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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Spain --

16-18 June 2015

This document reproduces a written contribution from Spain submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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SPAIN

1. "Competitive neutrality" and the role of the State in the market

1.1 What does competitive neutrality mean to you? Is competitive neutrality a useful or necessary goal for competition? Is it an objective of your competition authority? What is the ultimate goal in promoting a level playing field or undistorted markets in your jurisdiction?

1. Competition Authorities must safeguard an even playing field among undertakings in a market, irrespective of their ownership, nationality, institutional organization and objectives. In order for them to achieve this goal, they are endowed with two different types of tools.

2. On the one hand, when the competitive process is jeopardized by unilateral conduct or concerted practices by a single firm or by a group of them (public or private), antitrust and enforcement powers ought to be exercised. On the other, when public sector policies are distorting this 'competition on the merits' (e.g. owing to inappropriate regulation, state aid or procurement), advocacy powers should be enacted through the elaboration of reports or market studies (considering eventually the resort to legal and judiciary action). Therefore, as far as advocacy is concerned, it is crucial to follow a proactive approach and recommend the removal of all these distortions of competition introduced by the public sector, be it directly (through public firms) or indirectly (through inappropriate regulation)[1].

3. The term 'competitive neutrality' refers to the upholding of the level playing field specifically between state owned enterprises (hereinafter SOEs) and private firms. The respect to 'competitive neutrality' is a necessary goal for the achievement of an effective competition in its broadest sense.

4. The Spanish regulation which shapes the competition framework (mainly the Law 15/2007, of July 3rd, on the Protection of Competition and the Law 3/2013, of June 4th, creating the National Markets and Competition Commission) is totally consistent with the concept of 'competitive neutrality' (even if the wording 'competitive neutrality' does not appear as such). As happens with all countries under the umbrella of EU competition policy, antitrust affects all economic undertakings, regardless of their ownership (public or private) or their *raison d'être* (profit-oriented or not). The only areas beyond the scope of competition policy enforcement are non-economic activities (such as social insurance, public health care and public education) provided on the basis of other (non-economic) objectives (such as solidarity).

[1] One example of this proactive approach is the report issued by the Competition Authority about the commonly known as 'Google tax'. This tax was made compulsory for providers of services of aggregation of news and press-clipping companies, distorting competition and raising a barrier of access to the provision of these services. This has resulted in a dramatic decline of this activity (e.g. operators like Google News abandoned the Spanish market), impacting very negatively on the sources of revenue of mid-sized and small newspapers, impairing competition.

5. In addition to competition law, SOEs are affected by other specific regulation The Law 6/1997, of July 3rd, on the Organization and Functioning of the Central Government specifies that public firms are subject to private law in so far as they carry out an economic activity of producing goods or providing services[2]. This Law also suggests that SOEs should generally finance themselves through their own wealth and through ordinary and extraordinary revenues, although they could exceptionally resort to public budgetary resources if its constitution Act considers that option[3].

6. In addition, the Law 33/2003, of November 4th, of Public Administration Wealth declares that SOEs (as the other forms of public sector wealth) must be managed according to the constitutional principles of efficiency and economy[4]. Royal Decree 1373/2009, of November 4th, which develops Law 33/2003, explicitly states that SOEs must neither jeopardize nor distort market competition, regardless of the idiosyncratic aspects of public sector obligations (PSO)[5]. This piece of legislation also urges public firms to be transparent and identify costs related to the provision of services of general economic interest (SGEI) and to the remaining obligations set by law[6]. Finally, it also declares that SOEs management model must be adapted in order to meet the 'OECD Guidelines on Corporate Governance of State Owned Enterprises'[7].

7. Against this background, the Law 4/2007, of April 3rd, of Transparency in Financial Relations between Public Administration and SOEs and of Transparency of certain Firms imposes specific disclosure requirements to public (and private) enterprises granted with special or exclusive rights or operating services of general economic interest.

1.2 In your experience, what type of State measures can distort the playing field? Do you think that State-controlled or supported firms enjoy advantages or disadvantages (e.g. higher labour costs due to public status of their employees)? What types of distortions that you are mostly concerned with?

8. 'Competitive neutrality' might be at stake due to three factors:

- When SOEs and private firms compete directly in the provision of goods and services in the same economic activity, the former may enjoy several advantages, like tax exemptions, less costly financing, implicit or explicit guarantees, pricing unrelated to cost or not concerned by the need to obtain a given rate of profitability. This distorts competitive dynamics, impairing consumers' welfare and overall efficiency.

- Competition between private firms and SOEs becomes even more complex in network industries and/or heavily regulated industries. In these cases, regulation can seriously affect the free play of competitive forces, be it directly (if regulatory requirements are actually asymmetric for public and private undertakings) or indirectly (if regulation incentivizes the abuse of a dominant position by incumbent or large SOEs).

- Public procurement decisions may also impact 'competitive neutrality' when they confer advantages to public providers vis-à-vis private ones or when transactions are not structured

2 See Article 53 of Law 6/1997.

3 See Article 65 of Law 6/1997. The draft Law on the Judicial Procedure of the Public Sector (currently before the Parliament) insists (in its Article 103) on the need for SOEs to fund themselves through market revenue (although again this only applies for the central government).

4 See Articles 8 and 170 of Law 33/2003.

5 See Article 138 of Royal Decree 1373/2009.

6 This is mentioned at the end of the preamble and in Article 138 of Royal Decree 1373/2009.

7 See the end of the preamble of Royal Decree 1373/2009.

in a competitive and transparent manner. The latter would be the case of 'in-house providing', where some market services (e.g. consultancy) are directly entrusted to a government agency instead of selecting the supplier through a competitive tendering process, where bids of public and private firms are appraised according to objective criteria.

9. Nevertheless, it is sometimes argued that SOEs are laden with some burdens in comparison with private peers, such as less flexible staff and management policies, public service obligations (PSOs), greater administrative requirements and government/political influence. Evidence of this handicap for government firms would be the positive wage gap earned by their employees vis-à-vis their private sector peers[8].

10. But some of these arguments might be overstated or not applicable as far as Spain is concerned. For instance, SOEs do not normally have civil servants but public contractual employees, whose regime is less rigid. Actually, one of the items of the 2012 labour market reform consisted in easing the conditions to allow public sector entities to dismiss workers owing to economic, technical or organizational issues.

11. As for public sector obligations (PSOs), even if some SOEs are saddled with them, it is also fair to admit that they enjoy some other privileges (as in the case of postal services) and that they receive a compensation, which could be excessive. That is why, in order to avoid the risk of over-compensation, the EU framework might consider these schemes as illegal state aid when payments are not linked to costs.

1.3 In which sectors do you find the highest degree of State intervention and influence? Is the State's presence growing or decreasing in your economy? What is the weight of SOEs, regulated companies and/or public services in your economy?

12. It is quite difficult to get a robust quantitative estimate of the SOEs presence in the economy. Sociedad Estatal de Participaciones Industriales (SEPI) is a Public Law entity which brings together some of the main companies under the umbrella of the Central Government. The SEPI Group is currently made up by 16 companies where there is a majority and direct shareholding. These companies belong to several industries: energy, defense, food, environment and communications. Chief among them are Correos (the postal service incumbent) and RTVE (the public audiovisual corporation). Equally, SEPI has minority direct shareholdings in 10 firms in the abovementioned sectors[9] and indirect shareholdings in more than 100 companies. SEPI's net turnover reached €3.9 billion (below 4% of GDP) and the net result was €500 million, with a final workforce of more than 74,000 workers (a 0.42% of the total workforce).

13. But these figures only give a partial hint of the overall landscape, as there are big SOEs which are not included in SEPI, like AENA (the airport operator), RENFE (the railway transport incumbent) and Loterías y Apuestas del Estado (a gaming company). For instance, AENA[10] has a total revenue of €3.1 billion, a consolidated net result of €478.7 million and 7,320 workers. Meanwhile, RENFE[11] has a total revenue of €2.8 billion, a consolidated net result of - €3.6 million

8 Hospido, L., & Moral-Benito, E., (2014): *The public sector wage premium in Spain: evidence from longitudinal administrative data*, Working Paper 1422, Bank of Spain.

9 These include ENAGÁS (in charge of gas transmission), RED ELÉCTRICA CORPORACIÓN (in charge of electricity transmission), EADS NV (an aeronautic company), HISPASAT (a satellite communications operator), INDRA (consultancy and technology) and IAG (an group of airlines that holds the former publicly owned IBERIA).

10 Data for AENA correspond to its annual memory for 2014 expect for workers (where data refer to 2013).

11 Data for RENFE correspond to its annual memory for 2013.

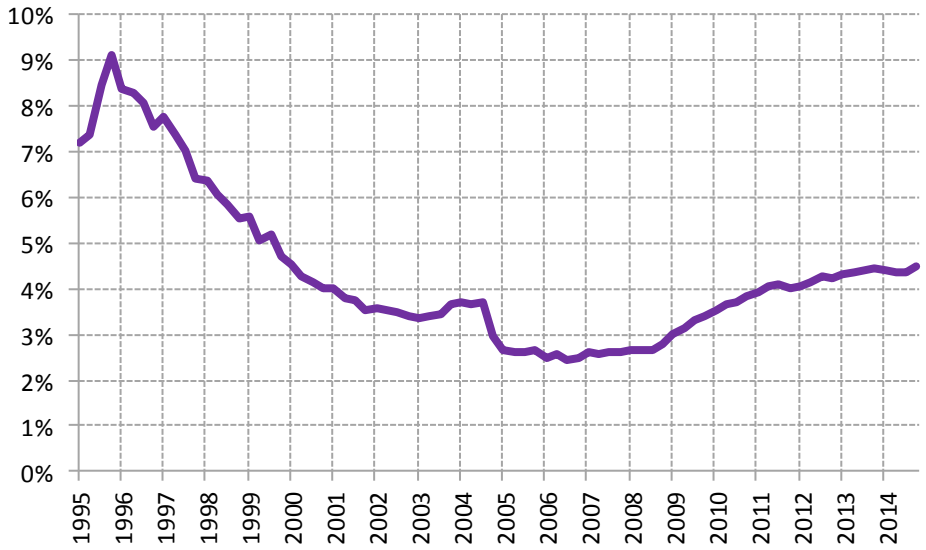
and 14,785 workers. As for Loterías y Apuestas del Estado[12], it has a total revenue of €8.5 billion, a consolidated net result of €1.7 billion and 619 workers.

14. Furthermore, it should be borne in mind that Spain is a very decentralized country and that regional and local entities have created a non-negligible number of firms. In fact, subnational and local governments tend to create more companies, even if smaller, than the central government.

15. Currently, the government has embarked on a process to reform the public sector under the CORA initiative (Comisión para la Reforma de las Administraciones Públicas). The last progress report mentions some achievements in the public sector rationalization, such as a net reduction of 50 firms in the central government and similar efforts at the regional and local level.

16. But beyond that anecdotical evidence, there are not good statistics about the actual presence of SOEs in the economy. Figure 1 aims at measuring it by computing the ratio of public firms' debt (not included in the institutional sector of Public Administration) vis-à-vis total debt of non-financial corporations. This figure shows that, after more than a decade of economic downturn, the share of debt of public firms has increased since the onset of the crisis.

Figure 1. Public firms' debt (as % of total debt of Non-Financial Corporations)

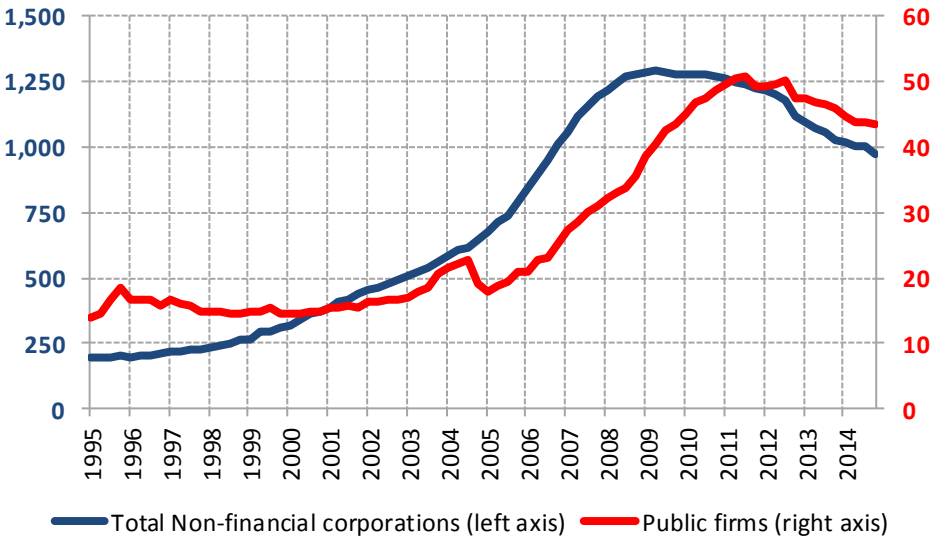


Source: Own calculations using Bank of Spain data (debt is taking on a consolidated basis)

17. Figure 2 disaggregates the two components of the previous ratio. Till 2005, public firms' debt increased very mildly and it lost weight relative to total non-financial corporations'. From 2005 to 2008 both stocks increased in parallel, this is why the ratio is stable during this phase. But since the commencement of the crisis, total non-financial corporations' debt started to decline, while public firms' debt still went on increasing till 2011. And, thenceforth, public firms' debt has fallen more slowly than total non-financial corporations, giving an explanation to the increase of the previous ratio at the end of period.

[12] Data for Loterías y Apuestas del Estado correspond to its annual memory for 2013.

Figure 2. Evolution of debt for Non-Financial Corporations and public firms (€ billion)



Source: Bank of Spain

18. Therefore, SOEs still have clout in the economy. Following the abovementioned outline to categorize competitive neutrality, State intervention can be divided into three areas:

- Nowadays, at least in Spain, competition between public and private firms (beyond network and heavily regulated industries, which will be analysed later on) is mostly a concern in regional and local markets. Some examples of activities affected could be recreational activities, local transportation, water services and, more recently, the deployment of networks and the provision of some telecommunication services by certain public administrations. Even if some of these cases might not be that relevant in size, it is still essential to carry out an effective advocacy policy to minimize these distortions.
- The most important activities where there are still huge SOEs competing directly with private firms are network and heavily regulated industries, such as postal services, freight rail transport, audiovisual services or gaming[13]. There are also other examples of fully publicly monopolized sectors, such as airports and passenger rail transport, where there are as well competitive neutrality concerns, as private firms could exert a pro-competitive and efficiency-enhancing effect should regulation allow their entrance. In those cases, competition authorities are essential, not only to penalize abuses of dominant position but also to prevent them by advocating for an efficient economic regulation which ensures 'competitive neutrality'. Furthermore, these SOEs are relevant in size and could affect not only the whole national market but also markets beyond the domestic one.
- The final area where there are 'competitive neutrality' concerns is public procurement, to the extent that it is not structured in a competitive and transparent manner. This is a concern

13 The financial sector could be subject to competitive neutrality concerns as well. In the past, savings banks tended to compete with private banks, although they were a priori non-profit organizations that did not need to earn profits. However, this proved to be a mixed blessing, as the lack of professionalization resulted in poor management. As a consequence, this model was brought to an end by the financial crisis and by regulatory reforms and most savings banks have become ordinary banks. The crisis has also provoked the nationalization of some credit institutions, although most of them are being privatized again. Competitive neutrality concerns are not addressed here because the intervention was temporary and crisis-driven. Furthermore, the intervention schemes set up provisions to ensure that state aid was used to improve the banking institutions financial health, preventing its use to gain an unfair competitive advantage.

for both central and subcentral governments. The sectors affected are market services, like consultancy, where there are government agencies which take advantage of the direct entrustment of some services, without a competitive and transparent tendering process.

2. Rules and tools to address competitive neutrality distortions available to competition authorities

2.1 Rules/Tools

19. As it has been already explained, 'competitive neutrality' is inherent to (and implicit in) the Spanish and EU competition framework. As the Treaty on the Functioning of the European Union clearly states, competition law applies to SOEs and to private firms entrusted with the provision of a Service of General Economic Interest (SGEI).

20. In this regard the Spanish Competition law applies to conducts by all kind of economic entities (public or private) and in all economic sectors except when those are explicitly exempted by a law.

Article 4. (anticompetitive) Conducts exempted by law.

1. Without prejudice to the eventual application of the Community (EU) provisions regarding competition, the prohibitions of this chapter[14] shall not apply to conducts that result from the application of an Act.

2. The prohibitions of this chapter shall apply to situations restricting competition which are derived from the exercise of other administrative powers or are caused by the action of public authorities or public companies without this legal protection.

21. Spain can rely on two other tools to address competitive neutrality concerns: State Aid control and provisions regarding SGEI and Public Service Obligations (PSOs).

22. As for State Aid, any granting of public resources which confers a selective economic advantage to an undertaking and has the potential to distort competition and trade flows may be declared incompatible with the EU Single Market. Therefore, the ultimate goal of this framework is to ensure competitive neutrality.

23. Meanwhile, when an activity is tagged as a SGEI, some undertakings can be saddled with PSOs, like universal service under certain quality and pricing conditions. These PSOs are a distortion to competitive neutrality if they are asymmetric, especially because PSOs are frequently responsibility of public incumbents which still exist in network industries. They can be a burden when the obligations are excessive and costly, although they could be a privilege if they imply a compensation which exceeds actual costs.

24. That is why SGEIs are subjected to competition law and compensation schemes associated with PSOs might be deemed as illegal state aid. As a consequence, some requisites have to be fulfilled. For instance, the act of entrustment of those PSOs should be transparent and competitive and the compensation has to be cost-oriented.

25. The non-enforcement powers of the competition authority can be divided in three areas: Firstly, there is a general task of advocacy to limit public intervention to those areas where there are market failures or objectives of common interest. This includes market studies, reports on draft laws and even the ability to challenge in the correspondent jurisdiction acts and decisions of Public Administrations that might raise barriers to competition. Furthermore, the Competition Authority has also competences regarding state aid, including reports about individual schemes and an annual

[14] i.e anticompetitive agreements, abuse of dominant position and unfair competition acts that severely affecty competition (articles 1, 2 and 3 of the Competition Act).

review. In this regard, the CNMC is also elaborating a 'Guide on the granting and the evaluation of state aid', which will be released this year (since it is included in the 'CNMC Action Plan for 2015' as the measure 8.5). The advocacy duty is more intense (albeit with the same instruments as the ones mentioned above: studies, reports on draft laws, etc.) in the case of heavily regulated sectors and network industries. In this regard, it is important to recall the potential synergies brought by the integration of the Competition Authority with sectorial regulators, in order to ensure that regulation is understanding towards the preservation of a competitive environment. Some of the recent advocacy work by the Competition Authority has affected these sectors:

- Railway:
  - A study on competition in rail freight transport in Spain (2013) looked into a sector which is a priori liberalized but where the public incumbent (RENFE-Operadora) still enjoys a market share in the range of 80%-90%, partly due to the lack of competitive neutrality. In this regard, the main concern is the risk of crossed subsidies coming from non-liberalized activities, like passenger transport. Furthermore, the firm with a dominant position in the upkeep of stock is an affiliate of RENFE. Finally, there are many *grandfather clauses* which benefit RENFE vis-à-vis its competitors, like an automatic legal validation of RENFE's rolling stock and personnel and a preferential use of the network by RENFE in the event of congestion.
  - A discussion paper on the process for liberalizing rail passenger transport (2014) suggested a pro-competitive strategy for this subsector. Firstly, appropriate accounting practices must be adopted to prevent the potential for crossed-subsidies between the different branches of the public incumbent (RENFE-Operadora). Secondly, the liberalization strategy may be progressive but it should give certainty to public operators through a binding calendar and the opening of corridors with the highest demand and potential profitability. Thirdly, PSO services must be liberalized through public tendering, which creates ex ante and ex post competition, instead of opting for automatic entrustment. And last but not least, all *grandfather clauses* which benefit RENFE vis-à-vis its competitors should be eliminated. Relying on this discussion paper, the 'CNMC Action Plan for 2015' includes the advocacy for a transparent and timely disclosure of the liberalisation timetable in order to ensure effective competition (measure 1.32).
  - A recent report[15] on the draft Law on the railway sector (approved by the Government and now before the Parliament) analyses the potential improvements of this new framework and its shortcomings. The main strength is the liberalization of PSO services through a transparent and non-discriminatory public tendering, although the draft Law still considers cases where a public entrustment could be admitted (where annual costs are below €1 million, where there are not potential competitors or in densely populated areas). Other positive aspects are the enhancement of transparency for the infrastructure owners and the elimination of the access toll (which generated a barrier to entry). Among the limitations, the CNMC report stresses the need for RENFE to allow access to its rolling material and its maintenance services, to adopt appropriate accounting practices (allocating net profits to each corridor) and to address the risk of aggressive commercial practices. The draft Law does not set a clear agenda for liberalization (which ideally should include corridors with the highest demand and potential profitability) nor does it make any progress on detaching RENFE from the Ministry of Development.
- Airports:
  - A study on the situation of airports in Spain and its prospects for liberalization (2014) analysed the abnormal situation of AENA, the public corporation which owns the whole

15 The CNMC report had not been released yet at the moment of preparing this contribution.

network of 46 airports. This has led to an over-capacity (which is perceived as a barrier to entry in a sector that already has many other economic and technical barriers), inefficient centralized decisions on fares and a lack of development of commercial revenues. Against this background, the study urged the government to adopt a decisive liberalization strategy, dividing the airport network in lots and allowing the entrance of private capital so that these groups of airports could compete among them.

- A report on the last regulatory reform by the government (2014) pointed out its limitations. Even if the new framework has facilitated the entrance of private capital in AENA, the absence of division in lots keeps the sector away from competition and perpetuates cross-subsidies between airports. The CNMC report also alerts of the potential violations of competition law in the system of discounts (be it because of an abuse of dominant position or be it due to illegal state aid).

- Postal services:

  - A report (2010) and a study (2011) on the current regulatory framework of postal services warned about competitive neutrality concerns. The public incumbent (Correos) was entrusted with the universal postal service (UPS) for a period of 15 years, instead of considering the selection of one or more firms through public tendering and the division of the market into geographic lots. Correos enjoys some competitive advantages, like tax exemptions or the presumption of veracity in administrative notifications, and potentially some disadvantages, given the lack of updating of conditions to be included in the UPS. Complexity of PSOs reduces transparency in the computation of the compensation to Correos as the UPS provider, creating risks of an excessive or an insufficient remuneration, jeopardizing in any case competitive neutrality. In response to these concerns the 'CNMC Action Plan for 2015' includes several projects linked to the UPS (measures 1.33 to 1.35 and 7.4) and to the assessment of general competition in this sector (measure 7.6).

  - A recent report (2014) focused on the specific activity of postal services to be provided during an electoral process. These where entrusted directly to Correos, but the report pointed out that, regardless of the consideration of PSOs, they could and should be subjected to a competitive, transparent and non-discriminatory tendering.

- Audiovisual services:

  - A report (2009) explored the current regulatory framework of audiovisual services, where the provisions to ensure competitive neutrality are insufficient. In particular, the report alerted on risks of potentially excessive bids for premium content by RTVE (the State broadcaster). This same report (and a previous one) also examined the financing of the RTVE. In order to avoid the consideration of this regime as illegal state aid, the report suggested setting the amount of the compensation depending on a benchmark estimate of 'efficient costs'. Conversely, the new financing model established contributions by other TV and telecommunication service providers, which were bound to take advantage of the removal of advertising in RTVE. But regional and local operators (which are mostly publicly owned) were exempted from these contributions, harming competitive neutrality.

  - In a similar vein, a more recent report (2012) zoomed in on a reform to increase flexibility of publicly owned regional audiovisual service providers. The report deemed this reform promising, given the sector's high and growing dependence on subsidies. At the same time, the report suggested pondering principles of public procurement to select private partners or beneficiaries from the concession.

26. As for the last dimension of competitive neutrality, related to procurement, the advocacy mission of the Competition Authority can be found in these projects:

- A specific study addressed the issue of in-house providing and commissioning (2013), given its negative impact on competition. On the one hand, the relationship between the in-house provider and the public administration is absent of competitive pressures. On the other, the in-house provider can take advantage of benefits coming from its privileged transactions with the public sector to compete in private markets. Therefore, the study recommended[16] assessing carefully the mere existence of the in-house provider and justifying, on a case by case basis, the commissioning of any transaction instead of its direct provision by the market through public tendering.
- Finally, a field which deserves further work is the one of private production of public services, like health care and education. In Spain, there is a very specific regime of free provision of these services by private centres, following a direct entrustment by the public sector which includes a compensation (*concierto*[17]). In health care, this may give rise to 'competitive neutrality' concerns, as health care centres can carry out private activities as well. In education, there are also claims by centres which develop private education, given that school centres which take advantage of the *concierto* may raise their revenues providing other services (optional non-purely education activities, like sports) and implement crossed-subsidy strategies.

2.2 Challenges

27. Sectorial regulators do have powers related to competitive neutrality. However, they do not collide with the Competition Authority competences, as competition policy in Spain is cross-cutting and the Competition Authority enjoys the same competences in every sector, regardless of the presence of a regulator.

28. Furthermore, it is worth recalling that the Competition Authority has integrated with the sectorial regulators under the common umbrella of the National Markets and Competition Commission. This is offering an appropriate venue to integrate competition considerations into regulatory decisions.

29. Some of the competitive neutrality issues related to sectorial regulators are the following:

- Telecommunications: the deployment of networks and the provision of electronic communication services by certain Public Administrations must abide by state aid rules and by the market economy investor's principle, carrying appropriate accounting practices so that the costs and benefits of its intervention are transparent[18].
- Postal services: the postal regulator must monitor and safeguard the provision of the universal postal service. At the same, it has to examine the accounting of the undertaking entrusted with this duty and compute a fair compensation for it[19].

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16 The draft Law on the Judicial Procedure of the Public Sector (currently before the Parliament) has adopted some of these recommendations, especially by urging a justification for the creation of an in-house provider. However, there is still the need to justify, case by case, the resort to in-house providing for any specific transaction. Furthermore, it is also pending the adaptation to Article 12.1.b) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, which states that direct entrustment can only take place where at least 80% of the controlled legal person activities carried out in the performance of tasks entrusted to it by the controlling contracting authority.

17 See article 116 of the Organic Law 2/2006, of May 3rd, on Education and article 90 of Law 14/1986, of April 25th, on Health Care.

18 See Article 9 of Law 9/2014, of May 9th, on Telecommunications.

19 See Article 8 of Law 3/2013, of June 4th, creating the National Markets and Competition Commission.

- Audiovisual services: the regulator must monitor the public service mission entrusted to the providers of audiovisual communication services at a national level. In addition, it has to assess the adequacy of public resources devoted to this aspect[20].
- Railway: the regulator must safeguard variety of supply in services covered by the railway network of general interest. In general, it has to ensure that the sector develops according to transparent and non-discriminatory conditions[21].

3.- Spanish competition law enforcement

30. The Spanish Competition law is enforced to every undertaking /(public or private) and economic sector, and only practices exempted by a law (no by rules with lower rank than law) can scape to competition law requirements. (Article 4 of the Spanish Competition Law (LDC))

31. In this regard the application of Competition Law to SOEs is out of question and does not raise any specific problem.

32. Problems arise when we talk about public entities that cannot easy be regarded as undertaking but that run economic activities such for example the Administration or certain public entities that depend of it

33. Accordingly the Spanish experience on enforcement related to public entities can be summarized as follows:

- Analysis should be made case by case, there are no general rules.
- It is necessary to determine if, on the analyzed case, the public Administration is acting as a market operator or not.
- In case of public administration is acting as a market operator, it should be analyzed if the denounced practices are anticompetitive or not and if they are or not exempted by a law.

34. As example on sanctioning cases, where public bodies were directly active as a market player and distorted the playing field we might mention:

- JEREZ WINES REGULATORY BOARD SALES QUOTA ARRANGEMENTS. Case nº 2779/07

  The Resolution dictated by the Council of the National Competition Commission (CNC) resolved the formal proceedings as a result of the complaint brought against the JEREZ WINES REGULATORY BOARD (Consejo Regulador) by the wine seller CAYDSA), plus two other late complainants (Bellavista, SL and Zoilo Ruiz Mateos, SL.

  The Jerez Wines Regulatory Board adopted some arrangements to implement a stabiliser mechanism in the sector based on sales quotas and not on product quality and identity, therefore lacking the necessary legal justification. The arrangements were declared anti-competitive because they are based on the historical sales levels of each distributor of this designation of origin, and thus constrain competition and restrict their freedom of trade.

  The Regulatory Board had thus engaged in an anticompetitive conduct prohibited by article 1 of Spanish antitrust law (Defense of Competition Act 16/1989 and Competition Act 15/2007), and by article 81 of the Treaty establishing the European Community, given that a

[20] See Article 9.8 of Law 3/2013, of June 4th, creating the National Markets and Competition Commission.

[21] See Article 10 of Law 3/2013, of June 4th, creating the National Markets and Competition Commission.

very large portion of Jerez wines are distributed in European Union countries, where trade would be presumably affected by the arrangements that were investigated in the complaint, according to the CNC Council.

Given the gravity of the violation, involving an agreement between competitors with the aim of restricting competition between distributors and sellers of wines of this designation of origin, the CNC Council decided to levy a €400 000 fine on the Regulatory Board of the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda"

On 15 July 2008 the CNC Council had already ordered that interim measures be taken against the Regulatory Board's sales quota arrangements for the 2007/2008 marketing campaign. The resolution was appealed before the revision Court (Audiencia Nacional) and the Court upheld the resolution, although it reduced the fine to €100 000.

- TOWN COUNCIL OF BENASQUE. Case nº 535/02

Electric Eriste, S.L. filed a complaint against the Town Council of Benasque for alleged restrictive practices of competition in awarding the said Town Council of electricity distribution service in the River Area 2 of the municipality. Both entities (Town Council and complainant) acted as operators in the municipal electricity distribution markets. The Competition Authority considered that the Town Council breached Article 14 of Law 40/1994 on the Regulation of the National Electricity System, which requires the legal separation of generation and distribution activities, obtaining a competitive advantage over the complainant. In addition, the Competition Authority considered that in the bidding process the Town Council took advantage of its participation in the Compensation Board (board for municipality public procurements) for not submitting its financial offer by writing, , making it verbally and later. These behaviors were considered unfair (Article 15.1 of the Law on Unfair Competition) and seriously distorting to the market, affecting the competitive process and therefore infringing Article 7 of the Spanish competition Act (Act 16/89) which prohibited unfair acts that severely distort competition. The Town Council was fined with €30 000.

- TOWN COUNCIL OF PALMA DE MALLORCA. CASE 650/08.

The Association of Funeral Services Companies and two individual companies (Lloret Balearic and Ortega Funeral services Soller) filed a complaint for practices prohibited by Article 6 of Law 16/1989 (abuse of dominant position) against the Town Council of Palma de Mallorca, the Municipal Funeral Company (EFMSA) and the Town Council of Sóller, namely that the Municipal Funeral Company has abused its dominant position in cemetery services in Palma de Mallorca Marratxi, to protect its activity versus actual or potential competitors..

It was proved that the measures taken by Town Council of Palma de Mallorca, concerning EFMSA, represent a strategy to maintain a monopoly on funeral services in Palma de Mallorca against other competitors. No other companies were licensed to operate in that municipality, and EFMSA hampered the activity of any other funeral company for transport to other cemeteries.

The CNC' Council considered that the EFMSA had used his position to protect from other competitors wishing to celebrate funeral services in Palma de Mallorca. The Council of Palma de Mallorca, as owner of EFMSA, was considered partly responsible for that breach. The file contains clear and convincing proves that the Town Council of Palma de Mallorca has determined the conduct of EFMSA. EFMSA behavior was fined with €500 000. Moreover, the Town Council of Palma de Mallorca was jointly responsible as owner of EFMSA, and for the decisions taken in its favor.

The CNC decision was upheld by Court on first (Audiencia Nacional) and second instance (Supreme Court).