

SUMMARY OF RESOLUTION S/0211/09 ENDESA INSTALACIÓN

On 18 December 2009 the CNC received a complaint filed by the Federación Nacional de Empresarios de Instalaciones Eléctricas y Telecomunicaciones de España (National Federation of Electrical and Telecommunications Installation Businesses of Spain — FENIE) against Endesa Distribución Eléctrica, S.L.U. (EDE).

According to FENIE, EDE was invading the market for unregulated electrical installations by: (1) by leveraging its dominant position in the related electricity distribution market to provide services and sell products in the unregulated electrical installations; (2) offering and providing repair services by the group's retail supplier (Endesa Energía), capitalising on the distributor's name and customer book; and (3) sending full budgets for performing extension installations not reserved to the distributor in reply to a request to supply, as well as reserving to itself certain types of work for reasons of service quality and security.

The works required to allow connection to the distribution network are classified as extension activities and hook-up activities. Extension installations include all electrical infrastructure between the existing distribution network and the first element owned by applicant that must be executed when new supply or expansion of existing supply is requested.

The conditions and procedures for connecting consumers to the grid are set out in Royal Decree 1955/2000 of 1 December 2000 regulating the activities of transportation, distribution, marketing, supply and the authorisation procedure for electrical installations. The rules on connection were partly amended by Royal Decree 222/2008 of 15 February 2008 establishing the remuneration system for the electricity distribution activity.

The regulations distinguish between two major categories of extension installations: those reserved to the distributor and those executed for the account of the customer (not reserved to the distributor). Execution of the first is reserved to the distributor, who is obliged to carry them out, in exchange for which the distributor receives the regulated extension duties or connection duties. The second must be executed at the applicant's expense by any installer or by the distributor itself.

The regulations also require the distributor, in relation to works executed for the account of the applicant, to provide the latter certain technical data so that the customers can use whatever installer they deem fit. The distributor must also specify the amount of the regulated duties payable to the distributor.

In its Resolution of 21 February 2012 the CNC Council held that EDE had carried on a series of prohibited conducts, namely:

- 1) In its replies to requests for new supply, which entail execution of an extension installation not reserved to the distributor, in 30% of the cases EDE included a detailed budget for all of the work to be done, including the part not reserved to the distributor. According to the information submitted by EDE, the percentage of cases in which a full budget is sent rises sharply the higher the voltage requested and hence the higher the price of the extension installation to be performed. EDE is thus using the privileged information it has in its capacity as distributor to, first, select the larger non-reserved installations and, second, quote its budget at the same time as it notifies the technical-economic conditions for fulfilling the supply request.

The CNC Council holds that the fact that the notices sent by EDE mention that the client can approach other installers to execute the work does not prevent it from obtaining a de facto competitive advantage that its competitors cannot replicate. The rest of the installers are not in a position to match this offer because they do not have the information the distributor has to target their commercial efforts and send their budget as early as the distributor does when it sends out the technical-economic conditions. The Council therefore ruled that EDE committed a violation of article 6 of Competition Act 16/1989 (LDC) and of article 102 of the Treaty on the Functioning of the European Union (TFEU) and consequently fined EDE €14,967,960.

- 2) Prior to the entry into force of Order ITC/3519/2009 of 28 December 2009, EDE had reserved to itself the works for connecting the new extension installation to the distribution network and charged for executing them. Before Royal Decree 222/2008 came into effect, the regulations did not make any express provision for the possibility of the distributor reserving connection works to itself, although EDE has traditionally done so and charged customers the price it deemed fit. Afterwards, those rules required EDE to reserve that work to itself, but did not authorise it to charge customers anything for work that EDE is obliged to carry out at its cost. From 19 March 2008 to 31 December 2009, EDE charged customers for executing the junctions and works to connect the extension installation to the distribution grid, even though the law gave it no right to do so, but rather explicitly provided that it was the distributor who was obliged to bear the cost of that work. The

CNC Council therefore holds that EDE has committed a violation of article 2 of the LDC by budgeting and charging customers for executing junctions and works to connect their extension installations to the grid, as the applicable regulations did not entitle EDE to charge for those works in the period running from 19 March 2008 to 31 December 2009. The Council therefore fines EDE €8,158,000.