



**International
Competition
Network**

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

**CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques**

SPAIN

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ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

1. Information on the law relating to cartels

A. Law(s) covering cartels:	Competition Act 15/2007 of 3 July. It is available in English on the CNC web page: www.cncompetencia.es
B. Implementing regulation(s) (if any):	C. ROYAL DECREE 261/2008 of 22 February 2008, approving the Defence of Competition Regulation. ACT 1/2002, of 21st February, regarding Co-ordination of the State and Autonomous Communities' Competences on Competition Defence They are available in English on the CNC web page: www.cncompetencia.es Resolution, of 30 January 2009, of the Presidency of the National Competition Commission, creating the Electronic Register.
D. Interpretative guideline(s) (if any):	CNC Communication on the method of setting fines imposed pursuant to Articles 1, 2 and 3 of the Spanish Competition Act and Articles 81 and 82 of European Community Treaty Available in Spanish on the CNC web page: www.cncompetencia.es

E. Other relevant materials (if any):	
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2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”?</p> <p>If not, please indicate the term you use instead.</p>	<p>Yes. The Fourth Additional Provision of the Competition Act 15/2007. defines a cartel as follows: "2.For the purposes of this Act, cartel is taken to be any secret agreement between two or more competitors which has as their object price fixing, production or sales quotas, market sharing, including bid rigging, or import or export restrictions."</p> <p>The Competition Act 15/2007, under the Title I, the Chapter I refers to Prohibited conduct and, in particular, Article 1 refers to "Collusive conducts", among them cartels are included:</p> <p>"1. All agreements, collective decisions or recommendations, or concerted or consciously parallel practices are prohibited, which have as their object, produce or may produce the effect of prevention, restriction or distortion of competition in all or part of the national market and, in particular, those which consist of:</p> <ul style="list-style-type: none"> a) The direct or indirect fixing of prices or any other trading or service conditions. b) The limitation or control of production, distribution, technical development or investment. c) The share-out of the market or sources of supply. d) The application, in trading or service relationships, of dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others. e) The subordination of the conclusion of contracts to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of these contracts..."
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas¹) and other types of “cartels”?</p>	<p>The Competition Act does not distinguish between very serious cartel behaviour and other types of cartels. Article 1, Section 1 of Competition Act includes a non exhaustive list of collusive conducts (see question 2A above) among which cartels are included. Notwithstanding, in the graduation of the various infringements set out in the Competition Act, cartels are classified as very serious infringements in Art. 62.4.a):</p> <p>"4. The followings are very serious infringements:</p> <ul style="list-style-type: none"> a) The collusive conduct typified in Article 1 of the Competition Act which consists of cartels or other agreements, decisions or collective recommendations, concerted or consciously parallel practices between actual or potential competing undertakings."

¹ In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

<p>C. Scope of the prohibition of hardcore cartels:</p>	<p>The following exceptions included in Section 3, 4 and 5 of Article 1, limit the general ban on collusive conducts:</p> <p>3. The prohibition in Section 1 shall not apply to agreements, decisions, recommendations and practices that contribute to improving the production or the commercialisation and distribution of goods and services or to promoting technical or economic progress, without the need for any prior decision for this purpose, providing that:</p> <p>a) They allow consumers a fair share of its benefits.</p> <p>b) They do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and</p> <p>c) They do not afford participating undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.</p> <p>4. The prohibition in Section 1 shall not apply to agreements, collective decisions or recommendations, or concerted or consciously parallel practices that comply with the provisions set out in the Community Regulations on the application of Article 81(3) of the EC Treaty for certain categories of agreements, decisions by associations of undertakings and concerted practices, including when the corresponding conduct may not affect trade between EU Member States.</p> <p>5. The Government may also declare through Royal Decree the application of Section 3 of this article to certain categories of conduct, prior report by the Competition Council and the National Competition Commission.</p> <p>Additionally, Article 4. exclude the "Conducts exempted by law":</p> <p>1. Without prejudice to the eventual application of the Community provisions regarding competition, the prohibitions of this chapter shall not apply to conduct those results from the application of an Act.</p> <p>Finally, Article 5. exclude from the general prohibition the "Conducts of minor importance":</p> <p>The prohibitions included in Articles 1 to 3 of this Act shall not apply to conduct which, due to their scant importance, are not capable of significantly affecting competition. The criteria for demarcating conduct of minor importance shall be determined according to regulations, taking into account, among others, the market share.</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>?</p>	<p>Yes it is, without prejudice to the exceptions metioned in 2C above</p>
<p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p>	<p>It is an administrative offence.</p>

3. Investigating institution(s)

<p>A. Name of the agency, which investigates cartels:</p>	<p>The Comisión Nacional de Competencia (CNC), when the colusive conducts restrict competition at national or supra-regional level, and the Regional Competition Authorities when such conduct, without affecting a sphere that is higher than that of an Autonomous Community or than that of the national market as a whole, affects or may affect free competition in the sphere of the respective Autonomous Community. (See Art 1 of Act 1/2002, regarding Coordination of the State and Autonomous Communities' Competences on Competition Defence and Articles 12 and 13 of Spanish Competition Act).I</p>
<p>B. Contact details of the agency:</p>	<p>Comision Nacional de Competencia c/ Barquillo, 5 - Madrid 28004 - España Tlf. 00 34 91 568 0510 - Fax: 00 34 91 568 0590 email: informacion@cncompetencia.es www.cncompetencia.es Languages on website: Spanish, English</p>
<p>C. Information point for potential complainants:</p>	<p>At CNC website, click on "Formularios e Impresos Tasas" and "Programa de Clemencia" www.cncompetencia.es</p>
<p>D. Contact point where complaints can be lodged:</p>	
<p>E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.</p>	<p>Yes. the Competition Act 15/2007, sets out mechanisms for the coordination of all of the administrative bodies that intervene in the application of the Act and coordination with the sectorial regulators, with the object of safeguarding the consistency of the competition policy efficiency in the allocation of public resources and the legal certainty of the economic operators.</p> <p>According to Art. 15 of the Competition Act in relation with Art.5 of the Act 1/2002, the National Competition Commission shall obtain from the competent autonomous body a mandatory, non-binding report, in relation to the conduct set out in Articles 1, 2 and 3 of the Competition Act or Articles 81 and 82 of the Treaty of the European Community, that, affecting a supra-autonomous sphere or the national market as a whole, have a significant effect in the territory of the respective Autonomous Community.</p> <p>Additionally, Art. 14 of the Defence of Competition Regulation states that "For the purposes provided in article 40 of Act 15/2007 of 3 July 2007, in relation to inspection powers, in proceedings that deal with the conducts envisaged in articles 1, 2 and 3 of this Act, the National Competition Commission and competent bodies of the Autonomous Communities, and the latter between them, may request the mutual assistance of their personnel."</p> <p>As for the coordination with sectorial regulators, art. 17 of the Competition Act state that:</p> <p>1. The National Competition Commission and the sectorial</p>

	<p>regulators shall cooperate in exercising their functions in matters of common interest.</p> <p>2. For the purpose of applying section above, information shall be transmitted mutually ex officio or at the request of the respective body regarding its respective actions, as well as non-binding opinions within the framework of the applicable procedures of sectorial regulation and of this Act. In any event:</p> <p>a) The sectorial regulators shall inform the National Competition Commission about the acts, agreements, practices or conduct that they may know of while exercising their powers which present signs of being contrary to this Act, providing any matter of fact available to them and, as the case may be, attaching the corresponding opinion.</p> <p>d) The National Competition Commission or the competent bodies of the Autonomous Communities shall request the sectorial regulators to issue the corresponding nonbinding report within the framework of proceedings instituted due to conduct restrictive of competition pursuant to Articles 1 to 3 of this Act.</p> <p>3. The Chairmen of the National Competition Commission and the respective sectorial regulators shall meet at least once a year to analyse the guidelines that shall guide the actions of the bodies that they chair and, as the case may be, establish formal and informal mechanisms for the coordination of their actions.</p>
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4. Decision-making institution(s)² [to be filled in only if this is different from the investigating agency]

A. Name of the agency making decisions in cartel cases:	
B. Contact details of the agency:	
C. Contact point for questions and consultations:	
D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.	
E. What is the role of the investigating agency if cartel cases belong	

² Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

under criminal proceedings?

5. Handling complaints and initiation of proceedings

<p>A. Basis for initiating investigations in cartel cases:</p>	<p>According to Art. 49 of Competition Act 15/2007, the proceedings are initiated ex officio by the Directorate of Investigation, either on its own initiative or at the request of the Council of the National Competition Commission or as a result of a complaint. Any natural or legal person, interested party or not, may submit a complaint on the conducts regulated by this Act.</p> <p>The Directorate of Investigation shall institute proceedings when rational signs are observed of the existence of prohibited conduct and it shall notify the interested parties of the decision to do so..</p> <p>According to Art.50, once the proceedings have been initiated, the Directorate of Investigation shall carry out the necessary handling acts for the clarification of the facts and the determination of responsibilities.</p> <p>As for the leniency programme, according to Article 46 and 50 of the Royal Decree 261/2008 of 22 February 2008, approving the Defence of Competition Regulation, which implement Art. 65 and 66 of the Competition Act 15/2007, the procedure for exemption from payment or reduction of the fine will be initiated by a company (or natural person) involved in the cartel, who must for such purpose submit to the Directorate for Investigation a formal application with relevant information and evidence and must satisfy certain conditions (full cooperation, ...).</p>
<p>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?</p>	<p>According to Art.25.2 of the Defence of Competition Regulation, about the initiation of the proceedings, "Complaints addressed to the Directorate for Investigation of the National Competition Commission shall contain, at minimum, the following information, and the complainant may submit the additional data and information set out in Annex I of this Regulation:</p> <ul style="list-style-type: none">a) Full individual or corporate name, domicile, telephone and fax number of the complainants and, if they are acting through a representative, evidence of the representative capacity and address for purposes of notices.b) Full individual or corporate name, domicile and, if applicable, telephone and fax number or any other relevant electronic media of the accused.c) Facts from which there derives the existence of a violation and evidence thereof, if applicable, and definition and structure of the relevant market.d) If applicable, justification of standing as interested party in any eventual disciplinary proceeding according to article 31 of Act 30/1992 of 26 November 1992 on the Legal Framework of Public Administrations and Common Administrative

	<p>Procedure.</p> <p>3. If the complaint does not meet the requirements laid down above, the complainant will be given ten days within which to remedy the failure or provide the requested documentation, and will be advised that failure to do so, will lead to the complaint being considered withdrawn.</p> <p>At the CNC website, on "Formularios e Impresos" and "Como formular una denuncia", there is information about the form to lodge a complaint before the CNC.</p> <p>Concerning the leniency programme, at the CNC's website, see "Leniency Programme" where you can find a GUIDANCE OF THE NATIONAL COMPETITION COMMISSION FOR PROCESSING APPLICATIONS FOR EXEMPTION FROM AND REDUCTION OF FINES which includes a "Form to be submitted with the leniency programme application" and also the presentation of a leniency application through the Electronic Register (https://oficinavirtual.cncompetencia.es).</p>
<p>C. Legal requirements for lodging a complaint against a cartel:</p>	<p>Art. 49 of Competition Act states that "Any natural or legal person, interested (legitimate interest) or not, may submit a complaint on the conduct regulated by this Act.". The complaint should have the content indicated in art. 25 of the Defence of Competition Regulation.</p>
<p>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?</p>	<p>As it is said in question 5.A,. according to Art. 49 of the Competition Act, the Directorate of Investigation shall initiate proceedings when reasonable evidence of prohibited conduct are observed and it shall notify the interested parties of its decision to do so.</p> <p>Faced with the possible existence of an infringement, the Directorate of Investigation may investigate information confidentially, included with domicile investigations of the undertakings involved, with the aim of a preliminary determination of whether the circumstances that justify the institution of the sanctioning proceedings are present.</p> <p>The Council of the National Competition Commission, at the request of the Directorate of Investigation, may decide not to institute proceedings and proceed to shelve the proceedings when it considers that there are no evidence of infringement of this Act.</p>
<p>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</p>	<p>Yes, it is. According to art.25.5.of Defence of Competition Regulation, "A decision not to bring the proceeding by the Council of the National Competition Commission, at the proposal of the Directorate for Investigation, shall be notified to the complainant, indicating the reasons for not initiating the proceeding in accordance with article 49 of Competition Act 15/2007 of 3 July 2007."</p>
<p>F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?</p>	<p>No. There is no time limit.</p>

6. Leniency policy³

<p>A. What is the official name of your leniency policy (if any)?</p>	<p>The Competition Act refers to applications for exemption from payment of the fine (Art 65) and reduction of the amount of the fine (Art 66).</p> <p>Regarding public availability, see question 5.B. ("Leniency Programme" at CNC's website)</p>
<p>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</p>	<p>Yes, it offers both. (See question 6A)</p>
<p>C. Who is eligible for full leniency?</p>	<p>Only the first one to provide evidence which would enable the CNC to order and inspection or to prove an infringement of Article 1 concerning cartels, provided that the CNC doesn't already have sufficient evidence. (It is the first one to come forward according to the entry date and time in the register of the National Competition Commission).</p>
<p>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</p> <p>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</p>	<p>Yes, this is the eligibility criteria for leniency.</p> <p>Yes, the date is important, because, as stated in question 6C, only the first undertaking or natural person to come forward will be eligible for full leniency.</p> <p>In this line, for the successive undertakings or natural persons to provide evidence, the degree of the reduction of the fine imposed shall depend of the moment which participants in the cartel come forward with relevant information. (30 to 50 percent for the second one; 20 to 30 percent for the third one; up to 20 percent for the rest)</p>
<p>E. Who can be a beneficiary of the leniency program (individual / businesses)?</p>	<p>Both, individual and businesses</p>
<p>F. What are the conditions of availability of full leniency:</p>	<p>According to Art. 65 of Competition Act and Art.46 and 52 of Defence of Competition Regulation, the general conditions are the following: provide decisive evidence; maintain cooperation throughout; cease the infringement -except in those situations in</p>

³ For the purposes of this template the notion of 'leniency' covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like 'leniency' 'amnesty' and 'immunity' are considered as synonyms.

	<p>which the National Competition Commission deems it necessary that said participation continue in order to preserve the effectiveness of an inspection-; not having destroyed evidence related to the application for exemption nor having disclosed, directly or indirectly, to third parties other than the Competition Authorities, the fact of its contemplated application or any of the content; not having adopted measures to oblige other undertakings to participate in the infringement.</p>
<p>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):</p>	<p>According to Art. 66 of Competition Act and art. 49 of Defence of Competition Regulation, an undertaking or natural person would be eligible for partial leniency when it provides evidence of the alleged infringement which represents significant added value with respect to the evidence already in the National Competition Commission's possession. (i.e. the new evidence has to make it easier for the CNC to prove the infringement).</p> <p>Also, Art. 66.1b of the Competition Act states that the undertaking or natural person involved must cooperate fully, continuously and diligently throughout the investigation, bring an end to its participation, not having destroyed evidence related to the application for exemption nor having disclosed, directly or indirectly, to third parties other than the Competition Authorities, the fact of its contemplated application or any of the content, and not having adopting measures to coerce other undertakings to participate in the infringement.</p>
<p>H. Obligations for the beneficiary after the leniency application has been accepted:</p>	<p>Full cooperation with the investigating agency during the proceedings is the main obligation for the beneficiary. According to Art. 52 of Defence of Competition Regulation, "...the fine exemption or reduction applicant will be deemed to cooperate fully, continuously and diligently with the National Competition Commission when, over the course of the proceeding, the applicant complies with the following requirements:</p> <ul style="list-style-type: none"> a) Provides the Directorate for Investigation without delay all relevant information and evidence relating to the presumed cartel in the possession of or available to the applicant. b) Remains available to the Directorate for Investigation to respond without delay to all requests that can contribute to establishing the facts. c) Facilitates interviews by the Directorate for Investigation with the employees and current executives of the company and, if applicable, with former executives. d) Abstains from destroying, falsifying or concealing relevant information or evidence in relation to the presumed cartel. e) Abstains from disclosing the filing of the fine exemption or reduction application, or the content thereof, prior to notification of the statement of objections or such time as may be determined by the Directorate for Investigation." <p>Along with this, the other conditions of availability of full or partial leniency mentioned in 6.F and G above are obligations to be fulfilled once the application is accepted.</p>
<p>I. Are there formal requirements to make a leniency application?</p>	<p>Yes there are. According to Art. 46 and 50 of the Defence of Competition Regulation, the applicant must submit to the Directorate for Investigation a formal application for exemption/reduction of fines accompanied by all information and evidence in the applicant's possession, taking into account, as applicable, the provisions of paragraph three of article 46.</p>

	<p>At the applicant's request, the Directorate for Investigation may allow the application to be submitted orally, accompanied by the relevant information and evidence, and recorded at the National Competition Commission premises, with a transcript thereof being entered in the register.</p> <p>The leniency application can be presented also through the Electronic Register (https://oficinavirtual.cncompetencia.es).</p>
<p>J. Are there distinct procedural steps within the leniency program?</p>	<p>Yes, there are.</p> <p>Full leniency:</p> <p>According to Art.47 of Defence of Competition Regulation, the Directorate for Investigation will examine the information and evidence presented and will check if they fulfil the conditions of article 65.1 of Competition Act, in which case it will approve the conditional exemption from payment of the fine, giving the applicant company or natural person notice to such effect.</p> <p>If at the end of the disciplinary proceeding, the applicant has complied with the requirements established in article 65.2 of Competition Act, the Council of the National Competition Commission, in accordance with the proposal of the Directorate for Investigation, will grant the applicant the exemption from payment of the fine in the resolution that puts an end to the proceeding.</p> <p>Even if the applicant hasn't complied with these requirements, it can still benefit from favourable treatment and reduction in the amount of the fine if it hasn't adapted measures to coerce other undertaking to participate in the unfringement (Art 65.2d of Competition Act).</p> <p>Partial leniency:</p> <p>According to Art. 50 of Defence of Competition Regulation, the Directorate for Investigation, no later than at the time of notification of the statement of objections of the proceedings provided for in article 50.3 of Competition Act, will inform the applicant company or natural person of its proposal to the Council of the National Competition Commission for reduction of the fine on fulfilment of the requirements established in article 66.1 of Competition Act or inform them that such proposal is not in order due to failure to fulfil the requirements for attaining the reduction.</p> <p>If the application for reduction of the fine is presented after notification of the statement of objections, the Directorate for Investigation will inform the applicant of its proposal for reduction of the fine in the resolution proposal of the proceedings referred to by article 50.4 of Competition Act.</p> <p>The Council of the National Competition Commission will set the percentage reduction that applies to each company or natural person in the resolution that puts an end to the disciplinary proceeding.</p>
<p>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</p>	<p>Concerning full leniency, when the Investigation Directorate checks that the applicant fulfils the conditions of article 65.1 of Competition Act, therefore it approves the conditional exemption from payment of the fine, giving the applicant company or natural person notice to such effect (Art. 47 Defence of Competition Regulation).</p> <p>As for partial leniency, at the time of notification of the</p>

	<p>statement of objections of the proceedings, the Investigation Directorate will inform the applicant of its proposal to the Council of the National Competition Commission for reduction of the fine on fulfilment of the requirements established in article 66.1 of Competition Act, or inform them that such proposal is not in order due to failure to fulfil the requirements for attaining the reduction (art. 50 Defence of Competition Regulation).</p>
<p>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</p>	<p>The leniency is granted on the basis of a formal decision adopted by the Council of the National Competition Commission, according to Art. 65 of Competition Act in relation with Art. 47 of Defence of Competition Regulation for full leniency and on the basis of Art. 66 of Competition Act in relation with Art. 50 of Defence of Competition Regulation for partial leniency.</p> <p>The Investigation Directorate is in charge of examining the leniency applications (see 6.J above) and make a proposal to the Council (the decision-making body of the CNC)</p>
<p>M. Does your legislation have a marker system? If yes, please describe it.</p>	<p>No, although the Investigation Directorate may grant, upon a prior reasoned request from the applicant, additional time for submitting evidence on the cartel. Once the evidence has been presented within the stipulated time limit, the filing date for the leniency application will be understood to be the date of the initial application. (Art 46.5 of Defence of Competition Regulation)</p>
<p>N. Does the system provide for any extra credit⁴ for disclosing additional violations?</p>	<p>No, it doesn't</p>
<p>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</p>	<p>Yes. According to Art. 51 of Defence of Competition Regulation,</p> <p>"1. The National Competition Commission will treat as confidential the fact of the filing of a fine exemption or reduction application, and will organise a special separate record with all application data and documents deemed to be confidential, including, in all events, the applicant's identity.</p> <p>2. According to what is provided in article 50.3 of Competition Act 15/2007 of 3 July 2007, the interested parties will have access to the data and documents which, though forming part of a special confidential record, are necessary to responding to the statement of objections.</p> <p>3. Without prejudice to what is provided in the preceding paragraph, no copies can be obtained of any statement by the fine exemption or reduction applicant that has been specifically made by the applicant for submission with the related application."</p>
<p>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</p>	<p>As a general rule, judicial appeals may be lodged against the final decisions of the Council of the National Competition Commission (art. 48 Competition Act). The decisions and resolutions of the Investigation Directorate about the conditional exemption does not jeopardise the right to a fair hearing and</p>

⁴ Also known as: "leniency plus", "amnesty plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

	not may cause irreparable damage to rights or legitimate interests and because of that are not appealable before the Council of the National Competition Commission.
Q. Contact point where a leniency application can be lodged:	At the CNC website, on "Programa de Clemencia" there is a GUIDANCE OF THE NATIONAL COMPETITION COMMISSION FOR PROCESSING APPLICATIONS FOR EXEMPTION FROM AND REDUCTION OF FINES which include a "Form to be submitted with the leniency programme application" and all the information data on telephone and fax number of the Leniency Programme, and also the information about the presentation of a leniency application through the CNC Electronic Register.
R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?	No, although the Council of the National Competition Commission will not grant the applicant the exemption from payment of the fine in the resolution that puts an end to the proceeding if the applicant has not complied with the requirements established in article 65.1 Competition Act. In this case, as a general rule, judicial appeals may be lodged against the final decision of the Council of the National Competition Commission.
S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?	No, it doesn't.

7. Investigative powers of the enforcing institution(s)⁵

A. Briefly describe the investigative measures available to the enforcing agency such as requests for information,⁶ searches/raids⁶, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.	<p>According to Art. 40 of Competition Act.</p> <p>"1. National Competition Commission personnel duly authorised by the Director of Investigation shall have the capacity of agent of the authority and may conduct all necessary inspections of undertakings and associations of undertakings for the due application of this Act.</p> <p>2. The personnel enabled for this purpose shall have the following powers of inspection:</p> <p>a) to enter any premises, land and means of transport of the undertakings and associations of undertakings and the private homes of the entrepreneurs, managers and other members of staff of the undertakings,</p> <p>b) to verify the books and other records relating to the business activity, irrespective of the medium on which they are stored,</p> <p>c) to take or obtain in any form copies of or extracts from such</p>
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⁵ "Enforcing institutions" may mean either the investigating or the decision-making institution or both.

⁶ "Searches/raids" means all types of search, raid or inspection measures.

	<p>books or records,</p> <p>d) to retain the books or documents mentioned in letter b) for a maximum period of 10 days,</p> <p>e) to seal all business premises, books or records and other business assets for the period and to the extent necessary for the inspection,</p> <p>f) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents related to the subject-matter and purpose of the inspection and record the answers.</p> <p>Exercising the powers described in letters a) and e) shall require the prior express consent of the affected party or, failing this, the corresponding judicial authorisation.</p> <p>3. The undertakings and associations of undertakings are obliged to submit to the inspections that the Director of Investigation has authorised.</p> <p>4. If the undertaking or association of undertakings opposes an inspection ordered by the Director of Investigation or exists a risk of such opposition, they must request the corresponding judicial authorisation when this involves restriction of fundamental rights from the Administrative Court, which shall rule within a maximum period of 48 hours.</p> <p>The public authorities shall provide the necessary protection and aid to the National Competition Commission personnel for the exercising of the functions of inspection.</p> <p>5. The data and information obtained shall only be used for the aims set out in this Act."</p> <p>Additionally, Art. 13.1. of Defence of Competition Regulation states that "...National Competition Commission personnel may be accompanied by experts or specialists in the matters addressed by the inspection, as well as by experts in information technologies, all of them duly authorised by the Director of Investigation."</p>
<p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p>	<p>Yes it can be inspected as it is said above.</p> <p>Additionally, Art. 13. of Defence of Competition Regulation which implement Art. 40 a) of Competition Act, states that "2...the personnel authorised by the Director of Investigation may conduct inspections in the private domiciles of entrepreneurs, directors and other staff of the companies if there are well founded indicia that books or other documents relating to the company and to the subject matter of the inspection may be found in those private domiciles that can serve to prove a serious or very serious violation. The authorised personnel will have the powers envisaged in article 40.2.b), c) and d) of Competition Act 15/2007 of 3 July 2007.</p> <p>3. The personnel authorised to carry out an investigation will exercise their powers upon prior presentation of a written authorisation from the Director of Investigation indicating the subject matter and purpose of the inspection, the persons investigated, data, document, operations, information and other elements that will be subject to inspection, the date on which the inspection is to be conducted and its scope. The written authorisation will likewise include the penalties envisaged in Competition Act 15/2007 of 3 July 2007 in the event the companies do not submit to the inspections or by any means</p>

	obstruct the inspection work of the National Competition Commission."
C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?	Yes, but it is needed the undertaking's consent or a judicial authorisation. In any case, this information shall only be used for the aims set out in the Competition Act. (see Art.40.2 and 40.5 of Defence of Competition Regulation)
D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.	No, it haven't.

8. Procedural rights of businesses / individuals

A. Key rights of defence in cartel cases:	<p>As a general rule, in the context of Cartel proceedings, interested parties have the same rights as within other Prohibition proceedings –the right to be notified of the facts charged to the alleged infringer, the infractions that such acts may constitute and possible penalties to be imposed, as well as the identity of the competent authority to impose the sanction and the legislation applied; the right to know at any moment, the status of proceedings and to obtain copies of documents contained in them; the right to submit any declaration or argument and to provide documents at any stage of the proceedings, submissions that must be taken into account by the competent body when drafting the proposed resolution; the right to obtain information and guidance on legal and technical requirements to submit requests or documents; the right to be given access to the records and files and to obtain copies of all documents in the file, except for trade secrets of other interested parties or third parties, as well as any other confidential information.</p> <p>Relevant legal provisions: Art.36-54 of Competition Act in relation with Art. 11-41 of Defence of Competition Regulation.</p>
B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation?	<p>Art.42 of Competition Act states that "At any time during the procedure, it may be ordered, ex officio or at the request of the parties, that the data or documents considered confidential are kept secret, using them to create a separate proceeding.."</p> <p>Competition Act do not envisage any difference depending on the way that the information has been provided.</p>

9. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision in the merits of the case must be made?</p>	<p>Art. 68 of Competition Law that refers to the lapse of infringements and of sanctions, states that "1. Very serious infringements shall lapse after four years, serious ones after two years and minor ones after one year. The term of the lapse shall be counted as of the day when the infringement has been committed or, in the case of continued infringements, as of when they have ceased."</p> <p>After the corresponding lapse of infringements, the investigation proceeding can not be initiated.</p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?</p>	<p>According to Art. 36.1."The maximum period for issuing and notifying the resolution that brings an end to sanctioning proceedings for restrictive competition conduct shall be eighteen months as of the date of the institution decision.."</p> <p>Within the deadline above, according to Art. 28 of Defence Competiton Regulation, "4. The time limit for investigating the case will be twelve months reckoned from the date of the decision to initiate proceedings. Expiry of the maximum time limit of eighteen months after the date of the decision to initiate the disciplinary proceeding without a resolution having been issued thereon will cause the proceeding to lapse in accordance with the terms of article 38.1 of Competition Act 15/2007 of 3 July 2007."</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?</p>	<ul style="list-style-type: none"> - For commencement: In Spain the decision of the competition authority to initiate the proceedings cannot be challenged at all. - For completion and for decisions regarding the investigation process (except commencement): Art 47, <p>Art 47 states that, only the decisions and resolutions of the Directorate of Investigation (our investigation body) which jeopardise the right to a fair hearing and may cause irreparable damage to rights or legitimate interests shall be appealable before the Council of the National Competition Commission within a period of ten days</p> <ul style="list-style-type: none"> - For decisions regarding sanctions: <p>Pursuant Art 48, against the decisions of the Chairman and the Council of the National Competition Commission (our decision-making body), no administrative appeals may be made, and a contentious-administrative appeal may be lodged within a period of two months.</p>

10. Types of decisions

<p>A. Please list which types</p>	<p>According to Art. 53 of Competition Act (in relation with Art. 1,2,</p>
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<p>of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1.</p>	<p>and 38 of Defence of Competition Regulation), "1. The resolutions of the Council of the National Competition Commission may declare:</p> <p>a) The existence of conduct prohibited by this Act or by Articles 81 and 82 of the EC Treaty.</p> <p>b) The existence of conduct that, due to its scant importance, is not capable of significantly affecting competition.</p> <p>c) The existence of prohibited practices not being accredited.</p> <p>2. The resolutions of the Council of the National Competition Commission may contain:</p> <p>a) The order of cessation of the prohibited conduct in a specific period.</p> <p>b) The imposition of specific conditions or obligations, be they structural or of behaviour.</p> <p>The structural conditions may only be imposed in the absence of others of behaviour of equivalent efficacy or when, despite conditions of behaviour existing, these are more onerous for the undertaking in question than a structural condition.</p> <p>c) The order of removal of the effects of the prohibited practices contrary to the public interest.</p> <p>d) The imposition of fines.</p> <p>e) The shelving of the proceedings in the cases foreseen in this Act.</p> <p>f) And any other measures whose adoption is authorised by this Act..."</p>
<p>B. Please list which types of decisions on the merits of the case can be made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).</p>	<p>The types of decisions on the merit of the case in hard core cartel cases are not different from the types of decisions for any cartel case.</p>
<p>C. Can interim measures⁷ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both⁸.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</p>	<p>Yes. According to Art. 54 of Competition Act, "Once proceedings have been initiated, the Council of the National Competition Commission (decision-making body) may, ex officio or at the request of one of the parties, on the proposal or prior report of the Directorate of Investigation, adopt the necessary interim measures intended to ensure the efficacy of the resolution that may be later issued. "</p> <p>Art. 40 and 41 of Defence of Competition Regulation, lay down the types and the procedure for the adoption of the interim measures.</p> <p>The main condition for taking such a decision is to ensure the efficacy of the resolution that may be later issued.</p>

⁷ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

⁸ Only for agencies which answered "yes" to question 2.C. above

11. Sanctions for procedural breaches (non-compliance with procedural obligations)⁹

A. Grounds for the imposition of procedural sanctions / fines:	Article 62.2 Competition Act establish as a minor infringement not supply the National Competition Commission with the information requested or supply incomplete, incorrect, misleading or false information (letter c); not submit to an inspection ordered in accordance with the provisions of article 40 (letter d); obstruct by any means the inspection labours of the National Competition Commission.
B. Type and nature of the sanction (civil, administrative, criminal, combined):	Administrative sanctions (minor infringement, as we said above).
C. On whom can procedural sanctions be imposed?	Procedural sanctions can be imposed on natural or legal persons (economic agents, undertakings, associations, unions or groupings of them).
D. Criteria for determining the sanction / fine:	The penalty of a minor infringement is a fine of up to 1% of the aggregate turnover of the infringing undertaking in the year immediately preceding the year of the imposition of the fine. In the event that it is not possible to calculate the turnover referred, the fine will be of 100,000 € to 500,000 €.
E. Are there maximum and / or minimum sanctions / fines?	See answer above.

12. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):	Administrative sanctions: fines
On whom can sanctions be imposed?	According to Art.61 in relation with Art. 63 of Competition Act, "Offenders shall be natural or legal persons who carry out actions or omissions typified as infringements by this Act." So that, sanctions (fines) may be imposed not only on the economic agents, undertakings, associations, unions or

⁹ In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be sanctioned.

	<p>groupings of them that, intentionally or by negligence, infringe the provisions of the Competition Act, but also on on each of its legal representatives or on the persons that comprise the management bodies that have participated in the agreement or decision.</p>
<p>B. Criteria for determining the sanction / fine:</p>	<p>Article 64 of Competition Act sets the Criteria for the determination of the amount of the fines, stating the following:</p> <p>"1. The amount of the fines shall be set in light, among others, of the following criteria:</p> <ul style="list-style-type: none"> a) The dimension and characteristics of the market affected by the infringement. b) The market share of the undertaking or undertakings responsible. c) The scope of the infringement. d) The duration of the infringement. e) The effect of the infringement on the rights and legitimate interests of consumers or on other economic operators. f) The illicit benefits obtained as a consequence of the infringement. g) The aggravating and mitigating circumstances that exist in relation to each of the responsible undertakings. <p>2. To set the amount of the fines, the following aggravating circumstances, among others, shall be taken into account:</p> <ul style="list-style-type: none"> a) In the case of repeated infringements typified in this Act. b) The position of leader in or instigator of the infringement. c) The adoption of measures to impose or guarantee the enforcement of the conduct constituting the infringement. d) The lack of collaboration or obstruction of the inspection task, notwithstanding the possible consideration as independent infringement pursuant to Article 62. <p>3. To set the amount of the penalty, the following mitigating circumstances, among others, shall be taken into account:</p> <ul style="list-style-type: none"> a) The performance of actions that terminate the infringement. b) The effective non-application of the prohibited conduct. c) The performance of actions intended to repair the damage caused. d) The active and effective collaboration with the National Competition Commission carried out outside the cases of exemption and of reduction of the amount of the fine regulated by Articles 65 and 66 of this Act."
<p>C. Are there maximum and / or minimum sanctions / fines?</p>	<p>Yes there are. Competition Act makes a graduation of the various infringements set out in it and in Art. 63 clarifies the maximum penalties of each type, set in terms of a percentage of the total turnover of the offenders.</p>
<p>D. Guideline(s) on calculation of fines: [name and reference number, availability (homepage address) and</p>	<p>CNC Communication on the method of setting fines imposed pursuant to Articles 1, 2 and 3 of the Competition Act 15/2007 of 3 td. July and Articles 81 and 82 of European Community Treaty</p> <p>Available in Spanish on the CNC web page:</p>

indication of the languages in which these materials are available]	www.cncompetencia.es
E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?	As a general rule, a challenge to a decision imposing a sanction do not have a suspensory effect on that sanction.

13. Possibilities of appeal

A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?	<p>Yes it does. Act 15/2007 provides for administrative appeals (Art 47) and contentious-administrative appeals (Judicial, see Art 48 below)</p> <p>Pursuant Art 47, the decisions and resolution of the Directorate of Investigation (our investigation body) which jeopardise the right to a fair hearing and may cause irreparable damage to rights or legitimate interests shall be appealable before the Council of the National Competition Commission within a period of ten days.</p> <p>Pursuant Art 48, no administrative appeals may be made against the decisions of the Chairman and the Council of the National Competition Commission (our decision-making body) and a contentious-administrative appeal may only be made in the terms provided for in Act 29/1998, date 13 July, concerning the Regulation of the Contentious-Administrative Jurisdiction.</p>
B. Before which court or agency should such a challenge be made? [if the answer to question 13/A is affirmative]	<p>Administrative appeal (Art 47): Before the Council of the National Competition Commission within a period of ten days.</p> <p>Contentious-administrative appeal (Art 48): Before an specific Contentious-Administrative Court (National Court) within a period of two months. The judgment of the National Court is also appealable before the Supreme Court.</p>