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Session III - Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean

-- Contribution from Luis Berenguer Fuster --

16-17 September 2014, Montevideo, Uruguay

The attached document from Mr Luis Berenguer Fuster (Broseta Abogados, Madrid) is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 16-17 September 2014 in Uruguay.

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PROMOTING COMPETITION AND GOVERNMENTS: THE CASE OF SPAIN

-- CONTRIBUTION FROM LUIS BERENGUER FUSTER ¹--

1. There can be no doubt that promoting or advocating competition is one of the fields of greatest potential growth among the tasks entrusted to competition authorities, together with the prosecution of anticompetitive conduct and monitoring of market concentration. Indeed, it serves to prevent and, to some extent, complement these latter tasks.
2. The definition of competition promotion by the International Competition Network is well-known: “all those activities conducted by the competition agency that have to do with the promotion of a competitive environment for the pursuit of economic activity by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and economic agents, and by increasing public awareness of the benefits of competition.” In light of this broad definition, since the National Competition Commission (Comisión Nacional de la Competencia or CNC; now the Comisión Nacional de los Mercados y la Competencia or CNMC) was created in Spain by Law 15/2007 it determined that the greatest responsibility for promoting a more competitive environment lay with government entities. At the same time, and as the other side of the same coin, it recognized that many situations where competition is limited are protected, if not explicitly supported, by the actions of government entities. Thus, it focused much of its activity on actions aimed at achieving pro-competitive behavior within government entities, especially with regard to their regulatory functions.
3. In 1991 Robert Coase received the Nobel Prize for Economics, essentially for his thesis on the role of lobbies and regulatory capture. The thesis may be summarized as follows: it is easier and safer to seek protection for your benefits in favorable regulation than in the formation of a cartel. This thinking is manifested in a recommendation formulated by one of his disciples, in a sarcastic tone, of course: to increase your benefits you can form a cartel, which is risky because it may be detected by the competition authorities and the sanctions may be severe; or, you can acquire a competing firm, which is both expensive and difficult to manage due to the difference in company cultures. Alternatively, there is a simpler and cheaper choice: hire a lobbying firm and get the government to approve regulations that protect you from competition.

¹ This document was prepared by Luis Berenguer Fuster (Broseta Abogados, Madrid) and former President of the National Competition Commission of Spain. The opinions expressed and arguments employed herein do not necessarily reflect the views of the Inter-American Development Bank nor those of the OECD and its member countries.

4. Aware of this fact, both the authors of the Spanish Competition Protection Law 2007 and the CNC itself focused their efforts to promote competition on the actions of government entities. To this end, the CNC made use of the four tools provided to it by this Law: preparation of sectoral reports, preparation of reports on legislative bills, reports on public subsidies, and – as a great innovation – active legitimization.

1. Sectoral reports

5. The 2007 Law reaffirmed a faculty already held by the Competition Protection Tribunal – the forerunner of the CNC – and one it had used extensively, especially in the 1990s: the preparation of sectoral reports. Just as in the past, many of these reports studied the competition problems identified in a particular sector (Professional Associations, Institutions for Collective Management of Intellectual Property Rights, Transportation Companies, etc.) and ended up making regulatory recommendations to government bodies. Two of these contained recommendations specifically directed to these bodies that took up the principles of “better regulation.” I refer to the “Recommendations to government entities for efficient regulation” from 2007, and the “Guide to the preparation of competition reports” from 2008. In essence, these documents recommended the government draw up regulations that would submit their content to a triple test. The first step would comprise asking whether the regulation proposed placed restrictions on competition; if not, the test is passed. If yes, then the second step is to ask if the restriction is necessary; if it is unnecessary, the regulation should be abandoned or altered. If it is necessary then the third step is applied. The final step of the triple test involves asking if there are other alternatives that could achieve the intended result while placing fewer restrictions on competition. Where other alternatives exist, these should be chosen, in order to impose the least possible damage on the competitive operation of the market.

2. Preparation of reports on legislative bills

6. The Spanish Law of 2007 granted the CNC consultative powers, enabling it to offer an opinion on all regulatory bills and proposals that impact on competition. These reports are prescriptive though not binding, but insofar as they have won prestige the observations they contain have served on a number of occasions to correct certain anti-competitive deviations contained in the proposed regulations.

7. The working method followed by the CNC, and now the CNMC, is that contained in the abovementioned reports, namely to submit the proposal to the triple test in order to identify restrictions on competition, whether these are necessary, and where they are necessary if there are no valid alternatives to achieve the intended aim that are less damaging to the competitive function of the market.

8. It would be an exaggeration to claim that this method has successfully avoided all restrictions on competition contained in legislative bills. There are many different interests assembled behind such bills, and those that are powerful always find a way to win protection from the competitive operation of the market. When they fail to find allies in the sectoral ministries (industry, agriculture, business, etc.) they do so in parliamentary process. It is especially galling when on certain occasions unanimity arises among political factions in Parliament to place restrictions on competition, as has occurred from time to time, for example in the case of the regulation of the Attorneys of the Courts, where members of parliament unanimously approved a regulation to benefit some 7,000 of these professionals in Spain, to the detriment of the 43 million Spanish users of the public justice system. However, this is no cause for self-castigation, since on a fair number of occasions these reports on legislative bills have served to avoid situations and regulations that would have placed restrictions on competition.

3. Reports on public subsidies

9. Control of public subsidies is essential to preserve market unity and avoid distortions in resource allocation. It is true that the underlying function of control of public subsidies in the European Union lies with the European Commission, which has the power to declare such subsidies void if they are contrary to

competition and trade between member states. However, the Spanish Competition Protection Law 2007 established a new sphere of action enabling the CNC – and now the CNMC – to issue reports and recommendations on the model of state and autonomous subsidies, while it also has the obligation to complete an annual monitoring report on public subsidies that reveals the resulting distortions to competition. Examples of this include the CNC’s disclosure of the distorting effects on competition of the PIVE plan. This involved state subsidies for owners of motor vehicles of a certain age who purchased a new vehicle and scrapped their old one. This plan, which had the laudable aim of promoting the renewal of the Spanish car fleet and the possibly less laudable aim of protecting car manufacturers, led to both manufacturers and importers increasing the price of vehicles by a similar amount to the subsidy, with the result that the subsidy benefitted them, rather than the consumer. Following the CNC report, in subsequent versions of the PIVE plan this effect has been corrected. Other interesting contributions in this field include the analysis of the anti-competitive effects of certain measures implemented by a number of Autonomous Communities to subsidize the air travel sector in order to create airports in their territory without sufficient potential traffic.

4. The great innovation: active legitimization

10. In drawing up the regulation that was to become Law 15/2007 on Protection of Competition, its authors took into account most of the considerations undertaken to date. This means that many of the restrictions on competition were contained administrative regulations, and the need to end, or at least limit, this was proposed. Evidently when such restrictions are part of a regulation that has the force of law, there is little that the Competition Authority can do, since only the Constitutional Tribunal has the power to revoke a law as contrary to the Constitution. Despite the fact the Spanish Constitutional Tribunal itself has declared that the principle of free competition forms an essential part of the principle of freedom of enterprise enshrined in Article 34 of the Spanish Constitution, to date it has never revoked any legal regulation for containing unnecessary or disproportionate restrictions on competition. Meanwhile, the Spanish Competition Authority was not empowered either to appeal a law for being unconstitutional, or even to raise the question of constitutionality, this being a mechanism reserved to the courts when, in applying a law, doubts about its constitutionality may arise.

11. Nor can the CNMC—as an independent authority, but an administrative body when it comes down to it—declare null and void any administrative act or administrative norm implemented by another government entity on the basis that it is contrary to competition. However, it is empowered to call for its nullification before the competent court, which in the case of Spain is the Administrative Court, although in order to do so it must be granting legal standing to call for such nullification. To this end, the 2007 Law introduced a new provision into its Article 12.3, which reads as follows:

12. “The National Competition Authority is empowered to challenge before the competent court acts of government entities subject to administrative law and general provisions of rank below the law that give rise to obstacles to the maintenance of effective competition in the markets.”

13. Meanwhile, Article 13.2 of the same Law ascribes similar powers to the competent bodies in the Autonomous Communities for challenging acts of autonomous or local government entities in their territories.

14. This new content is worthy of consideration, since in the light of the growing number of provisions to be approved in Spain, principally as a result of the decentralizing process,² it appears unlikely

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A report produced in 2009 indicated the increase in regulation in Spain by the simple method of counting the number of pages in successive Official Gazettes between 1978—the year the Spanish Constitution was approved and the decentralization process began with the creation of the autonomous communities—and 2008. While the pages in the Official State Gazette remained constant at around 20,000, the gazettes of the autonomous communities, taken together, have increased disproportionately to reach around 700,000.

that a relatively small body, such as the CNC and now the CNMC, might have the capacity to identify all the restrictions on competition that may arise from such extensive regulations. This is true, but it is also true that the mere existence of this power reinforces the deterrent nature of the reports on legislative bills issued by the Competition Authority, since it is not the same thing for someone preparing a bill to face a negative report from the Competition Authority as to have the Sword of Damocles hanging over them of a potential challenge in the Administrative court if the restrictions on competition that have been identified are not corrected.

15. Another option is to carefully choose the basis for exercising this power; namely to appeal the most flagrant violations of competition regulations in order to increase the deterrent effect of the measure, given that a battery of rulings that annul government acts or provisions on the basis they undermine the principle of free competition sends a powerful message to the authors of such acts or regulations, and encourages more pro-competition regulation.

16. An exemplary case is the administrative complaint raised by the National Competition Authority against a decree enacted by the Consell de la Generalitat Valenciana to approve the plan for modernization of permanent regular public transport concessions by road. In the public transport by road sector the European Union had approved a regulation³ that established a duration of no more than ten years for bus or coach concessions. Ignoring this regulation, the decree by the Generalitat Valenciana, with the excuse of approving a modernization plan, extended existing concessions for up to fourteen years. This measure closed the market to new entrants, restricting competition and authorizing concessions without respect for the process of fair tendering and public competition to which concessions for public services must be submitted once the contractual period of these concessions has ended.

17. The issue was analyzed by the Administrative Chamber of the High Court of Justice of the Comunidad Valenciana, and a ruling was issued on October 22, 2012 annulling the abovementioned Decree by the Generalitat Valenciana, on the basis of the primacy of EU law and the fact that this non-compliance hindered market entry for potential new entrants, and lacked the requirements of publicity and free competition that must govern public procurement.

5. Conclusions

18. The advocacy or promotion of competition is a powerful instrument, together with enforcement and monitoring of market concentration, when the regulations governing competition authorities empower them to do so, as in the case of the Spanish Competition Protection Law 2007. This instrument is of key importance when it is a question of overseeing—whether through reports or other actions—the activity of government entities, with the aim of ensuring their regulatory behavior reflects principles of “better regulation” and avoids placing restrictions on competition. In this way it acts as a counterbalance to the efforts of lobbyists that always seek to protect established market players, by creating a ring-fenced area where they are protected from competition. In this work it is very important to win the support of the media in order to make the public aware of the damaging effects on consumers of restrictions to competition. As pointed out more than two hundred years ago by a Spanish writer, the Marquis de Cabarrus, restrictions to free trade are always established for the benefit of a few and in the ignorance of the many. It is the work of competition authorities to open the eyes of the many, revealing privileges to a few supposed restrictions of competition, and the harm they pose to everyone else.

³ Regulation EC 1370/2007, of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road.