

## **GUIDELINES ON TERMINATION BY COMMITMENTS OF INFRINGEMENT PROCEEDINGS**

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### **I. SCOPE OF THE GUIDELINES**

- (1) Article 52 of the Spanish Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia - LDC) regulates termination by commitments as a means of resolving investigations into prohibited conducts. And those provisions of the LDC are developed and implemented in article 39 of the Competition Regulation (RDC), approved by Royal Decree 261/2008 of 22 February 2008.
- (2) The Third additional provision of the LDC provides that Spain's antitrust authority, the Comisión Nacional de la Competencia (CNC), may issue Guidelines clarifying the principles that guide its action in applying the Act. In particular, Guidelines referring to articles 1, 2 and 3 of the LDC will be published after hearing from the Defence of Competition Council, on which there are represented, *inter alia*, regional competition authorities from the Autonomous Communities.
- (3) In issuing these Guidelines on Termination by Commitments (Guidelines on Commitments), the CNC seeks to establish the general criteria guiding the CNC's actions and let companies know how to proceed when requesting and processing a termination by commitments of their infringement proceedings.
- (4) This enhances the transparency and predictability of the circumstances in which such commitments can be accepted and the relevant procedures, increasing the legal certainty afforded to economic operators.
- (5) These Guidelines applies to the termination by commitments of proceedings brought for violation of articles 1, 2 and/or 3 LDC and, if applicable, of articles 101 and/or 102 of the Treaty on the Functioning of the European Union (TFEU).
- (6) In light of the experience acquired during their application, the CNC may revise these Guidelines once two years have passed after they were first implemented.

### **II. THE PURPOSE OF TERMINATION BY COMMITMENTS IN THE LDC**

- (7) Termination of an infringement proceeding by means of commitments is a way of ending an investigation brought for possible substantive infringement of competition rules, that is, for violation of articles 1, 2 and/or 3 LDC and, if applicable, of articles 101 and/or 102 TFEU. Therefore, this means of concluding a case does not apply to other types of proceedings brought by the CNC against other conducts contrary to the LDC.
- (8) The LDC prohibits certain anti-competitive conducts and regulates the proceeding for enforcing those prohibitions. The standard way of terminating those proceedings is through an express decision by the CNC Council on the essential core of the case, declaring that a violation of articles 1, 2 and/or 3 LDC and, if

applicable of articles 101 and/or 102 TFEU has or has not been demonstrated to exist.

- (9) Without prejudice to the above, the law also provides for the possibility of the proceeding being terminated through the acceptance of certain commitments. This is an atypical means of ending an infringement proceeding in which the CNC terminates the case by accepting certain binding commitments voluntarily offered by the presumed infringing party, without the need for a declaration as to whether the violation has been demonstrated to exist or, consequently, for a penalty to be levied.
- (10) Termination by commitments has a dual objective. The first is quick reestablishment of the conditions of competition that had been jeopardised by the anti-competitive conducts that were detected, by means of commitments that resolve the competition problems or eliminate the unjustified restrictions of competition, safeguarding consumer welfare and the public interest. And the second is to comply with the principle of administrative effectiveness, allowing a more appropriate use of the CNC's resources by helping to reduce investigation work and shorten the time it takes to resolve the infringement proceeding in which a termination by commitments is accepted.
- (11) For these reasons, termination of infringement proceedings by commitments is more feasible the earlier it is applied for in the investigation phase of the proceeding, because the greater the CNC's conviction that a violation has been committed, the more unlikely it will be to conclude that the public interest can be safeguarded without the need for punishing the anti-competitive conduct. Furthermore, the more the investigation of a case advances, the weaker the effect of satisfying the public interest in a swift conclusion to the proceeding that allows quick implementation of the remedies that put an end to the constraint of competition detected.
- (12) In addition, in principle a termination by commitments is not admissible in those cases in which as a general rule there exist no viable commitments for the purposes of article 52 of the LDC, either for purposes of resolving the effects on competition of the conducts investigated or for achieving sufficient assurances of the public interest.
- (13) Also, in order to safeguard the deterrent nature of competition rules, even where it accepts termination of an infringement proceeding by accepting commitments and not pronouncing itself on whether a violation of the LDC has been demonstrated to exist, the CNC may evaluate, in the commitments-based termination resolution itself, the compatibility of the conducts analysed with competition rules.
- (14) The commitments that may give rise to a commitments-based termination of an infringement proceeding may be behavioural or structural in nature, or a combination of the two. For example, commitments to modify a conduct, to put an end to certain types of arrangements, to eliminate provisions from agreements, contracts or bylaws, to disinvest, to refrain from engaging in certain economic activities, etc.

- (15) Lastly, it must be borne in mind that termination of an infringement proceeding by commitments is not the same as the settlement procedure of European Union law,<sup>1</sup> which has no reflection in Spain's competition regulations.

### III. WHEN CAN A TERMINATION BY COMMITMENTS BE USED?

- (16) In deciding when to begin the procedure for reaching a termination by commitments of an infringement proceeding and eventually accepting the commitments offered, the CNC will apply the criteria described here.
- (17) It should be kept in mind that decisions to initiate these proceedings and accept commitments are discretionary with the CNC, and that each infringement proceeding has its own specific characteristics, so that the CNC must apply to each case the margin of authority it holds to evaluate the issues involved.
- (18) The **decision at to whether to begin** the process of reaching a termination by commitments rests with the Investigations Division<sup>2</sup> of the CNC, upon prior proposal by the presumed perpetrators of the prohibited conducts.
- (19) Without prejudice to the above, the Investigations Division may invite the presumed perpetrators to seek a termination by commitments if it deems that the circumstances of the case warrant such termination. As a general rule, this invitation will be issued simultaneously to the opening of the infringement proceeding, although it may also be made after that time.
- (20) In this regard, when adopting the decision to begin the TC procedure, consideration is given to the time saved in the investigation and resolution of the case, with the consequently quicker implementation of remedies that put an end to the constraint of competition detected. For this reason, the CNC will value very highly that the proposal for termination by commitments be submitted in the very earliest stages of the infringement proceeding, with the aim of securing the public interest as set out in article 52 of the LDC.
- (21) Also, to adopt the decision to initiate the TC procedure, the Investigations Division takes into account diverse factors, both of a substantive and of a procedural nature, that are of relevance for complying with the criteria for admissibility of a termination by commitments established in article 52 LDC, namely, the resolution of effects on competition and safeguarding of the public interest.
- (22) As regards the procedural questions, as a general rule the Investigations Division will decided to begin the TC procedure when:

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<sup>1</sup> The settlement provided for in Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases.

<sup>2</sup> Article 39.1 RDC: “[...] the Investigations Division may resolve, at the proposal of the presumed perpetrators of the prohibited conducts, to initiate actions to achieve a termination by commitments of an infringement proceeding on matters of prohibited practices and agreements. [...]”

- The party that requests the beginning of the TC procedure has previously contacted the Investigations Division to explore the possibility of terminating the official investigation through the acceptance of binding commitments.
  - The request is made before the time limit for replying to the statement of objections provided for in article 50.3 LDC.
  - The request sets out the general contours of the commitments the presumed infringing party would be willing to offer, and a statement as to why those commitments are considered adequate and sufficient for allowing a termination of the infringement proceeding.
- (23) With respect to the substantive aspects, in general terms, a TC procedure will NOT be initiated when:
- The investigation involves:
    - a one-off conduct with no continuity.
    - a violation of article 1 LDC in relation to a cartel.
  - The conducts investigated have had irreversible effects on competition during a significant period of time or have affected a substantial part of the market.
  - The CNC or some other competition authority has previously declared the presumed perpetrators responsible for a prohibited practice on the basis of similar conducts, or where they have been party to a previous termination by commitments for similar practices.
  - Discontinuation of the infringement proceeding puts the effectiveness and deterrent effect of competition rules at risk; in particular, where the CNC deems that an express pronouncement is needed of a violation of competition law.
- (24) Furthermore, in relation to acceptance of the **commitments proposed**, and for purposes of fulfilment of the legal requirement that the commitments must resolve the effects on competition, the CNC will value that the proposals comply with the following requirements:
- The commitments offered effectively, clearly and unequivocally resolve the competition problems detected.
  - The commitments can be implemented quickly and effectively.
  - Monitoring the fulfilment and effectiveness of the commitments is workable and efficacious.

#### **IV. HOW IS A TERMINATION BY COMMITMENTS PROCESSED?**

##### **IV.1. Start**

- (25) Once an infringement proceeding has been opened, any of the presumed infringers may ask the Investigations Division to start the TC procedure.

- (26) As already indicated, the earlier a request for termination by commitments is presented, the more likely it is to be successful, and, in particular, it should generally be presented before the end of the stipulated time limit for replying to the statement of objections under article 50.3 LDC.
- (27) The request can be made even if not all of the presumed infringers in the investigation participate, although it must cover all of the presumed prohibited conducts for which the applicant is responsible that were identified when the proceeding was formally opened or, if applicable, in the statement of objections.
- (28) Before formally filing the application for start of the TC procedure, it is advisable that for presumed infringing party to contact the Investigations Division in order to discuss the general contours of the commitments the applicant would be willing to offer.
- (29) The application for start of the TC procedure should contain the general contours of the commitments the presumed infringer would be willing to offer, along with a statement justifying why those commitments are considered adequate and sufficient for permitting the proceeding to be terminated on the basis of commitments.
- (30) Once the formal request has been received, the Investigations Division will resolve to accept or reject, in a reasoned decision, the start of the TC procedure.
- (31) The Resolution to begin the TC procedure will establish, as a general rule, a time limit of 15 business days within which the applicant can submit the first version of the commitments, unless the first version of commitments was already presented with the application to start the TC procedure. That Resolution will also stop the clock on the time limit for resolving the infringement proceeding until the end of the actions leading to the termination by commitments. The Resolution will be notified to all parties with an interest in the proceeding.
- (32) Failure to submit the first proposal of commitments within the stipulated time frame will be regarded as a withdrawal of the request for termination by commitments, continuation of the infringement proceeding and renewed running of the clock for concluding the case.
- (33) A decision by the Investigations Division to start the TC procedure does not necessarily imply that it will submit a proposed termination by commitments to the CNC Council; nor does it preclude a continuation of the infringement proceeding if the Investigations Division decides the commitments eventually offered are not proportionate or sufficient for resolving the effects on competition of the conducts investigated and securing the public interest.

#### **IV.2. Processing**

- (34) Commitment proposals will identify the commitments offered, the parties subject to those commitments, and the territorial scope of application, timetable for implementation and duration of the commitments.
- (35) All requests for confidentiality in relation to the commitments proposal submitted to the Investigations Division must give a reasoned point-by-point justification of the

confidentiality sought, accompanied by a non-confidential version of the commitments proposal, which may be modified by the Investigations Division to include information whose confidentiality it does not accept.

- (36) The Investigations Division will immediately forward each commitments proposal to the CNC Council.<sup>3</sup> The Investigations Division will at the same time forward the non-confidential version of the first commitments to the rest of the presumed infringers and other interested parties in the infringement proceeding, in order that they may submit the pleadings they deem fit within 10 days.
- (37) With respect to the rest of the presumed infringers subject to the infringement proceeding who also wish to seek a termination by commitments of the proceeding, they may either endorse the commitments presented or offer their own commitments with respect to the conducts detected. In the latter case, the additional commitments will be processed in the same way as the commitments offered by the party that requested the start of the TC procedure.
- (38) In addition, the Investigations Division may send the non-confidential version of the commitments offered to other parties not involved in the proceeding, within the framework of the requests for information provided for in article 39.1 LDC in order to obtain information with which to assess the adequacy of the commitments.
- (39) The Investigations Division may ask parties that have presented commitments to submit all such clarifications or modifications as it deems necessary in relation to those commitments.
- (40) The Investigations Division will bring before the CNC Council the termination by commitments proposal referred to by article 39.5 RDC, if it believes the first commitments offered are proportionate and sufficient for resolving the effects on competition of the conducts investigated and secure the public interest.
- (41) Otherwise, the Investigations Division will issue a reasoned statement of the inadequacy of the first commitments proposal and give the party that presented it a period of 10 business days within which to submit a second commitments proposal.
- (42) Failure to submit the second set of commitments within the stipulated time frame will be regarded as a withdrawal of the request for the TC procedure, continuation of the infringement proceeding and renewed running of the clock for concluding the case.
- (43) If the Investigations Division believes the second set of commitments offered are proportionate and sufficient for resolving the effects on competition of the conducts investigated, and secure the public interest, it will bring before the CNC Council the proposal for termination by commitments provided for in article 39.5 RDC.

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<sup>3</sup> Article 39.2 RDC: *“The presumed infringers will present their proposed commitments to the Investigations Division within the time limit stipulated by the latter in the resolution to initiate the termination by commitments procedure, which shall be no greater than three months. The said proposal will be forwarded to the CNC Council for its knowledge.”*



- (44) If the Investigations Division decides the second commitments presented are not proportionate or sufficient for resolving the effects on competition of the conducts investigated in the proceeding and do not secure the public interest, it will issue a reasoned declaration that it deems the party that presented the commitments to have withdrawn the TC request, with the continuation of the infringement proceeding and renewed running of the clock for concluding the case. This resolution will be notified to all interested parties in the proceeding.

### **IV.3. Resolution**

- (45) Once the proposed termination by commitments has been brought before the CNC Council by the Investigations Division, in those cases in which the proceeding was also brought for violation of articles 101 and/or 102 TFEU in relation to the conducts referred to by the termination by commitments, the CNC Council will refer to the European Commission the termination by commitments proposed by the Investigations Division, for the purposes provided for in article 11.4 of Council Regulation (EC) No 1/2003 of 16 December 2002.
- (46) In relation to the Investigations Division's proposed termination by commitments, the CNC Council may decide:
- To resolve the infringement proceeding through a termination by commitments, upholding the adequacy of the commitments finally offered.
  - That the commitments offered are not proportionate or do not adequately resolve the effects on competition of the conducts examined in the proceeding so as to secure the public interest, and instruct the Investigations Division to continue the infringement proceeding.
  - That there be presented new commitments that resolve the problems detected. On those new commitments the Council will resolve by either declaring termination by commitments or by instructing the Investigations Division to continue the infringement proceeding.
- (47) Where the CNC Council instructs it to continue the infringement proceeding, the Investigations Division will start the clock again on the time limit for resolving the case as from the date of the CNC Council's resolution, and serve notice thereof on all interested parties in the case.
- (48) The resolution of the CNC Council terminating the proceeding with acceptance of commitments will contain the minimum content set out in article 39.6 RDC.

### **IV.4. Monitoring**

- (49) Breach of the TC resolution will give rise to application of the measures provided for in article 39.7 RDC.
- (50) In such event, the CNC may open a new infringement proceeding under articles 1, 2 and/or 3 LDC and, if applicable, articles 101 and/or 102 TFEU, against the same conducts that were the object of the termination by commitments.