

## **COMMUNICATION ON LENIENCY PROGRAMME<sup>1</sup>**

### **1. SCOPE AND GUIDING PRINCIPLES OF THE LENIENCY PROGRAMME**

#### **1.1. Purpose and regulatory basis for the Communication**

- (1) The Third Additional Provision of the Spanish Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia — LDC) provides that the Comisión Nacional de Competencia (CNC) may publish Communications to clarify the principles that guide its enforcement of the Act. Communications referring to articles 1, 2 and 3 of the LDC are published after hearing from the Defence of Competition Council, which includes, amongst others, representatives of regional competition authorities from the Autonomous Communities.
- (2) In this Communication the CNC seeks to contribute to enhancing the transparency and predictability of its actions in those infringements proceedings in which applications are filed for exemption from payment of the fine and/or reduction of the fine (leniency applications).
- (3) Articles 65 and 66 of the LDC, as developed and implemented by articles 46 to 53 of Royal Decree 261/2008 of 22 February 2008 which approved the Defence of Competition Regulation (RDC), allow the CNC to grant exemptions from payment of fines or reductions in the amount of fines to undertakings or individuals who inform the CNC of the existence of a cartel and of their participation or responsibility in the cartel, accompanied by the substantive evidence at their disposal or which may be obtained through an internal investigation, provided the requirements and conditions laid down in the LDC and in its implementing regulations are met.
- (4) The leniency programme set up under the LDC is inspired by the EU model contained in the European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (European Commission Leniency Notice)<sup>2</sup>, and by the Model Leniency Programme of the Network of Competition Authorities<sup>3</sup>.
- (5) This Communication takes into account the experience accumulated since the programme came into force in Spain. In any event, the requirements, conditions and concepts contained and explained in this Communication must be understood in terms of the evolution of the CNC's practice and Spanish case-law, as well as the practice and case-law of the European Union.

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<sup>1</sup> The term leniency refers collectively to the situations and the exemptions and reductions of fines provided for in articles 65 and 66 of the Spanish Competition Act 15/2007 of 3 July 2007, respectively.

<sup>2</sup> Published in the OJEU C 298/17 of 8 December 2006.

<sup>3</sup> The Model Programme was revised in November 2012 and the update should be reflected in this Communication, taking into account that the CNC is the National Competition Authority for the purposes of Council Regulation (EC) 1/2003 of 16 December 2002 (Fifth Additional Provision of the LDC).

## 1.2. Scope of application of the leniency programme

- (6) The purpose of the leniency programme is to facilitate detection of cartels or to advance in investigating those already detected, supporting the investigative work of the CNC and its capacity to establish the investigated facts and conducts to the legally required standard of evidence.
- (7) Therefore, only undertakings or individuals who voluntarily cooperate with the CNC to make a decisive contribution to the establishment of the facts and to bringing or advancing the investigation of a cartel can benefit from the leniency programme. Application and dissemination of the leniency programme enhances the programme's effectiveness in detecting and dismantling cartels and, ultimately, in deterring the pursuit of cartel practices.
- (8) Cartels consist of collusive conducts between actual or potential competitors, which are prohibited by article 1 of the LDC and classified as very serious infringements under article 62.4 of the LDC. Section 2 of the Fourth Additional Provision of the LDC also emphasises their secrecy and their anti-competitive purpose.
- (9) Consequently, this Communication applies to leniency applications by undertakings and individuals liable<sup>4</sup> for non-time-barred infringements of article 1 of the LDC and, if applicable, of article 101 of the Treaty on the Functioning of the European Union (TFEU), if the infringement consists of coordinating their conduct in the market or influencing the parameters of competition by means of conducts such as directly or indirectly fixing prices or other trading or service conditions, production or sales quotas, exchanges of information on prices or on projected amounts, sharing markets, including bid rigging practices, restriction of imports or exports or joint boycotts, all of which fall within the notion of cartel<sup>5</sup>.
- (10) Such conduct may take the form of an outright agreement, a concerted practice or, even more commonly in both national and EU practice, complex and composite forms of collusion<sup>6</sup>. It must be secret, although this does not mean that each and

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<sup>4</sup> In accordance with the terms of articles 61 and 63 of the LDC.

<sup>5</sup> Including, for example, conducts such as coordinating the amounts, proportion, circumstances or timing of price increases, coordinating changes in format or volume accompanied by fixing a price (CNC resolution of 21 January 2010 case S/0084/08 Fabricantes de gel); coordinating the positions in a bid, when each position is associated with a given level of prices or volume (CNC resolutions of 19 October 2011, case S/0226/10, Licitaciones Carreteras; of 26 October 2011, case S/0192/09, Asfaltos; of 12 January 2012, case S/0179/09, Hormigón y productos relacionados; and of 2 August 2012, case S/0297/10, Postensado y Geotecnia; of 8 March 2013, case S/0329/11 Asfaltos Cantabria; and of 25 March 2013, case S/0316/10 Sobres de papel); exchanges of information on projected prices and other parameters of competition (CNC resolutions of 2 March 2011, case S/0086/08 Peluquería Profesional; and of 24 June 2011, case S/0185/09 Bombas de fluidos; and of 19 January 2012, case S/0280/10 SUZUKI-HONDA), as has also been indicated both in Spanish case-law (judgments of the National Court (Audiencia Nacional) of 25 and 26 October and 15 and 28 November 2012 and 4, 22, 24 and 31 January 26 February 2013, in relation to case S/0226/10 Licitaciones Carreteras, or of 1, 4, 5 and 25 February 2013, in respect of case S/0185/09 Bombas de fluidos) and EU case-law (judgment del Court of Justice of the European Union of 8 July 1999, Commission/Anic Partecipazioni, C 49/92 P, judgment of the General Court of the European Union of 16 June 2011, Solvay/Commission, T-186/06) and in the Guidelines on the applicability of article 101 of the TFEU to horizontal co-operation agreements, as well as in the Model Leniency Programme.

<sup>6</sup> See, for example, the CNC resolutions of 12 November 2009 case S/0037/08 Seguro Decenal; of 2 March 2011, case S/0086/08 Peluquería Profesional; of 24 June 2011, case S/0185/09 Bombas de fluidos or of 12 January 2012, case S/0179/09, Hormigón y productos relacionados, of 28 February 2013, case S/0342/11 Espuma de poliuretano or of 25 March 2013, case S/0316/10 Sobres de papel, which were inspired by the settled case-law of EU courts and the consistent practice of the European Commission according to

every aspect of the cartel need be secret, so that there must be weighted the relative importance of all elements that hinder the detection's cartel taken as a whole<sup>7</sup>. In this regard, it bears emphasis that leniency benefits are justified precisely due to the difficulty inherent in detecting and putting an end to very serious anti-competitive conducts which, because they are carried on in a covert or disguised fashion, are much harder to prosecute and investigate in their full breadth and scale without the cooperation of the undertakings or individuals involved in the infringement and hence knowledgeable of the cartel details and capable of providing evidence on the cartel.

### 1.3. Scope of leniency benefits

- (11) To ensure the maximum possible effectiveness of the leniency programme and in accordance with section 6 of the *Communication of the CNC on the quantification of fines arising from competition violations*, the CNC, when appropriate, will apply the leniency programme rules of articles 65 and 66 of the LDC, after calculating the final amount of the fine that applies under that Communication<sup>8</sup>.
- (12) The exemption or reduction of the fine will be available to those who file the relevant application for exemption or reduction of the fine, as well as to their legal representatives or the persons on their executive bodies who participated in the cartel, provided they have cooperated with the CNC. Therefore, the exemption or reduction granted to a leniency applicant does not extend to other entities that also participated in the cartel, such as an association of which the leniency applicant is a member<sup>9</sup>.

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which the definitions of agreement and concerted practice, within the meaning of article 101 of the TFEU, catch forms of collusion having the same nature and which are only distinguishable from each other by the forms in which they manifest themselves (judgments of the Court of Justice of the European Union of 8 July 1999, *Commission/Anic Partecipazioni*, C-49/92 P and of 20 March 2002, *HFB Holding and others/Commission*, T-9/99 or the judgment of the General Court of the European Union of 16 June 2011, *Solvay/Commission*, T-186/06. This has also been upheld by judgments of Spain's National Court (Audiencia Nacional), such as its decisions of 15 and 17 October 2012, in relation to case S/0167/09 *Productores Uva y Mosto de Jerez* and of 4 and 5 February 2013, with respect to case S/0185/09 *Bombas de fluidos*).

<sup>7</sup> In this regard see, for example, the CNC resolutions of 2 March 2011, case S/0086/08 *Peluquería Profesional*; of 24 June 2011, case S/0185/09 *Bombas de fluidos* and of 6 October 2011, case S/0167/09 *Productores Uva y Mosto de Jerez*, and the judgments of the National Court (Audiencia Nacional) of 15 October 2012 and 5 February 2013, as well as the Judgment of the CJEU of 24 September 2009, joined cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07.

<sup>8</sup> See, for example, the CNC resolution of 28 February 2013, case S/0342/11 *Espuma de Poliuretano*, and there are EU case-law precedents along the same lines, supporting the practice of the European Commission, such as, for example, the judgment of the General Court of 3 February 2011 in case T-33/05, *Compañía Española de Tabaco en Rama S.A. (Cetarsa) v. European Commission*, para. 246: "In this regard, it should be noted that the EU court has recognised the merits of this approach, which consists in the fact of cooperation being taken into account after the 10% upper limit has been applied, inasmuch as this ensures that the Leniency Notice is fully effective: if the basic amount was significantly in excess of the 10% limit before the application of the Leniency Notice, and that limit could not be applied immediately, the incentive for the undertaking concerned to cooperate with the Commission would be much less, since the final fine would be reduced to 10% in any event, with or without the undertaking's cooperation (judgment of the Court of 4 July 2006, *Hoek Loos/Commission*, T-304/02, ECR p. II-1887, para. 123)". See also the judgments of the Court of First Instance of 29 November 2005, *SNCZ/Commission*, T-52/02, ECR p. II-0000, para. 41 and of 29 April 2004, *Tokai Carbon and others/Commission*, joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, ECR p. II-0000, paras. 352 to 354.

<sup>9</sup> See, for example, the CNC resolution of 28 February 2012, case S/0342/11 *Espuma de Poliuretano*.

- (13) The application of the leniency reduction to an undertaking or individual preclude any further reduction for that same undertaking or individual under article 64.3(d) of the LDC when setting the amount of the fine.

## **2. FILING OF LENIENCY APPLICATIONS**

### **2.1. Leniency applicant**

- (14) A leniency application may be filed, under articles 65 or 66 of the LDC, by any undertaking or individual (directly or through their duly evidenced legal representatives<sup>10</sup>) that participates in a cartel affecting all or part of the national territory. Eligibility to be considered a leniency applicant under the above therefore extends to undertakings and individuals whom may be considered responsible for a cartel, and hence liable for the applicable sanction, irrespective of whether that responsibility derives from their direct involvement in the cartel, from their decisive influence as parent company or as a successor undertaking to the one that originally participated in the cartel.
- (15) Given that under article 63.2 of the LDC fines may be levied on each of the legal representatives or the persons on the executive bodies of the economic operators, undertakings, associations, unions or groupings that have taken part in the anti-competitive agreement or decisions, such persons may also file a leniency application in their own name.
- (16) According to the terms of the LDC, the same leniency application cannot be filed by several undertakings or by several individuals at the same time or by an association in the name of its members with respect to their participation in the same cartel.
- (17) Nevertheless, for the purposes of applying article 61.2 of the LDC, leniency applications may be filed by the undertaking that controls another one that participates in a cartel or jointly by both. Similarly, if according to articles 65.3 and 66.4 of the LDC, the applicant undertaking extends the application to its legal representatives and to the persons who belong to the executive bodies that have taken part in the cartel practices, the CNC will extend the leniency granted to the applicant undertaking, provided the said individuals also cooperate with the CNC to establish the facts, in accordance with the requirements of the leniency programme.
- (18) An undertaking or individual who is considering filing a leniency application may contact the contact person at the Investigations Division of the CNC indicated on the CNC website in order to receive assistance on how to submit the application. To the extent that the applicant brings sufficient information on the cartel in which it participates or has participated to the knowledge of the Investigations Division (for

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<sup>10</sup> Document evidencing the authority to act as representative or certified photocopy thereof, with a sworn translation if that power of attorney is not drawn up in an official language of the Spanish State.

example, indication of the sector affected, or the products or services), the Investigations Division may indicate whether the conditional exemption is available.

## **2.2. Common elements of a leniency application**

- (19) The leniency application must be addressed to the Investigations Division. Although the application may be presented at any office authorised as official register under article 38.4 of Act 30/1992 of 26 November 1992 on the Legal Organisation of Public Administrations and Common Administrative Procedure, the entry date and time of those applications taken into account when determining their order of reception will be that of their entry in the CNC register, as provided in the RDC. Those filed directly in the CNC register may be submitted in writing or through the CNC Electronic Register<sup>11</sup>.
- (20) At the request of the applicant, the Investigations Division may accede to accepting oral applications. To do so, it will arrange a meeting at the CNC offices and, after the recording has been transcribed, the declaration will be registered. The transcript's entry date and time in the CNC register will determine the order of receipt of that leniency application. The oral application will be recorded and transcribed using the CNC's own resources, upon prior review of the recording and verification of the accuracy of the transcript, and the applicant will not be allowed to use recording devices.
- (21) As for the content of leniency applications, be they written or oral, for exemption or reduction, in addition to an acknowledgement of the applicant's participation in the cartel, the application must contain the following information:
  - a) On the applicant: full individual or corporate name, taxpayer identification number, address, contact person, telephone number, fax number and, for applications filed by individual entrepreneurs or entities without legal personality that operate under a trade name, the full names and addresses of the owners or partners and contact details. For applications filed by a legal representative on behalf of his or her principal, identity of the representative and a copy of the power of attorney.
  - b) On the rest of the cartel participants: full individual or corporate name, taxpayer identification number, address, telephone number, fax number.
  - c) Detailed description of the cartel:
    - Aims, activities and functioning.
    - Affected products, services and territory.

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<sup>11</sup> According to the terms of the 30 January 2009 Resolution of the Office of President of the CNC, which created the Electronic Register.

- Structure of the market affected by the cartel (sellers, buyers, market shares, and any other information on the market that may be significant in relation to the cartel).
  - Duration and nature of the cartel.
  - Form and scope of the participation of the applicant and of the rest of the cartel participants.
- d) List of leniency applications that the applicant has presented or will present to other competition authorities in respect of the same cartel, with the obligation to update this information if other applications are subsequently submitted. In addition, the applicant must confirm to the Investigations Division that it has not revealed, directly or indirectly, its intention to submit the leniency application or its content to and any third parties other than those competition authorities.
- e) Description of the steps taken or initiated before the filing of the leniency application for the purpose of checking that the applicant's participation in the cartel has ended and that no evidence of the cartel has been destroyed or tampered with at the time the leniency application is submitted (in this regard, see section 5 of this Communication).
- (22) In addition, the leniency application must be accompanied by the information and evidence of the cartel, in particular, all contemporaneous evidence in the applicant's possession that allow the cartel's existence to be demonstrated, such as:
- a) Statements, minutes, summaries, annotations, e-mails, faxes, recordings, etc., that contain information on the dates, locations and identities of the individuals or undertakings who participated in the cartel meetings or other contacts between cartel participants, as well as the content of those meetings or contacts and supporting evidence.
  - b) Information on the actions carried out by cartel participants, with supporting materials that evidence those actions (statements, minutes, e-mails, faxes, etc.).
  - c) Statements, agreements, travel documents, commercial documents, circulars, e-mails, letters, minutes, faxes, recordings, etc., that refer to the existence, objective, functioning and scope of the cartel, as well as to the cartel participants.
  - d) Statistics or other data referring to the facts described and which demonstrate the existence and participation in the cartel (the evolution and formation of prices, sale or bidding conditions, usual conditions of the transactions, etc.).
- (23) The evidence submitted in the leniency application may include written or oral statements by the persons who took direct part in the acts described by the applicant. Those statements should describe their knowledge of the cartel and, in

all cases event, make reference to the role played in the cartel by the applicant and by other cartel participants<sup>12</sup>.

- (24) If so requested by the applicant at the time the application is submitted or thereafter, the Investigations Division will issue a receipt certifying that the application has been filed. The receipt will identify the applicant and contain the Investigations Division's certification of the date and time the leniency application was entered in the CNC register and its content. In no event will issuance of this receipt imply grant of conditional exemption by the Investigations Division or, as applicable, of the requested reduction in the fine. The receipt only serves to certify the date and time when the leniency applicant entered the CNC register.
- (25) The Investigations Division may request clarifications from the applicant in relation to the information and evidence filed and grant a time limit for submitting those clarifications.
- (26) Throughout the proceeding the applicant must continue submitting all evidence that comes to its attention or which it obtains through its internal investigation. In any event, any change in the information submitted by the applicant must be notified spontaneously and without delay to the CNC.

### **2.3. Application for exemption from payment of the fine**

- (27) The Investigations Division will check that the exemption applicant has accompanied the application with evidence that fulfil the requirements of article 65.1 of the LDC and that the application contains confirmation that the applicant does not consider it has adopted any measures to coerce others to join or remain in the cartel.
- (28) An exemption application may only be submitted before the Statement of Objections (SO) has been notified. Exemption applications filed at any time in the proceeding after said notification will be automatically rejected by the CNC.
- (29) In accordance with article 46.5 of the RDC, the Investigations Division, upon a prior reasoned request from the applicant, may grant a time limit for submitting the evidence mentioned in point 22 of this Communication which the applicant was unable to submit at the time the application is presented. Once the evidence has been submitted within the time limit granted by the Investigations Division, the date and time of receipt of the exemption application will be considered to be the initial entry date and time of the application. Nevertheless, if the evidence is eventually not submitted, the leniency application will be automatically rejected. If the evidence is submitted after the designated time limit, that new later submission date will be the one that determines the CNC register entry date and time for the exemption application.

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<sup>12</sup> In this respect see, for example, the CNC Council resolutions of 10 November 2011, case S/0241/10 Navieras Ceuta-2 and of 23 February 2012, case S/0244/10 Navieras Baleares and the CJEU judgment of 25 January 2007, joined cases C-403/04 P and C-405/04 P.

- (30) If exemption is not available, the exemption applicant may request on a subsidiary basis that the application be assessed under article 66 of the LDC as an application for reduction of the fine.

#### **2.4. Application for reduction of the fine**

- (31) According to article 66.1 of the LDC, an application for reduction of the fine may be submitted by an undertaking or individual participant in a cartel who does not qualify for exemption, either because exemption is not available or because the applicant coerced other cartel participants and is therefore disqualified from seeking exemption.
- (32) The order of receipt of reduction applications will be determined according to the CNC register entry date and time. That order of receipt determines the order in which an assessment of whether the submitted information and evidence give the Investigations Division significant added value and, therefore, of the size of the reduction to which the applicant may be entitled under article 66.2 of the LDC.
- (33) The likelihood of the Investigations Division proposing a reduction of the fine for a reduction applicant will be greater the earlier the reduction application is submitted. Nevertheless, according to article 50.3 of the RDC, an application for reduction of the fine may be filed after notification of the statement of objections, with the applicant submitting evidence that makes a significant and conclusive contribution to the investigation of the cartel and facilitates the work of Investigations Division in demonstrating its existence and scope. In principle, Investigations Division is unlikely to take into account applications submitted after the completion of the investigative phase has been announced.

#### **2.5. Summary applications**

- (34) If the leniency application, be it for exemption or reduction, has been or will be submitted before the European Commission as the competition authority particularly well placed to investigate the cartel, the leniency applicant undertaking<sup>13</sup> may file a summary application with the Investigations Division by completing the form attached to this Communication<sup>14</sup>. In any event, the Investigations Division may require the applicant to submit additional information and fix a time limit for doing so.
- (35) The applicant must complete the summary application within 10 days, submitting the cartel evidence to the Investigations Division, once the European Commission has notified the applicant that it will not examine the cartel described in the

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<sup>13</sup> The possibility of allowing individuals not organised as “undertakings” to submit summary applications is not contemplated, given that only undertakings may submit leniency applications to the European Commission according to its Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, because the European Commission only levies sanctions on undertakings.

<sup>14</sup> The form may also be submitted in English, in accordance with the provisions of the Model Leniency Programme ([http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_annex\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf)).



application. In the event the summary application is an exemption application for the CNC, an extended time limit for submitting the cartel evidence may be requested. Once the leniency application has been completed and the evidence submitted within the stipulated time limit, the date and time of receipt of the leniency application will be understood to be the initial entry date and time when the summary application was filed. If the application is not completed within the stipulated time limit, it will be automatically rejected, and if it is completed after said time limit, that new later date will be the one that determines the CNC register entry date and time for the leniency application.

### **3. EXEMPTION FROM PAYMENT OF THE FINE**

#### **3.1. Contribution to the investigation required in order to be exempted from paying the fine**

- (36) According to article 65 of the LDC, in order to be exempted from paying the fine for which it might otherwise be liable, the applicant must be the first to provide the Investigations Division with sufficient information and evidence to allow it to order an inspection in relation to a cartel or to establish the existence of a cartel infringement:
- a) The first undertaking and/or individual who, in the opinion of the CNC, provides the Investigations Division with the necessary evidence to order an inspection in a cartel investigation may qualify for exemption from payment of the fine. This requirement will be deemed fulfilled if the applicant's contribution allows the Investigations Division to order an inspection, irrespective of whether or not the inspection is successful or is even carried out, if the Investigations Division chooses to employ other investigative instruments (article 65.1(a) of the LDC).
  - b) Alternatively, exemption from payment of the fine may be granted to the first undertaking and/or individual that submits evidence which, in the judgment of the CNC, allows the Investigations Division to legally verify the existence of an infringement of article 1 of the LDC and, if applicable, of article 101 of the TFEU, provided a conditional exemption has not been granted under the preceding point in relation to the same cartel (article 65.1(b) of the LDC).
- (37) The Investigations Division will not grant the conditional exemption if, at the time the exemption application is filed, it already has in its possession sufficient evidence to order an inspection or establish the cartel infringement without relying on the submissions of the exemption applicant, even if it cannot do so at the same level or detail or with the same breadth of scope.
- (38) If the CNC receives more than one application for exemption from payment of the fine in relation to the same cartel, it will examine the applications by order of receipt.

#### **3.2. Disqualification of exemption applicants**

- (39) In accordance with article 65.2(d) of the LDC, an exemption applicant who has taken measures to oblige other undertakings and/or individuals to join or remain in the cartel is disqualified from obtaining exemption from payment of the fine.
- (40) The event provided for in article 65.2(d) of the LDC will not apply if the applicant's conduct derives from execution of mechanisms established by the cartel, such as inviting others to join, participating in the approval or execution of coordinated or concerted measures of coercion or the assumption of leadership or coordinating functions in the cartel or functions of controlling or monitoring the agreements reached by the cartel<sup>15</sup>.
- (41) The CNC will exclude the applicant from exemption if it has evidence showing the existence of this circumstance attributable to the exemption applicant. Toward this end it will verify that the steps taken by the applicant, such as coercive acts, exertion of economic pressure strong enough to create a real risk of expulsion from the market, boycott or refusal to supply, are attributable to the applicant on the basis of its specific conduct. When determining whether an exemption applicant has exerted coercion the CNC will take into account the applicant's capacity to oblige others to participate in the cartel and the evidence of both the coercive action taken by the exemption applicant and the conduct of the coerced undertaking<sup>16</sup>.
- (42) If the evidence shows that an exemption applicant who has already been granted conditional exemption took measures to oblige other undertakings and/or individuals to participate in the infringement, no exemption from payment of the fine will be granted to any party as the possible subsequent leniency applicants will no longer be able to meet the requirements of article 65.1 of the LDC.
- (43) Disqualification from exemption does not preclude the disqualified applicant from obtaining a reduction in the amount of the fine if the applicant meets the requirements of LDC article 66, and this will not alter the determination of the level of reduction of the possible reduction applicants.

### **3.3. Rejection of the application for exemption from payment of the fine**

- (44) The Director of Investigation will reject an exemption application due to lack or loss of competence or purpose or for non-fulfilment of the LDC article 65 requirements. In particular, one of the aforesaid circumstances will be considered to exist in situations such as the following:
  - 1. If the CNC is not the authority particularly well placed to deal with the exemption application submitted and that competence rests with the European Commission or with the competition authority of another European Union

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<sup>15</sup> See, for example, the CNC resolution of 28 February 2013, case S/0342/11 Espuma de Poliuretano.

<sup>16</sup> See, for example, the CNC resolution of 28 February 2012, case S/ 0342/11 Espuma de Poliuretano.

Member State, in accordance with Council Regulation (EC) 1/2003 of 16 December 2002.

2. If the CNC is not the competent authority to deal with the exemption application and that competence rests with a regional competition authority, after applying the coordination measures provided for in Act 1/2002 of 21 February 2002 on the Coordination of the Powers of the Central State and the Autonomous Communities in Defence of Competition Matters.
  3. If the presumed infringement becomes time-barred under article 68.1 of the LDC.
  4. If the fine exemption application is presented after the SO has been notified.
  5. If the exemption application has been submitted jointly by several applicants or if the applicant indicates it has not participated in the cartel.
  6. If the applicant is disqualified from obtaining exemption from payment of the fine because it took steps to compel other undertakings and/or individuals to join or remain in the cartel.
  7. If the content of the exemption application is insufficient, because it does not contain information and evidence on a cartel or if such evidence is not presented after the applicant has been granted a specific time limit for doing so.
  8. If the content of the exemption application is incomplete because the information and evidence submitted do not allow the Investigations Division to order an inspection or to establish a cartel infringement.
  9. If the conditional exemption is not available because the requirements of LDC article 65 are not met, whether because the CNC already has sufficient evidence to order an inspection or to establish the existence of the infringement or because a conditional exemption has already been granted to another exemption applicant.
- (45) The decision rejecting the exemption application will indicate that the exemption applicant may withdraw the information and evidence submitted after making a request to the Investigations Division to that effect. In the case of oral exemption applications and statements, the exemption applicant may request the Investigations Division to erase them.
- (46) In any event, the Investigations Division has the authority to change the assessment made in the rejection decision if the exemption applicant submits new information on the described practice or if the CNC is considered the competent authority to deal with that practice. In this case, the Investigations Division will examine the information and new evidence submitted by the exemption applicant and check whether the requirements of LDC article 65.1 are met, and adopt the relevant decision on the exemption application that has been submitted.
- (47) The decision to reject the application for exemption from payment of the fine will not prevent the Investigations Division from continuing its investigation if it already had relevant information in this respect or from making use of its investigative powers.

- (48) The decision rejecting the exemption application will specify, if applicable, that the exemption applicant has requested on a subsidiary basis that its application be examined under article 66 of the LDC. In this case, the order of receipt of the reduction application will be determined by the CNC register entry date and time for the exemption application submitted. The same procedure will be followed if the exemption applicant requests that the application be assessed as a reduction application after having being notified of the rejection of its exemption application.

### **3.4. Grant of exemption from payment of the fine**

- (49) The Director of Investigation will resolve to grant conditional exemption to the exemption applicant before an inspection is carried out, in the event provided for in article 65.1(a) of the LDC, or before notification of the statement of objections in the event provided for in article 65.1(b) of the LDC.
- (50) Grant of conditional exemption from payment of the fine by the Investigations Division is of a provisional nature. It implies the investigative body's acknowledgement that the exemption application submitted meets the LDC article 65.1 requirements at the time the decision is adopted and having regard to the information available at that time.
- (51) The Investigations Division will specify, on a reasoned basis, both in the statement of objections (SO) and in the proposed resolution (PR), whether it is maintaining the conditional exemption that was granted, and progressively evaluate the applicant's fulfilment of its cooperation duties over the course of the investigation. If the Investigations Division believes such duties have been breached, it will so state and submit a reasoned proposal to the CNC Council not to grant the exemption, so the applicant can submit the pleadings it deems fit on the matter.
- (52) In accordance with article 47.4 of the RDC, if at the end of the infringement proceeding the exemption applicant has fulfilled the requirements of LDC article 65.2, it will fall to the CNC Council, in accordance with the proposal of the Investigations Division, to grant the applicant exemption from payment of the fine in the resolution that puts an end to the proceeding.

## **4. REDUCTION OF THE AMOUNT OF THE FINE**

- (53) Leniency applicants who do not meet the requirements to qualify for exemption may be able to benefit from a reduction in the amount of the fine that would otherwise be levied on them, if they provide evidence of the presumed infringement with significant added value relative to the evidence already in the CNC's possession and comply with the LDC article 66.1(b) requirements over the course of the proceeding.
- (54) The Investigations Division will not examine the evidence submitted in a reduction application without first having ruled on the grant of a possible conditional exemption to a previous exemption application filed in relation to the same cartel.

- (55) Where several reduction applications are filed with respect to the same cartel, the evidence submitted by the successive reduction applicants will be examined according to the order of receipt of their respective applications. Therefore, depending on the order in which reduction applications are submitted, the first reduction applicant will be considered for the first reduction band, the second applicant for the second and the rest for the next band. Now, each reduction band will remain available to successive reduction applicants for so long as the evidence submitted by the preceding reduction applicant does not contribute significant added value. Therefore, for example, if the examination of the submissions of an applicant who is eligible for the first band (because it was the first candidate for the reduction) concludes that it does not provide significant added value, that first band will be open for the following applicant who does provide significant added value. In this case, by acceding to the first band, it will free up the second band for the next candidate. The third band is left for the last group of applicants.
- (56) According to article 66 of the LDC and article 49 of the RDC, to determine if the evidence submitted by the reduction applicant provides significant added value, the evidence must be assessed in terms of its intrinsic value (by reason of its nature or its level of detail) for grounding the Investigations Division's conviction as to the facts of the infringing actions and conducts and the legally relevant circumstances for their analysis and assessment. Depending on the individual cases, significant factors for determining added value may include, amongst others, the type of document, its date, origin and author, its recipient, the occasion and purpose for which it was prepared, the place where it has been kept and its specific content, in particular, clarifying the meaning of codes, etc. In this regard, in the current state of Spanish and EU case-law and practice, information and incriminating evidence directly relating to the facts which may be provided by the reduction applicant are considered to have greater probative value than those which only have an indirect bearing; testimony (statements, recordings, etc.) on the acts in which the author has participated that accompanies its leniency application have greater probative value than the indirect testimonies it may submit; and written evidence dating from the period in which the investigated acts took place (minutes, e-mails, letters, faxes, etc.) provided in the leniency application are of greater probative value than those dated at a later time, for example<sup>17</sup>. As a result of all of the above, a particularly high probative value must be attached to certain information or statements provided by the leniency applicant in and of themselves, whether due to their admission of guilt and self-incrimination, or with respect to other cartel participant undertakings and/or individuals because they come from a direct witness of the reported or described circumstances<sup>18</sup>.

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<sup>17</sup> See for example the judgment of 12 July 2011, T-112/07 Hitachi and others/Commission [2011] OJ C 252/30, para. 68; the judgment of 8 July 2004, JFE Engineering and others/Commission, T 67/00, T 68/00, T 71/00 and T 78/00, ECR p. II 2501, paras. 219 and 220.

<sup>18</sup> Joined cases T-67/00, T-68/00, T-71/00 and T-78/00 and judgments of the Court of 16 November 2006, Organic Peroxides/Commission, T 120/04, ECR p. II 4441, of 11 July 2011 in the cases T-133/07, Mitsubishi Electric Corp./Commission and T-132/07, Fuji Electric Co. Ltd./Commission and of 25 October 2011, T-348/08 Aragonesas Industrias y Energía, SAU/Commission [2011] OJ C 355/15.

- (57) To determine its significant added value, the evidence provided by the reduction applicant has to be compared with the evidence already in the Investigations Division's possession at the time the reduction applicant makes its submissions, because the new evidence must serve to uncover new facts or responsibilities with respect to the investigated cartel or to complete the accounting of the facts and the attribution of liabilities. This is the case, for example, if the new evidence allows the CNC to more reliably prove certain points that were already known or demonstrated, corroborating other evidence or strengthening or demonstrating the credibility or reliability of the evidence already available.
- (58) After assessing the evidence submitted by the applicants, and their compliance with the duty to cooperate, the Investigations Division will note in the SO whether the LDC article 66 requirements have been met and, if affirmative, will propose the reduction band for the fine that could be levied on the applicants, specifying the order of receipt of their applications.
- (59) If the Investigations Division concludes that the reduction application does not provide evidence or that the evidence it provides only relates to facts or responsibilities which the Investigations Division could establish using evidence already in its possession before the reduction application was submitted, it will not propose any reduction of the fine, and the applicable reduction band will therefore be available to ensuing applicants, and this will be noted in the statement of objections.
- (60) If the reduction application is submitted after the SO has been notified and before the investigative phase has ended, the Investigations Division will indicate in the proposed resolution whether the reduction applicant has met the LDC article 66 requirements and, if affirmative, it will propose the applicable reduction according to the application's order of submission.
- (61) In the PR the Investigations Division will propose that the first reduction applicant who meets the significant added value test be given a reduction of between 30% and 50% of the fine; the second a reduction of 20% to 30%, and the successive applicants a reduction of up to 20%, specifying the order of those successive applicants.
- (62) According to article 66.3 of the LDC, submission by the reduction applicant of evidence that allows the establishment of additional facts with direct bearing on the amount of the fine will be taken into account by the Investigations Division, which will so specify in the SO or the PR depending on the point in time at which it holds this to have been proven, and propose that said additional facts be taken into account when setting the fine for that reduction applicant, given that it was the first to provide compelling evidence of those additional facts about the cartel. In this regard compelling evidence is considered to be evidence which of itself is sufficient to demonstrate a fact without having to be corroborated by other evidence.
- (63) The CNC Council is responsible for assessing the reduction of the fine proposed in the Investigation Division's PR, and will set the percentage reduction of the fine within the relevant band, provided the reduction applicant has complied with its duty to cooperate. It will do so having regard to the level of significant added value

contributed and to the date and procedural timing of the contribution, taking into account the evidence in the case record as a whole<sup>19</sup>. In its resolution the CNC Council, in accordance with the proposal of the Investigations Division, will also state whether the reduction applicant contributed compelling evidence of the additional facts on the cartel that entitle it to the partial exemption described in the preceding point.

- (64) The CNC Council will apply the percentage reduction in the final amount of the fine, after said amount has been calculated in accordance with articles 63 and 64 of the LDC and with the CNC Communication on the Quantification of Sanctions.
- (65) The resolution that puts an end to the infringement proceeding will state both the final amount of the fine and the amount payable by the parties after applying the leniency programme.

## **5. DUTY OF LENIENCY APPLICANTS TO COOPERATE**

- (66) A leniency applicant must cooperate with the CNC fully, continuously and diligently until the conclusion of the proceeding, in accordance with paragraphs a), b) and c) of article 65.2 of the LDC and article 52 of the RDC, and displays a genuine spirit of cooperation. Applicants who hinder the investigation or the proceeding by conduct not in keeping with that spirit will not be eligible for leniency. The leniency applicant's duty to cooperate includes, inter alia, the following:
  - a) Providing the Investigations Division will all information and evidence in relation to the cartel that is in the possession of or available to the applicant. This duty to cooperate is breached if the applicant holds back information and evidence.
  - b) Remaining available to the Investigations Division to respond promptly to any of its requests that may contribute to establishing the facts or to clarifying information already submitted by the applicant, such as clarifying the meaning of coded messages used by the cartel or translating documents not originally drawn up in Castilian Spanish, amongst others.
  - c) Ensuring, in as much as practicable, the availability of present employees and officers and, if applicable, of former officers of the leniency applicant.
  - d) Refraining from destroying, falsifying or concealing relevant information or evidence on the cartel as from the time the leniency applicant contemplates submitting the leniency application.
  - e) Refraining from directly or indirectly revealing before the SO has been notified the leniency application or the intention to submit the leniency application, except for notification to the European Commission or other competition

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<sup>19</sup> In its resolution of 28 February 2013, case S/0342/11 Espuma de Poliuretano, the CNC Council took into account, amongst other factors, that the reduction applicant provided evidence with significant added value even before inspections were carried out in the case.

authorities in relation to leniency applications filed before the same, and for obtaining advice from outside legal counsel, provided those legal advisors do not reveal said information to other parties. Nevertheless, the leniency applicant may make a reasoned request for the Investigations Division to authorise limited disclosure of the submission of the leniency application and, if applicable, of having obtained the conditional exemption. The Investigations Division may authorise such limited disclosure to persons or entities for which disclosure is justified, taking into account the circumstances cited by the leniency applicant and conditional in all events on that information being treated confidentially by said persons or entities to whom the disclosure is made.

- (67) When submitting the leniency application, the applicant must state whether the cartel remains in operation and if the applicant continues participating in the cartel; in order to qualify for leniency the applicant must have put an end to its participation in the cartel or state its intention to do so at the time the application is presented. If the applicant states its participation in the cartel ended before it submitted the application, it must describe the steps taken that demonstrate said discontinuation and its timing.
- (68) Nevertheless, in order to protect the cartel investigation and not alert other participants, the Investigations Division may authorise the leniency applicant to continue contacts and actions which are indispensable for maintaining the appearance of continued participation for the time needed by the Investigations Division to prepare the appropriate investigative measures. In this case, unless there is evidence to the contrary, continuation of the contacts on the terms indicated by the Investigations Division will not be considered an infringement, and the applicant's participation will be considered to have ended at the time the leniency application was submitted.
- (69) With the exception of the event contemplated in the preceding paragraph, if the CNC learns that the applicant has continued or resumed the anti-competitive contacts, it will deem the applicant to have breached the conditions for obtaining leniency.

## **6. CONFIDENTIALITY AND ACCESS TO LENIENCY APPLICATIONS**

- (70) According to article 51.1 of the RDC, the identity of the applicant is confidential and the CNC will treat the fact of a leniency application being submitted as confidential, and will set up a separate special file with the application and its accompanying documents.
- (71) Nevertheless, given that on submitting its application the applicant lists the other competition authorities before whom it has submitted or intends to submit a leniency application in relation to the same cartel, the CNC may maintain contacts and consultations with the competition authorities who have received those applications.



- (72) After notification of the SO, in accordance with article 51.2 of the RDC, the interested parties in the infringement proceeding will have access to the data and documents which form part of the separate confidential case file but are necessary for replying to the statement of objections. In general terms, it will be understood that the information and evidence submitted by leniency applicants on the cartel do not contain information that classifies as confidential under article 42 of the LDC. Before notice of the SO is served, however, such issues of confidentiality as may be raised by the leniency applicants will be resolved.
- (73) Access to the leniency applications after notification of the SO is governed by article 31 of the RDC, except for the statements made by the leniency applicants, which may be seen, but not copied, by the interested parties in the infringement proceeding, in accordance with article 51.3 of the RDC. The public version of the resolution that puts an end to the infringement proceeding, which will be published on the CNC website, will make no reference to said statements, and the references to the folios that contains those statements will be treated as confidential.
- (74) In the event of judicial review, when the leniency application submitted in the infringement proceeding is sent to the National Court (Audiencia Nacional), the CNC will expressly identify the statements made by the leniency applicant, no copies of which will be allowed, in accordance with article 51.3 of the RDC.
- (75) If documents submitted by a leniency applicant are required by a competent court to examine the CNC's actions before the resolution is issued that puts an end to the administrative proceeding in which the leniency application was filed, those documents will be remitted on a confidential basis, with an express indication that they cannot be communicated to possible interested parties or third parties, given the special protection the LDC guarantees for leniency applications and the serious consequences that could arise from disclosure of the filing or content of the leniency applications, not just for maintaining the incentives for other competitors in the cartel to submit leniency applications, but also for protecting the CNC's investigation.
- (76) When the CNC appears in competition cases to provide information or give its opinion, under article 15.bis of the Civil Procedure Act 1/2000 of 7 January 2000, it will abstain from submitting data or documents provided by leniency applicants.
- (77) In the civil damages actions which may be brought in relation to cartel infringements prosecuted in competition proceedings in which leniency applications have been submitted, the CNC will not provide copies of the statements of the leniency applicants, as such disclosure would impair the effectiveness of the leniency programme and weaken the fight against cartels<sup>20</sup>.

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<sup>20</sup> Resolution of 23 May 2012 of the European Competition Authorities on the protection of leniency material in the context of civil damages actions.

## **7. COORDINATION WITH THE EUROPEAN COMMISSION AND NATIONAL COMPETITION AUTHORITIES OF EUROPEAN UNION MEMBER STATES**

- (78) Pursuant to the applicable EU Regulations and having regard to the Notices of the European Commission on enforcement of the competition rules of article 101 of the Treaty on the Functioning of the European Union, as well as on cooperation in the Network of Competition Authorities, the CNC will inform the European Commission of the submission of a leniency application in relation to a cartel capable of affecting trade between European Union Member States in order to determine the authority best placed to investigate the presumed cartel and/or to take the appropriate investigative steps. The CNC will act along similar lines if the applicant indicates that it has submitted or intends to submit the leniency application before other competition authorities of European Union Member States.

**TEMPLATE FOR THE SUBMISSION OF A SUMMARY APPLICATION WITHIN THE ECN**

1. Information about the applicant:

Undertaking (name, address) (if the application is submitted on behalf of different legal entities of the same group of companies, please list those in alphabetical order):

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.....

Representative(s) for the undertaking:

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.....

2. Information about the alleged infringement:

Participants:

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Concerned product(s) (as specific as possible)

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Affected territories:

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Location of the evidence:

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Brief description of the alleged infringement:

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Period of the alleged infringement:

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Other useful information:

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3. Information about the submission of a leniency application before the European Commission:

Date of the submission of the application (if not yet submitted, date foreseen by the undertaking)

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Name of the contact at the Directorate General for Competition of the European Commission:

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Observations why the applicant considers that the European Commission would be a particularly well placed authority to deal with the alleged practices:

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4. Information on the submission of leniency applications before other competition authorities:

Name of the other competition authorities to which the leniency applicant has also submitted a leniency application, with the name of the contact at each of them:

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Name of the other competition authorities to which the leniency applicant is going to submit a leniency application:

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5. Additional information, if any:

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Date:

Signature: