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LATIN AMERICAN COMPETITION FORUM

Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

-- Contribution from Spain --

23-24 September 2015, Montego Bay, Jamaica

The attached document from Spain is circulated to the Latin American Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 23-24 September 2015 in Jamaica.

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Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

-- CONTRIBUTION FROM SPAIN --

1. Introduction

1. The Spanish Competition Authority has acquired extensive experience in identifying restraints on competition through various advocacy instruments, essentially market studies and reviews of proposed laws and regulations, and to a lesser extent through reports on public subsidies and the preparation of guidelines and, exceptionally, turning to the courts to challenge rules that represent barriers to effective market competition. In recent years, there has been a much greater appreciation of the importance, the scope and the impact of these instruments on the part of the public authorities, market players and society as a whole.

2. This contribution assesses the capacity and the success of the first two instruments mentioned in identifying restraints on competition, as well as their influence in bringing about changes in laws and regulations, starting with an analysis of some concrete cases. We then go on to present the current initiatives under way to evaluate the effectiveness of competition advocacy instruments and the role that sophisticated quantitative analysis can play in their preparation.

2. Identifying constraints on competition through market studies and the review of proposed laws and regulations

3. The two most important instruments employed by the Spanish Competition Authority in the public exercise of its advocacy function are market studies and reviews of proposed laws and regulations¹. These two

¹ There are other advocacy instruments available as well. These include, first, Guidelines and Recommendations, the purpose of which is to publicise and create awareness of specific aspects relating to the defence and promotion of competition among public administrations and economic operators, as well as businesses and final consumers. Second, the Competition Authority is empowered to file judicial appeals against administrative acts and regulations that result in barriers to effective market competition. This capacity is recognised in Article 5.4 of Law 3/2013 of 4 June, creating the National Commission for

tools are used to detect restraints on competition and to formulate amendments to proposed laws and regulations in order to intensify the level of competition in various sectors and markets of the Spanish economy.

4. The Spanish Competition Authority has a great deal of experience in detecting restraints on competition through market studies. The first market studies were conducted by the former Tribunal for the Defence of Competition (TDC) in the early 1990s. By means of those studies, restraints were identified in such sectors as road transport, electric power transportation and distribution, local [utility] services, the real estate market, banking, ports, pharmacies and telecommunications. Those studies had an influence on certain processes of liberalisation that occurred in Spain towards the end of the 1990s, primarily in the electric power and telecommunications sectors.

5. The establishment of the former National Competition Commission (CNC) in 2007 led to a qualitative and quantitative leap in the preparation of market studies, within a legal setting that for the first time gave explicit recognition to the function of promoting competition as one of the basic pillars of Spain's competition policy². The number of studies prepared and published – averaging 4 or 5 each year over the period 2008-2013 – represented an increase in comparison with previous stages in the history of Spanish competition policy. In methodological terms, the studies constituted progress in that they introduced economic and quantitative analysis while involving greater participation by market players in their preparation, and wider dissemination and impact among the public authorities and society as a whole.

6. In total, the Spanish Competition Authority has prepared nearly 40 market studies since 1992, covering various markets and economic sectors³. In all these cases the studies identified the main legal and regulatory obstacles to competition in the sector or market, and offered recommendations for amendments that would intensify competition. The number and intensity of the recommendations vary from one study to the next, but in many cases they have included more than ten recommendations.

7. Since the creation of the CNC in 2007, the identification of restraints on competition has also been pursued through reviews of proposed laws and regulations, where the experience acquired by the Spanish Competition Authority is very broad and the pace of activity is high. These reviews assess the impact on competition of legal and regulatory rules of a general nature, prior to their final approval (reviews of proposed laws and regulations), and occasionally even after they have been approved (statements of position). The reports on proposed laws and regulations have proven to be a very powerful

Markets and Competition (CNMC) and in Article 27 of Law 20/2013 of 9 December, guaranteeing market unity. Third are the functions relating to public aids, Law 15/2007 of 3 July on the Defence of Competition allows the CNMC to issue reports on subsidy systems and individual aids and to address recommendations to the public authorities with a view to maintaining effective market competition. The CNMC also issues an annual report on public aids granted in Spain, which is submitted to the Spanish Parliament and to the Minister of the Economy, and is published at the CNMC webpage, www.cnmc.es

² Specifically, Law 15/2007 of 3 July on the Defence of Competition. Following the 2013 changes in the institutional framework for competition policy and regulation in Spain, that function is enshrined essentially in Law 3/2013 of 4 June, creating the National Commission for Markets and Competition (CNMC).

³ These include: professional services and associations, the book publishing sector, the food sector, the commercial distribution sector, the technical inspection of vehicles, the road transport of merchandise, the cement sector, the market for the sale and exploitation of football rights, interurban bus transportation, the elevator installation and maintenance market, certification services, collective management of intellectual property rights, relations between distributors and manufacturers in the food sector, the automotive fuels distribution market, the central wholesale markets for the supply of perishable food products, rail transport and the real estate market. These studies can be consulted at <http://www.cnmc.es/es-es/promoci%C3%B3n/informesyestudiossectoriales.aspx>

instrument for detecting restraints that affect competition across the economy⁴, and for bringing about changes in the rules, provided they are issued before final approval of the law or regulation, when the capacity to influence the final outcome is greater. Moreover, they have helped to foster a stronger culture of competition among public administrations in Spain, which will sometimes use the report as a tool for confronting sector players and spelling out the reasons why a rule that would unjustifiably restrict competition should not be adopted. In total, the Spanish Competition Authority has conducted some 170 reviews of proposed laws and regulations since 2008, in a great many economic sectors and fields.

8. Several of the market studies published have led to concrete legal and regulatory changes in line with the recommendations made by the Competition Authority. Yet such amendments have never come about as a result of any wholesale acceptance of the Authority's recommendations. For reasons related to the economics of reforms, the advocacy of competition is necessarily a "long-distance race", in which the Competition Authority has over time to persist in its efforts to have its recommendations carried out, using various channels of action and outreach. In any case, over time we do see a partial incorporation of the Authority's recommendations, as for example in the case of professional associations and services, the automotive fuels sector, or the collective management of intellectual property rights⁵, *inter alia*:

- **Professional associations and services.** Over the last two decades, the Spanish Competition Authority has published a series of studies on the professional services sector. In 1993 it published the "Report on the Free Exercise of Professions", which had some impact on the timid legal changes made at the end of the 1990s, primarily through Royal Decree-Law 5/1996 of 7 June on liberalisation measures relating to land law and professional associations. Some 15 years later, in 2008, the CNC published its Report on the professional services sector and professional associations, in which it insisted on many of the aspects dealt with in the 1993 report that had not yet been translated into law. Various recommendations made by the CNC in 2008 concerning restrictions on the exercise of professional services were incorporated in the process of transposing the [EU] Services Directive into Spanish legislation, and some of them are reflected in the changes made by Law 2/1974 of 13 February on Professional Associations, through that transposition process.
- **Distribution of automotive fuels.** In this area, the market studies conducted by the Spanish Competition Authority have again been very numerous. In 2009 the Authority published the Report on Competition in the Automotive Fuels Sector, which was followed by three additional studies⁶, and a Study on the wholesale market for automotive fuels in Spain was recently published, focusing specifically on the wholesale market. The first three studies had no significant regulatory impact, although they did serve to strengthen the Competition Authority's knowledge and experience in this sector and they enhanced its reputation among government officials and society as a whole. To some extent, those factors were behind the request transmitted to the CNC by the line Ministry in 2012, asking it to carry out the fourth study mentioned. That study incorporated 23 recommendations in all – 16 relating to the wholesale market and 7 to the retail market. Following publication, some of the recommendations were reflected in the amendments introduced by Law 11/2013 of 26 July on measures to support

⁴ The reviews of draft laws and regulations cover a very broad range of economic sectors. These reports can be consulted at <http://www.cnmc.es/es-es/promoci%C3%B3n/informessobrenormativa.aspx>

⁵ It is important to note that, despite the normative changes mentioned, there is in all these sectors a very wide margin for eliminating unjustified restraints on competition under current laws and regulations.

⁶ Report in follow-up to the report on automotive fuels (2011), Report on monitoring of the automotive fuels distribution market in Spain (2012) and the Report on the consultations by the Secretariat of State for the Economy and Support to Enterprises on the automotive fuels market in Spain (2012).

entrepreneurs and encourage growth and job creation⁷. As noted, in 2015 the CNMC published a further study on the automotive fuels sector (the fifth by the Competition Authority and the first by the CNMC). This is also the first study to focus on the wholesale segment of the market⁸.

- **Intellectual property.** The collective management of intellectual property rights has been the object of numerous enforcement decisions by the Competition Authority since the late 1990s. In 2010 the CNC published its Report on the Collective Management of Intellectual Property Rights, in which it made recommendations for legislative reforms intended (i) to boost competition in the provision of intellectual property rights management services for the holders and users of such rights and, in the absence of progress toward liberalisation and given the persistence of monopolistic intellectual property rights management entities, (ii) to counter that monopolistic power and in this way to avoid potential abuse and inefficiencies. Four years after the publication of that study, the Spanish parliament approved a reform to the Intellectual Property Law which, although it did not call for greater freedom of entry or effective competition in the provision of services to holders and users (the option initially recommended by the CNC), did incorporate changes that reflected several of the regulatory recommendations designed to offset the monopolistic power of entities and avoid inefficiencies.

3. Initiatives regarding ex-post evaluations of actions to promote competition

9. There are several reasons why it is important to have a proper evaluation of competition policy in general, and of policies to promote competition in particular⁹. The first relates to the Competition Authority's accountability to government and to society. The Competition Authority consumes public resources that could be devoted to other uses, and it is therefore essential that public officials, and society as a whole, should have the information needed to assess the impact achieved through the use of those resources. Second, it is important to have information on those measures and decisions that have proven to be workable, with a view to selecting best practices, refining and improving existing instruments, and establishing priorities. Third, such evaluation is essential in garnering support for competition policy among public officials and society. When it comes to promoting competition, it is crucial to measure the impact of such activity so that public officials and society as a whole (i) will be aware of the damage caused by rules that impose unjustified restraints on competition, (ii) will accept and support the recommendations made by the Competition Authority, and (iii) will advocate and defend a policy to protect and promote rigorous and effective competition. In order to gain popular acceptance of the message

⁷ This case illustrates progress in the "long-distance race" to promote competition, from an initial phase (the first three studies) in which the recommendations were not taken on board by the public authorities, to a final phase (fourth study) in which the line Ministry itself asked for recommendations and accepted some of them.

⁸ The study was published in July, and has not yet led to regulatory changes. Nevertheless, the Minister of Industry has publicly recognised "the need for further measures to promote greater competition in the wholesale fuels market, in line with the recommendations of the National Commission for Markets and Competition" <http://www.europapress.es/economia/energia-00341/noticia-soria-ve-necesario-mayor-nivel-competencia-mercado-carburantes-20150809122934.html>

In addition, the leading firm in the sector (REPSOL) has indicated its intention to sell its participation in CLH, which means that it would no longer be a member of the CLH Board of Directors, thus responding to one of the recommendations of the CNMC. http://www.elconfidencial.com/empresas/2015-08-11/repsol-pone-en-venta-su-participacion-en-clh-y-abre-la-puerta-a-una-desinversion-en-bloque_962584/

⁹ See, *inter alia*, Office of Fair Trading (2010) Evaluation of OFT Competition Advocacy, prepared for the OFT by London Economics, June 2010; Evenett, S. J. (2006), 'Competition Advocacy: Time For A Rethink?', Northwestern Journal of International Law and Business, Volume 26, Issue 3.

that competition enhances welfare, it is important to measure the positive effects flowing from the regulatory changes recommended by the Competition Authority in the course of its advocacy function.

10. There are some challenges inherent in evaluating the impact of efforts to promote competition. The main challenge is to determine how much credit should be attributed to the Competition Authority for achieving the normative change that is to be evaluated¹⁰. In legal and regulatory changes, influence is exerted not only by the Competition Authority but also by various types of agencies, ministerial departments, and even pressure groups. It can be very difficult to determine what would have happened without the intervention by the Competition Authority. Whatever the credit accorded the Authority, for its competition advocacy to be evaluated as effective the recommendations must be implemented in the form recommended by the Authority. In many cases, these recommendations are lumped together as a set, and the expected effects will depend on whether they are also implemented as a set. If the recommendations are implemented piecemeal, the initially anticipated effects will not necessarily be those observed in the subsequent evaluation. Lastly, in many cases the recommendations will not be accepted even in part, thus making any impact measurement impossible.

11. Although there are many examples of partial regulatory changes sparked by recommendations from the Spanish Competition Authority, the evaluation of competition advocacy instruments has had a qualitative bias, focused primarily on (i) monitoring to determine whether or not the recommendations are incorporated into the regulatory framework over time, and (ii) analysing the functioning of the market some time after the market study has been conducted, and occasionally incorporating analysis of a quantitative type. In this second approach, the analysis has sometimes focused on demonstrating the persistence of inefficiencies or malfunctioning of the market detected in the past, showing that, some years later, an inefficient regulatory framework is still in place and that the normative amendments recommended by the Competition Authority have not been carried out. An example would be the follow-up conducted in the fuels sector¹¹. In other situations, the analysis has served to confirm the Authority's predictions in relation to the incorporation of a more restrictive normative framework than that prevailing at the time the market study was prepared, for example in commercial retail distribution¹². In still other cases, the monitoring has been more informal and more qualitative, normally involving contact with public officials and various agents of the sector to assess the market effects flowing from the elimination of regulatory restraints on competition – as was the case in the automotive fuels sector, with the entry of gasoline refiners following the relaxation of urban zoning restrictions in certain regions of Spain; in commercial distribution, in the case of some regions that have opted for more pro-competitive regimes that facilitate entry; or in professional services and associations, where the framework following transposition of the Services Directive has allowed a faster pace of entry. The evidence gathered in all these cases is consistent with *ex ante* expectations.

12. In any case, there has been relatively little quantitative *ex post* measurement, in a systematic manner and with sophisticated quantitative instruments, of the impact of recommendations implemented with respect to variables such as prices, entry and innovation. At the present time, the Competition Authority is wrapping up an investigation (to be published before the end of 2015) in which it is using sophisticated quantitative analysis tools to assess the impact of a pro-competition reform aligned with the

¹⁰ Ibid.

¹¹ See the Follow-Up Report to the Report on Automotive Fuels (2011).

¹² See the evaluation performed by the TDC in 1995 on the new restrictions included in the regulations governing commercial retail distribution, in “Competition in Spain: Balance Sheet and New Proposals”, and the analysis of the effects and confirmation of the evaluation performed by the CNC in the “Report on the relations between manufacturers and distributors in the food sector” (2011).

recommendations issued by the Spanish Competition Authority in the past. This exercise will in fact represent the first quantitative *ex post* evaluation undertaken by the Spanish Competition Authority.

13. To enable a more robust quantitative evaluation of impacts, the Spanish Competition Authority is developing a methodology to evaluate the impact of competition policy, as established in its 2015 Work Plan. In the area of competition advocacy, the medium-term evaluation strategy will rely on two specific pillars. First, it will review the economy-wide normative impact of the recommendations made, identifying the interventions that have been most effective in this area and the factors that explain their relative success or failure. Second, specific *ex post* evaluations will be performed on past recommendations of the Competition Authority, in line with the evaluation already performed, and with the practice of other competition authorities.

4. Use of sophisticated quantitative analysis in efforts to promote competition

14. As in many other countries, there has traditionally been very limited resort to sophisticated quantitative analysis of competition policy in Spain. Nevertheless, since the establishment of the former CNC in 2007, there has been some progress in the use of this type of analysis. When it comes to promoting competition, the introduction of sophisticated quantitative analysis is not an end in itself, but in many cases it is fundamental for (i) expanding and reinforcing a portion of the analysis, (ii) demonstrating the harmful impact of rules that impose unjustified restraints on competition and reduce welfare, and (iii) reinforcing the empirical evidence on which the recommendations are based, with a view to increasing the likelihood that they will be supported and accepted by government officials and by society as a whole.

15. Sophisticated analysis of this kind has been applied on several occasions in the context of preparing market studies. One interesting case is the Monitoring Report on the Market for Distribution of Automotive Fuels in Spain in 2012, which incorporated an economic model for analysing the "rocket and feather effect" in fuel markets¹³. The results obtained through the error correction model developed show the existence of asymmetries in the speed at which domestic retail prices adjusted to fluctuations in international oil prices: those asymmetries stood out clearly in the case of gasoline, but were weaker for diesel. This provided evidence of the harmful effects on consumers, who derive no prompt benefit from falling international oil prices but are quick to feel the effect when those prices rise. As the existence of "rockets and feathers" is compatible with a relaxation of competitive pressure among operators, especially taking into account the many other indicators analysed, the study provided additional empirical evidence to support the recommendations for regulatory amendments. On the other hand, as this is an issue of considerable popular interest, and one that is frequently treated only superficially in the mass media, the empirical evidence provided by the Authority enhanced the objective rigor of the Authority's analysis and its reputation among public officials, the academic world, and society as a whole. The market studies now under way, which will be published in 2015 and 2016, also employ various econometric techniques to examine more closely some of the concrete aspects of the field of study, as an additional complement to the quantitative and economic analysis that market studies have been pursuing for many years.

¹³ The "rocket and feather" phenomenon refers to an asymmetric translation of international fuel prices into retail prices. Specifically, these asymmetries mean that, when international fuel prices rise, domestic pre-tax prices at service stations will react more swiftly than when international prices are falling.

16. Quantitative analysis has also been incorporated into other competition advocacy products, beyond market studies. The Reports on Public Aids have traditionally attempted to evaluate some concrete system of subsidies – e.g. for the purchase of automobiles¹⁴ – in a quantitative manner. In turn, judicial challenges against administrative acts and regulations from which obstacles to the maintenance of effective market competition are derived have recently begun to incorporate economic reports that reinforce the legal argument and that may include theoretical or empirical models to illustrate the effect of the restrictions challenged and to quantify their cost to consumers.

5. Conclusions

17. The Spanish Competition Authority has accumulated extensive experience in identifying restraints on competition through various advocacy instruments, essentially market studies and reviews of proposed laws and regulations, and to a lesser extent through reports on public subsidies and the preparation of guidelines and, exceptionally, turning to the courts to challenge rules that represent barriers to effective market competition. In recent years, there has been a much greater appreciation of the importance, the scope and the impact of these instruments on the part of the public authorities, market players and society as a whole.

18. In total, the Spanish Competition Authority has prepared nearly 40 market studies since 1992, and around 170 reports on proposed laws and regulations since 2008, in numerous economic sectors and fields. This intensive competition advocacy activity has in various cases led to concrete regulatory changes in line with the recommendations made.

19. The evaluation of competition advocacy has to date had a primarily qualitative bias focused on monitoring, a number of years after conducting a market survey, the implementation of recommendations and market performance, but without including a very sophisticated analysis of its impacts in cases where recommendations had been accepted. There has been relatively little quantitative *ex post* measurement, conducted systematically and with sophisticated quantitative instruments, of the impact of normative amendments. To develop further the *ex post* side of the evaluation of competition advocacy, in the course of 2015 the Spanish Competition Authority undertook its first exercise in *ex post* evaluation of a pro-competitive reform. At the same time, it started work on developing a methodology to assess the impact of competition policy.

20. Since the establishment of the former CNC in 2007, there has been some progress in incorporating sophisticated quantitative analysis into competition advocacy instruments. The introduction of this type of quantitative analysis has served to expand and reinforce certain aspects of the analysis, demonstrating the impact of harmful rules on public welfare, and reinforcing the empirical evidence on which the recommendations are based, with a view to enhancing their degree of support and acceptance by governments and by society as a whole. Sophisticated quantitative analysis has been used primarily in market studies, but it has also been applied in other advocacy instruments.

¹⁴ See *Informe de Ayudas Públicas* [CNC Report on public aids] (2009).