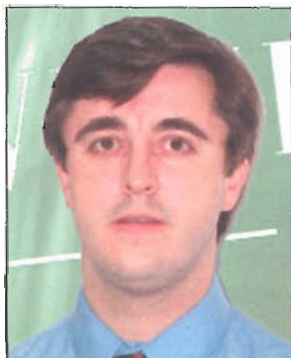


Vieira de Almeida

By Miguel Gorjão-Henriques



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El Parlamento portugués acaba de aprobar el boooador sobre el nuevo régimen de lenidad en derecho de la competencia ("leniency"). Según Miguel Gorjão-Henriques, de Vieira de Almeida, los programas de lenidad son habituales en EEUU y la mayoría de países de la UE (excepto Dinamarca, Italia, Eslovenia, Malta, Estonia y España). La lenidad es un instrumento basado en la filosofía del "soplo" a fin de facilitar el trabajo de las autoridades reguladoras de la competencia. Estos programas permiten a las empresas obtener inmunidad respecto a su responsabilidad penal (en EEUU) y/o inmunidad total o parcial en cuanto al pago de multas (EEUU y UE); asimismo, contienen algunas diferencias en función de los países.

New Portuguese Regime on Leniency in Competition Law

The Portuguese Parliament has just approved a draft bill proposed by the Government establishing for the first time a leniency regime under competition law.

Leniency programmes are common in the EFTA, US and most of the EU (but not Denmark, Italy, Slovenia, Malta, Estonia, Spain (although specifically foreseen in articles 67 and 68 of the 2006 Anteprojecto de Ley de Defensa de la Competencia) and Portugal.

Leniency is an instrument to facilitate the antitrust regulators' task, although based on a whistleblower philosophy. EU member state competition authorities – and the Commission itself – are joining a trend developed by the DOJ in the USA, although the criminal nature of American offences give leniency programmes a quite different aspect. In return for significant assistance rendered to the competition authority, leniency programmes enable companies to obtain immunity from criminal prosecution (in the US) and a total or partial immunity from fines (both in the US and the EU). Leniency programmes differ, however, from country to country and undertakings will have to take into account these cross-border variations.

The new act will not modify Portuguese Competition Law 18/2003, of 11 June, the "Competition Law", but the new leniency programme will be applied by the Autoridade da Concorrência (the Portuguese Competition Authority, or "AdC"), established in 2003 by legislative reform, in line with a parallel EU "modernisation package" based on EC Regulation 1/2003.

According to Competition Law Article 28, the AdC may apply fines to undertakings whenever, after due process, they are declared to have infringed articles 4, 6 or 7 of that Law, or articles 81 or 82 of the EC Treaty.

Although the fines and other

sanctions provided for under the Competition Law are aligned with those of Regulation 1/2003, there is no specific provision in this Law allowing for the establishment of a leniency programme. Only article 44 allows the AdC to consider, as criteria that may be used to determine the specific fine to be applied, the co-operation with the Authority, until the close of the administrative proceedings and the offender's behaviour in eliminating the prohibited practices and repairing the damage caused to the competition.

The Portuguese leniency regime has some features worth noting. Firstly, the preamble addresses only horizontal agreements (i.e. between competing firms) as being subject to the leniency programme. However, there seems to be no reason to exclude from the Law vertical agreements (i.e. between non competing firms).

Secondly, the law does not consider relevant (contrary to what happens in the US and, in a way, article 44 of the Competition Law) restitution to injured parties, even where possible, as one of the relevant pre-requisites. This is in line with the drawbacks of the European leniency system (under the EC Commission 2002 notice) and its disregard for recouping damages for breach of EC/national antitrust rules.

If an investigation is already underway, the fine for the first lenient undertaking can be reduced by at least 50% and for a second, up to 50%. This is a major difference from the Commission notice, as this credits "added value" for the evidence delivered by the lenient party.

Finally, although the Competition Law states that an appeal against a fine imposed by the AdC decision has a suspensory effect, this would not be the case with an AdC leniency decision. The implications of this proviso will be analysed further.

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