices; (iv) the fine reduction intervals and conditions were revised, harmonising them with the EU regime; (v) the provision instituting a “leniency plus” mechanism (additional reduction of the fine for those first providing evidence regarding other infringements) was eliminated; and (vi) a new provision was added clarifying the regime for non-disclosure of documents supplied under the leniency program.

While this revision should, theoretically, bring the leniency regime greater attractiveness and effectiveness, this reform was not particularly extensive, and, at least insofar as we can assess on the basis of publicly available information, it has not yet had any measurable practical impact, in terms of an increase in the number of applications.

In Portugal, total immunity is granted to the undertaking or individual (administrator or equivalent person, who may also be found liable for an antitrust infringement under the PCA) who first discloses its participation in an alleged agreement or concerted practice, as long as the information and evidence it provides, in the view of the Portuguese NCA, allow it to: (i) provide a substantive reason to carry out an inspection, if the NCA did not yet have sufficient information to do so; or (ii) adopt a decision identifying an infringement, as long as the NCA did not yet have sufficient evidence to do so.

A reduction of the fine is granted to undertakings or individuals who, while not meeting the conditions for immunity, provide information and evidence on an infringement with “significant added value with respect to the information already in possession of the NCA”. Following the EU model, reductions are granted on a first-come first-served basis, with the same percentage intervals as in the Spanish Competition Act.

In both cases, the same four additional requirements apply, as those foreseen in the Spanish legislation. The requisite of full and continuous cooperation is additionally specified as requiring the provision of all the information and evidence that it has or may come to have in its possession or under its control and of promptly replying to any request for information that may contribute to determining the facts.<sup>15</sup> Immunity is not available to undertakings who coerced others to participate in the infringement.

---

<sup>14</sup> It has been argued that the phrasing of the conditions for leniency in the original leniency Act created ambiguity and legal uncertainty: “In particular, the fact that, in order to qualify for an exemption, the company had to provide information allowing the [Portuguese NCA] to verify the existence of a breach of the law probably made the standard too difficult to reach. Companies were clearly faced with the risk that it could be considered that the proof of the cartel was not the result of the information they provided” – PINTO CORREIA, C., “Portugal”, in VARNEY, C. (ed.), *The Cartels and Leniency Review*, 3<sup>rd</sup> ed., Law Business Research, 2014.

<sup>15</sup> It is also stated that the information and evidence provided should include: “full and accurate information on the agreement or concerted practice and the undertakings involved, including its aims, activities and functioning, the product or service concerned, the geographical scope, the duration, and specific information on dates, locations, content of and participants in contacts made, and all relevant explanations presented in support of the application”.

Both total immunity and fine reduction can be obtained even if an investigation has already been initiated into those specific practices. The law clearly indicates that fine reduction is also available after the adoption of an SO, implying it is not available if an SO has already been issued. The leniency application may be presented in writing or verbally, in Portuguese or English, and a summary application form is also available.

Article 81 of the PCA provides a specific regime for the protection of the confidentiality of leniency applications and documents submitted under it. It is a matter of doctrinal dispute whether this regime needs to be adjusted in light of EU law principles and national civil procedural law principles and access to documents rules. However, it is clear that this provision guarantees a degree of protection that exceeds what has been determined by the European Courts for the leniency documents held by the European Commission, and it goes far beyond what is foreseen in the Private Enforcement Directive. In other words, the Portuguese leniency regime is, at least in this regard, extremely favourable to applicant undertakings.

As in other countries, it is a matter of doctrinal dispute, in Portugal, whether undertakings have an actual “right” to immunity and to reduction of the fine under the leniency regime.<sup>16</sup>

### 2.2.3. Portuguese Leniency: Case-Law

Up to 31 August 2015, the Portuguese NCA issued 4 Decisions in which leniency applications were filed, as shown in Table 2 below.

**Table 2 - List of Portuguese Decisions following Leniency Applications at 31 August 2015**

<i>Case</i>	<i>Nr. of Infringers</i>	<i>Decision Date</i>	<i>Full Immunity<sup>+</sup></i>	<i>Fine Reduction<sup>++</sup></i>	<i>Cartel Duration (years)</i>	<i>Type of Cartel</i>
<b>1. Catering</b> <i>PRC/2007/02</i>	5 (+6 <i>indiv.</i> )	<b>31/07/2012</b>	<b>No.1 YES</b>	<b>Not applicable</b>	<b>10</b>	<i>Price fixing, market sharing and exchange of sensitive information in the provision of catering services for hospitals, schools, prisons, industry and services</i>
<b>2. Commercial forms</b> <i>PRC/2010/08</i>	4 (+3 <i>indiv.</i> )	<b>13/12/2012</b>	<b>No.1 YES</b>	<b>Not applicable</b>	<b>10</b>	<i>Price fixing and market sharing in the market for commercial forms</i>
<b>3. Polyurethane</b>	3 (+5)	<b>18/07/2013</b>	<b>No.1 YES</b>	<b>No.2 50%</b>	<b>11</b>	<i>Price fixing and exchange of sensitive</i>

<sup>16</sup> It has been suggested that the new drafting reduced the discretionary margin for the Portuguese NCA in deciding to grant immunity (instead of “may grant”, Article 77 of the Portuguese Competition Act now reads “grants...”) – see: XAREPE SILVEIRO (2012), cit., at 264-265. However, the law also subjects the assessment of the meeting of the conditions to “the view of the NCA”. The same leading member of the Portuguese NCA is on record as stating that, in his personal opinion, while the granting of immunity is virtually an obligation of the Portuguese NCA, subject to the fulfillment of the respective conditions, there is a significant discretionary margin in the granting of a fine reduction - XAREPE SILVEIRO (2012), cit., at 265. Jorge de Figueiredo and Flávia Loureiro have also indicated that the revision of Article 77 implies that the Portuguese NCA now has a “duty” to grant immunity when the legal conditions are met – see Annotation to Article 77 in GORJÃO-HENRIQUES, M. (dir.), «Lei da Concorrência – Comentário Conimbricense», Almedina, 2013, p. 775.

foam PRC/2011/01	indiv.)					information between manufacturers of flexible polyurethane foam
4. School equipment	5	August 2015	No.1 YES	No.s 2, 3 and 4 YES (% unknown)	2	Price fixing and market sharing agreement in the supply and assembly of prefabricated modules for schools in public tenders

Source: The authors' drafting based on Portuguese NCA information.

+ Full Immunity to the First Leniency Applicant (No.1)

++ Fine Reduction to the Second, Third and Subsequent Leniency Applicants (No.2, No.3, No.4, etc.)

Only one of these four investigations was not triggered by the leniency application (*School equipment* cartel). And one – the first – was filed by an individual.

The Portuguese NCA applied the “added value” test in all cases, and while it is not easy to make an outsider’s assessment of the way the test was applied, it would seem that it has been rigorous but fair. Only one of the undertakings in these cases saw its application refused. It had been the first to come forward, but ended up not benefiting from leniency. The precise reasons were deemed confidential, but it would seem that, in the opinion of the Portuguese NCA, it failed to supply a complete application. In one of these cases, the Portuguese NCA felt that 4 out of 5 participating undertakings had presented sufficient information and evidence to qualify for leniency, which may suggest a rather permissive interpretation of its requirements, possibly meant to make it as attractive as possible for companies to resort to this mechanism.

The first leniency case, the *Catering* cartel, initiated on 2 February 2007, arose from a leniency application presented by a former manager of one of the participating companies. No others filed for leniency. A first decision was annulled on procedural grounds and replaced by a second decision. A total of €14.7 million in fines was imposed, including a total of €21,000 for directors (fines between €2,500 and €5,000 for each). On appeal, the Competition, Regulation and Supervision Court (CRSC), in its judgment of 19 July 2013, considered the infringement partly time-barred and reduced the fines to a total of €6.3 million. The Lisbon Appeal Court considered the entire infringement time-barred so, in the end, no sanctions were imposed in this case.

The *Commercial Forms* cartel was the first to be initiated by a leniency application from a participating undertaking, almost four years after the leniency regime was fully regulated (3 November 2010). The applicant received immunity (no other company filed for leniency), extended to other companies within the same economic unit, including a Spanish company. A total of €1.8 million in fines was calculated (including fines up to €3,000 for administrators), but only €1.15 million was imposed, thanks to the leniency. The CRSC (judgment of 7 March 2014) reduced the final fines to a total of €459,300.

The *Polyurethane Foam* cartel related to the effects on Portuguese territory of practices that were being investigated simultaneously in Spain and at the EU level. The first two applications, in summary form, were received in August and September 2010, but the investigation was only officially opened on 6 January 2011. The first application was rejected, with the 2<sup>nd</sup> applicant (which submitted its complete application in February 2011) being promoted to the first slot and receiving immunity. In April 2011, another undertaking filed for leniency and succeeded in obtaining a 50% reduction. A total of

€5.8 million was calculated (including fines for managers of up to €5,000 EUR), but only a total of €993,000 was applied, thanks to leniency and settlement proceedings (thus confirming the willingness of the Portuguese NCA to apply the two types of reduction in practice).<sup>17</sup> The decision was not appealed.

In the *School equipment* cartel, at least four undertakings filed for leniency after the initiation of the investigation by the Portuguese NCA (inspections carried out on 29 January 2014). As the decision has not yet been made public, the precise amount of reduction given to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants is not known. A total of €831,810 fine was effectively applied. Once again, fines were reduced both under the leniency regime and thanks to settlements.

At least one case arising from a leniency application is still pending, but little is publicly known. The Portuguese NCA carried out dawn raids in March 2013 and, on 29 May 2015, it sent out a Statement of Objections to 15 banks, wherein it stated it believed these undertakings carried out an unlawful concerted practice for 11 years, exchanging sensitive information relating to certain retail credit instruments (including prior warning of price changes).<sup>18</sup> The case is generally believed to have been initiated by a leniency application submitted by a bank headquartered in another Member State. From what can be gathered from public statements, only one other bank seemingly filed for leniency in this case. From an outsider's perspective, there seemed to be a striking absence of concern in the financial sector after the dawn raids.

Prior to the adoption of the leniency regime, there were two incidences of what one author called "leniency avant la lettre".<sup>19</sup> Using the existing framework that allowed reducing fines on the basis of cooperation, the Portuguese NCA granted very substantial fine reductions in two cartels, the most notable of which was the *Glucose Diagnostic Strips* cartel cases (PRC/2003/06 and PRC/2005/04). After the Portuguese NCA had adopted a decision imposing fines for a cartel in a public tender for hospital supplies, one of the targeted companies (Johnson & Johnson), soon followed by another (Bayer), came forward with evidence of similar collusion in a number of other tenders, which allowed the adoption of a new decision. While the two companies which presented the information were still fined – respectively, €360,000 and €1,300,000 – their fines were substantially smaller than the ones imposed on the other undertakings (between €6.8 and €2.15 million).<sup>20</sup>

---

<sup>17</sup> The President of the Portuguese NCA stated, in a Speech on 4 April 2014 (available at: [http://www.concorrencia.pt/vPT/Noticias\\_Eventos/Intervencoes\\_publicas/Documents/Discurso\\_CAPD\\_C\\_4abril2014.pdf](http://www.concorrencia.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/Discurso_CAPD_C_4abril2014.pdf)), that leniency and settlement proceedings are complementary and should actually reinforce each other.

<sup>18</sup> See Portuguese NCA Press Release 11/2015.

<sup>19</sup> MOURA E SILVA, M. (2011): «Anti-Cartel Enforcement in Portugal: A Short Chronicle of an Uphill Struggle», *European Competition Law Review*, 32, p. 37.

<sup>20</sup> The other example of substantially reduced fines on the basis of cooperation (after the initiation of the investigation) was the Salt cartel (PRC/2005/25).

#### 2.2.4. Portuguese Leniency: Not a Success Story

Writing in 2011, when the only leniency case publicly known was the *Catering* cartel, an insider of the Portuguese NCA noted: “there is clearly reason to be concerned as to whether the necessary conditions exist for a successful leniency program”.<sup>21</sup> Four years later, the sentence still holds true.

Portugal has adopted 4 leniency decisions in 9 years, i.e. 0.45 per year. This average is further reduced – 0.33 per year – if we only take into account the leniency applications by undertakings. This contrasts with Spain’s 22 leniency decisions in 7.5 years (all of which from applications by undertakings), i.e. 2.9 per year. In a purely quantitative approach, this means Spain’s leniency policy has been almost 9 times more successful than the Portuguese one. It has been 17 times more successful if we compare the amount of fines (before judicial review).

While Spain’s economy and population is larger than Portugal’s (*circa* 19% of GDP and 21% of population), there is no necessary correlation between the number of cartels and a country’s demographic or economic size. But even if we adjust the figures to take into account these different sizes, Portugal is about a 5<sup>th</sup> of Spain, so there would still be a significant discrepancy in the success of the leniency policy.

Of the 5 leniency cases known in Portugal (one not yet concluded), one was initiated by a disgruntled (former) employee (*Catering*) and 3 others have an international, non-Portuguese dimension to them. The applicant in the *Commercial Forms* cartel was a single undertaking that included a company in Spain, where similar practices were also investigated. The *Polyurethane foam* cartel was being investigated also in Spain and at the EU level. And the *Banks* cartel case was initiated by an applicant headquartered in another Member State, with a stronger tradition of antitrust enforcement. The only purely Portuguese leniency seems to have been the *Schools equipment* cartel, and there the leniency applications were presented in reaction to dawn raids.

In light of this reality, it is unsurprising that there are no official assessments of the success of the leniency policy in Portugal. However, the Portuguese NCA clearly remains fully committed to ensuring that, both in what concerns the letter of the law and the manner in which it is applied, the leniency regime is as enticing as possible to undertakings. It has also continued to publicly affirm the crucial importance of the leniency policy and to attempt to make the business community more aware of it.<sup>22</sup>

### 3. REASONS FOR THE “LENIENCY GAP” IN THE IBERIAN PENINSULA

In this section, we will endeavour to identify why leniency has prompted companies to react to the prisoner’s dilemma in Spain and in Portugal in such different manners.

In “The Stone Raft”,<sup>23</sup> Portuguese novelist José Saramago extensively sought to identify similarities - geographic, genetic, historical, religious, cultural, linguistic and

<sup>21</sup> MOURA E SILVA (2011), cit.

<sup>22</sup> See, e.g., Portuguese NCA Activity Report 2014, p. 25.

<sup>23</sup> SARAMAGO, J. (1986), “A Jangada de Pedra”, Caminho.

economic affinities – between Spain and Portugal in a hypothetical situation whereby the Iberian Peninsula would have broken off from the European Continent and be floating freely on the Atlantic Ocean. In his hypothesis, Spain and Portugal were drawn ever closer to one another. Yet, as far as leniency is concerned, the Iberian Stone Raft more closely resembles a cruise ship and its small escort vessel.

Both Iberian regimes are 3<sup>rd</sup> generation leniency regimes,<sup>24</sup> largely harmonised with the ECN's Model Leniency Programme (in force at the time of their adoption) and the EU's leniency regime. There are few differences between the rules of the two legal orders. At most, the Portuguese regime can be said to more favourable to applicants (e.g., availability of a marker system, and a possibly higher degree of protection for leniency documents). We were also unable to identify significant differences in the way the two regimes are applied by each NCA. While the comparison is difficult, due to the difference in the number of cases, it seems fair to say that, at most, the Portuguese NCA has shown itself willing to be more permissive, by extending leniency to a greater number of applicants, even when their application was made after dawn raids (*School equipment* cartel).<sup>25</sup> It can't be said that in either country there is a perception that leniency may be refused on the basis of broad discretionary assessments.

Bottom-line, it is our belief that both regimes have been designed and applied in a manner that is adequately meant to maximize their attractiveness to undertakings.

One factor that may cause potential leniency applicants to hesitate is that it is a matter of legal debate whether the NCAs have an obligation and the undertakings have a right to immunity or reduction of the fine if the corresponding requisites are met. And even if, in theory, there is an actual right thereto, it is still untested to what extent courts would carry out an effective judicial review of whether the conditions were met, or if they would leave a large margin of discretion for the NCA's assessment. However, the track record of both NCAs, as previously mentioned, shows that the opportunities for this issue to be raised are rare. Furthermore, this factor exists equally on both sides of the border, and so it cannot account for the discrepancy in the success of the leniency policy.

We also considered whether the type and length of the conducts for which leniency was requested could suggest some justification for the cross-border variations. But we could find no evidence for that. Leniency is available for the same types of practices. Both in Spain and Portugal, cartel decisions arising from leniency applications tend to relate to hardcore practices (mostly price-fixing) and to long periods (around 10 years). The only notable difference is that, on average, the Spanish cartels involved a higher number of

---

<sup>24</sup> According to the classification put forward in IDOT, L. (2005), «Une question d'actualité en droit de la concurrence: programmes de clémence et internationalization», in *Droit et Actualité – Études Offertes à Jacques Béguin*, Paris, Litec, pp. 363-379.

<sup>25</sup> Some authors suggest that the Spanish NCA has applied “elevated standards when determining whether undertakings have fully and continuously collaborated”, arguing that in several cases information was allegedly provided with added value and yet the benefit of leniency was withheld – see: GUTIÉRREZ, A., LAPRESTA, A. R., “Spain”, in VARNEY, C. A., *The cartels and leniency review*, 2nd ed., Law Business Research, 2014, p. 304

participants,<sup>26</sup> which could account for a smaller degree of stability and incentive to use the leniency regime. However, the importance of this factor should not be overestimated, since 11 of the Spanish cases had a number of participants very close to the Portuguese figures (between 3 and 6).

Having excluded these factors, what reasons can be behind the “Leniency Gap”? In our opinion, the following must be considered.

### 3.1. Dissuasive factors

#### 3.1.1. Number of dawn raids carried out by the NCAs

In Spain, leniency has gone hand-in-hand with a significant increase of dawn raids in a wide variety of sectors. Leniency, which came into force in 2008, followed an increase of the Authority’s investigatory powers in 2007. Spanish inspectors have applied a rather broad interpretation of what they consider amounts to an “obstruction” of dawn raids. In July 2015, the Spanish NCA said that it was carrying out an average of 8 dawn raids per year, in which the premises of around 60 companies are being inspected.

The Portuguese NCA also has far reaching powers to carry out inspections and ask for information. However, in Portugal, dawn raids are a less common event. Thus, for example, in 2015, so far as is public knowledge, 2 dawn raids have been carried out. In 2014, no inspections were announced, and in 2013 only 1 was.

#### 3.1.2. Number of restrictive practices decisions adopted by the NCAs

The number of restrictive practices (Arts. 101 and 102 and/or national equivalent) decisions adopted by the Portuguese NCA, generally, is much smaller than that of its Spanish counterpart.

In Spain, between 2003 and up to August 2015,<sup>27</sup> approximately 232 decisions were adopted identifying unlawful restrictive practices, i.e. an average of approximately 18 per year.

Since its inception in 2003 and up to August 2015,<sup>28</sup> the Portuguese NCA has adopted 36 decisions identifying unlawful restrictive practices (practices in breach of Arts. 101/102 and/or national equivalents),<sup>29</sup> i.e. an average of 3 per year. Slightly less than half of these related to agreements between undertakings (including horizontal and

<sup>26</sup> The Spanish cartels arising from leniency had an average of 13 participants (or 9 participants, excluding from the average a case with 99 participants - Case S/0471/13 *Concesionarios Audi/Seat/VW*), whereas the Portuguese cartel cases averaged 4 participants.

<sup>27</sup> These were compiled by the authors from the Activity Reports of the Spanish NCA (i.e. former “Tribunal de Defensa de la Competencia” and “Comisión Nacional de la Competencia”) for the relevant years, complemented by recent press releases and information available on the Spanish NCA website.

<sup>28</sup> These figures were compiled by the authors from a presentation of the President of the Portuguese NCA in Coimbra, on 17 January 2014 («Ultrapassar a crise: o papel da concorrência»), and from a presentation of the former President of the Portuguese NCA to the Portuguese Parliament on 13 March 2013. Figures relating to 2014 and 2015 were compiled by the authors from the Portuguese NCA Report of 2014 and from decisions and news published on the Portuguese NCA website.

<sup>29</sup> It should be noted that this figure includes the re-adoption of previous decisions, in at least two cases.

vertical agreements). In other words, there has been an average of about one cartel decision per year. The Portuguese NCA's output in restrictive practices decisions is almost 6 times below its Spanish counterpart's.

### 3.1.3. Level of fines imposed by the NCAs in cartel cases and their judicial review

The Spanish NCA is said to have applied a high level of fines partly in order to secure the success of its leniency rules. However, in order to provide legal certainty for the business world, it issued a soft Notice on the Calculation of Fines in 2009. Sadly, the Spanish Supreme Court recently found (January 2015) that this Notice is not only worthless due to its soft nature but that the NCA may not adopt such a Notice.<sup>30</sup> That being said, it is not clear that this has led to a decrease of the level of fines. On 28 July 2015, a total fine of €171 million was imposed on an automobile cartel. Despite this aggressive fine setting, many Decisions are quashed by the Court of Appeal or the Supreme Court. However, the impact on the fines' deterrent effect seems to have been limited so far.

As for Portugal, fines are visibly smaller. Given the smaller size of the market, the 10% turnover limit and the method used to calculate fines, this is to be expected. But we feel it is not too daring to say that serious doubts can be raised as to the dissuasive effect of antitrust fines in Portugal. For one thing, the Portuguese NCA is not particularly aggressive when setting fines. And for good reason, since the courts, as a rule, very significantly reduce the amount of fines imposed.

In the *Catering* cartel, for example, fines totalling €14.7 million were initially imposed, representing 3.8% of the participating undertakings' turnover in the year preceding the decision. The first instance court reduced the fines to €6.3 million, i.e. a total of €630,000 for each year of a cartel which was estimated by the Portuguese NCA to have granted the participants economic benefits totalling €172 million. In the *Commercial forms* cartel, the CSRC reduced the total fines from €1.15 million to €459,000, i.e. €46,000 per year of the cartel. In the 2<sup>nd</sup> *Glucose Diagnostic Strips* cartel case, total fines of €13.4 million were imposed for a cartel affecting *circa* 30 public tenders in 2 years and causing damages to the National Health Service estimated at around the same figure. The first instance court reduced the fines to €5 million.

While this issue would benefit from further quantitative research, it seems fair to conclude that fines have been set at a lower level in Portugal than in Spain. Also, both Portuguese and Spanish companies have a high degree of confidence in their chances of getting those fines substantially reduced, or even fully quashed, by the courts.<sup>31</sup> While the creation of the specialised Competition Court has increased the Portuguese

---

<sup>30</sup> MARCOS FERNÁNDEZ, F. (2015), «*Blowing Hot and Cold: The Last Word of the Supreme Court on Setting Fines for Competition Law Infringements in Spain*», Jean Monnet Working Paper IE Law School, AJ8-220-I, p. 91

<sup>31</sup> One leading Portuguese author has suggested that it is not only the reduction of fines, but also the tendency to annul decisions on procedural grounds, that drastically contributes to reducing the fear of public antitrust enforcement in Portugal - MOURA E SILVA (2011), cit.

NCA's success rate (especially by decreasing the number of cases lost on procedural grounds), it has not reversed the tendency for substantial reductions of the fines.

The higher level of fines in Spain may be linked to the higher level of maturity of its competition law and policy, given that it takes time for a competition regime to operate effectively. Spain adopted its first competition law in 1963, even though one should rightly question its effectiveness at a time when Spain was under Franco's dictatorship. However, competition law was already in place in Spain's nascent democracy of the 70s and the 80s, prior to its accession to the European Union in 1985. Portugal, on the contrary, adopted its first competition law in 1983. Furthermore, its public enforcement system was widely acknowledged to have a number of shortcomings, which were only addressed in the 2003 reform that created the *Autoridade da Concorrência*. In many ways, this moment was like a new beginning for competition law in Portugal.

#### 3.1.4. Length of proceedings and time-barring

An important feature of the Spanish competition environment resides in the speed of cartel investigations following the leniency applications. In Spain, the Authority is bound by a maximum term of 18 months (the Supreme Court does not refrain from quashing Decisions when this term is exceeded, e.g. Case 294/91 *Aceites I*). Hence, taking account of the usual suspensions of this 18-month term (mainly due to confidentiality issues), the time between the initiation of the cartel proceedings and the final Cartel Decision is usually about two years.

In Portugal, there is no definitely binding deadline to conclude the investigation. The average total duration of investigations into restrictive practices seems to be slightly higher. While contradictory official statistics can be found, it seems there has been a tendency for reduction of the length of proceedings from about 4 to a little over 2 years. General perceptions seem to point to rather lengthier proceedings. The Portuguese NCA has repeatedly run into problems with time-barring. Several of its restrictive practices decisions (including one arising from leniency, the *Catering* cartel) have been quashed as a result. While it may not be fair to say that these have occurred in a greater rate than in Spain, the lower number of decisions means that their psychological impact may be greater.

### 3.2. Economic and circumstantial factors

#### 3.2.1. "Snowball effect"

Whistle-blowing begets whistle-blowing. It is reasonable to assume that the fact that the leniency policy is more frequently used increases the instability of cartels and the fear that other participants will blow the whistle. This should be seen against a backdrop where leniency policy has sometimes been perceived to be used as part of a business strategy to undermine competitors. Spain has benefited from this "snowball effect", whereas in Portugal there haven't been enough instances to initiate it.

Furthermore, in Spain, there has been a noticeable trend for "multiple whistle-blowing", i.e. companies that simultaneously participated in various cartels blowing the whistle for several of those cartels at the same time. Thus, for example, Henkel was the

first to blow the whistle for 3 cartels.<sup>32</sup> Similarly, Unipapel (currently Adveo Group International) filed leniency applications in 4 cases.<sup>33</sup> No such trend can be seen in Portugal.<sup>34</sup>

### 3.2.2. Size of the markets and impact on competition compliance and risk assessment

One possible explanation for a greater success of the Spanish leniency policy would be that, by having a larger market, there would be a greater number of potential leniency applicants in Spain who would be large enough to develop sophisticated competition compliance programs and who would assess antitrust risk differently. We were unable to find clear evidence for or against this possibility, but the elements available indicated that, while it may contribute, this will, at the very least, not be a decisive factor.

In Spain, some of the cartel cases arising from leniency involve large sophisticated players and markets with very large turnovers, but others were small, even regional markets. One interesting element to consider is that the first leniency applicant is not necessarily the “big fish” of the market in question. The first companies to blow the whistle between 2008 and 2013 were in 18% of the cases companies with the highest share (the “number 1”) on their market, in 30% of the cases “number 2” on their market and in 53% of the cases “number 3” on their market<sup>35</sup>.

In Portugal, only one of the cases which were initiated by leniency applicants (the *Banks* cartel) can be said to involve large markets with sophisticated players, where the leniency applicant’s decision arose from the implementation of a competition compliance programme. In the *Polyurethane foam* cartel, the leniency applicant was the market’s “number 1” (it seems it may have actually been the smallest of the competitors the first to come forward, even though its leniency application was not considered complete). In the *Commercial forms* cartel, it was the “number 2”. The applicant in the *Banks* cartel was a large international player but a small one on the Portuguese market.

Another way to approach this same issue is to argue that, the smaller the market, the greater the fear of retaliation. Indeed, it is often suggested, both in Spain<sup>36</sup> and in Portugal, that companies hesitate to resort to the leniency regime out of fear that they will become pariahs on the market. Experience in private practice provides corroborative, if perhaps anecdotal, supporting evidence.

---

<sup>32</sup> Case S/0085/08 *Dentífricos*, Case S/0084/08 *Fabricantes de Gel* and Case S/0086/08 *Peluquería Profesional*. It saved a total fine of €14 million by blowing the whistle.

<sup>33</sup> First in cases S/0317/10 *Material de Archivo*, S/0343/11 *Manipulado de Papel* and S/0316/10 *Sobres de Papel*; later on in Case S/0318/10 *Exportación de sobres*.

<sup>34</sup> The closest to it was the attitude taken by Johnson & Johnson and Bayer in the *Glucose Diagnostic Strips* cartel case (which can be presumed to have been influenced by the foreign parent company), who voluntarily came forward with information of collusion in a number of public tenders, after there were fined for one of them.

<sup>35</sup> BORRELL ARQUE, J.R., JIMÉNEZ GONZÁLEZ J.L., ORDÓÑEZ DE HARO, J.M. (2014): “Redefiniendo los Incentivos a la Colusión: el Programa de Clemencia”, 50 Aniversario de la Primera Ley de Competencia en España, No. 876 ICE.

<sup>36</sup> GUZMÁN ZAPATER, C. (2012): «El «programa de clemencia» en el sistema español de defensa de la competencia: una visión práctica». Working Paper IE Law School, AJ8-188.

The same fear of retaliation justifies an unwillingness to resort to antitrust private enforcement mechanisms. In that regard, it should be noted that there is clear parallelism between the success of the leniency policy and of private enforcement in both countries. In Portugal, the number of private enforcement cases remains substantially smaller than that of Spain. According to one study,<sup>37</sup> between 1999 and 2012, there were 323 antitrust private enforcement cases in Spain. During the same period, there are less than 30 known cases in Portugal.

### 3.2.3. Influence of international factors

Another thesis that required testing was that the leniency cases were largely being driven by international factors, such as the antitrust compliance culture of multinational, non-Iberian undertakings, and parallel investigations into the same practices in other jurisdictions. We believe there is substantial evidence that this should be considered a very important factor.

According to the General Director of the Spanish NCA's Investigations Directorate in 2012, a large number of Spanish leniency applicants are international companies, probably due to differences in compliance culture. In Spain, the whistle is generally blown either by multinational companies or by Spanish companies with operations in the EU.<sup>38</sup>

In Portugal, as was already noted, of the three cases which were initiated by undertakings submitting leniency applications, one was initiated by a player from another Member State (one with a much stronger tradition of antitrust compliance), and the two others involved at least one group also active in Spain and practices that were also being investigated in other jurisdictions (including Spain).

### 3.2.4. Antitrust specialists

While this issue is inevitably tied to a “chicken and egg” problem, we also believe that there can be a direct correlation between the number of specialised antitrust lawyers, working as in-house or outside counsels, in each market and the success of the leniency policy.

## 3.3. Cultural factors

It is particularly difficult to assess the impact of cultural (psychological) factors on the success of leniency policy. There is no reliable data that can allow us to take a clear stand in this regard. But we can't help noting that cultural issues are the most frequently identified reason, in Portugal, to explain why the leniency regime has not been

<sup>37</sup> MARCOS FERNÁNDEZ, F. (2014), «La aplicación privada del derecho de la competencia por los tribunales españoles», ICE, No. 876, p. 91; MARCOS FERNÁNDEZ, F. (2013) “Competition Law Private Litigation in the Spanish Courts (1999-2012)”, GCLR, Issue 4, p. 167.

<sup>38</sup> GUZMÁN ZAPATER, C. (2012): «El Programa de Clemencia en el Sistema Español de Defensa de la Competencia», <http://hayderecho.com/2012/01/17/el-programa-de-clemencia-en-el-sistema-espanol-de-defensa-de-la-competencia/>

successful. And this is true whether one speaks to businessmen, practitioners, academics or the general public.

The *crux* of the matter can be boiled down to the general perception that, as a rule, Portuguese are particularly averse to hassle and are, in an often quoted expression, a people of “peaceful customs”, who shy away from rocking the boat. Whether or not this is true, and whether it can be said to be a more significant factor in Portugal than in Spain, is impossible to say at this point.

#### 4. CONCLUSION

Spain and Portugal’s leniency regimes are almost identical. If anything, the Portuguese law and its enforcement so far can be said to be more favourable to applicant undertakings. Spain is demographically and economically larger (5 times) than its neighbour, but the two countries are very similar, namely considering geographic, genetic, historical, religious, cultural and linguistic factors.

And yet, Portuguese leniency policy has been 9 times less successful than the Spanish one, in number of decisions, and 17 times less successful in amount of fines (before judicial review).

In Spain, cartel proceedings having their roots in leniency applications represent *circa* 20% of all antitrust proceedings. In Portugal, they are 10%. At EU level, the figure is as high as 47%.<sup>39</sup>

In a “carrot and stick” analogy, having concluded that there is nothing wrong with the “carrot”, which has grown to be nicely enticing on both sides of the border, the problem seems to lie, at least in part, with the “stick”.

Portugal significantly trails behind Spain in number of dawn raids carried out, in number of restrictive practice decisions adopted and in total amount of fines imposed. And because the leniency policy has been more frequently used, Spanish cartel participants have greater reasons for mistrust. Undertakings in Portugal have less to fear and fewer reasons to go for the carrot.

To this one must add cultural factors, always quoted as a justification for the lack of success of the leniency policy, and the fact that a larger market generates more sophisticated structures within companies, nudging them towards greater awareness and competition compliance. More importantly, in both countries, a large part of the success of the leniency policy is owed to endogenous factors – whistleblowing arising from the compliance culture of foreign multinationals or from investigations in other jurisdictions.

---

<sup>39</sup> BORRELL ARQUE, J.R., JIMÉNEZ GONZÁLEZ J.L., ORDÓÑEZ DE HARO, J.M. (2014): “Redefiniendo los Incentivos a la Colusión: el Programa de Clemencia”, 50 Aniversario de la Primera Ley de Competencia en España, No. 876 ICE.