

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Competition Issues in Aftermarkets - Note by Spain

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/aftermarkets-competition-issues.htm*

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1. Introduction

1. The objective of this paper is to contribute to the proposed discussion in the roundtable, sharing six antitrust cases which affected aftermarket issues, and which have been analysed by the Spanish Competition Authority¹ in the last few years.
2. Those antitrust cases have been tackled using different antitrust instruments in Spain: anticompetitive agreements (market sharing/discrimination/non-competition), abuse of dominant position (refusal to supply/margin squeeze) and unfair competitive practices (providing misleading information).
3. Four cases took place in the lifts sector. The other two cases affected vehicle washing machinery and GSM-R² equipment. These cases have been chosen due to especial circumstances relevant for market definition in aftermarket or for market power assessment.
4. In each case we provide a brief description of the complaint, a short summary of the relevant markets and a brief assessment, including the main issues arisen from the investigation and how the CNMC has tackled them.
5. Market definition is an essential exercise and sometimes becomes a rather difficult task in aftermarket cases.
6. In these cases it is not so easy to differentiate primary and secondary markets and vertical integration of the main operators complicates the analysis, as the structure of one market usually conditions the structure of the other.
7. In any case, when there is a specific and differentiated demand for just aftermarket services, the CNMC has opted to define narrow secondary markets. In particular, the supply of original spare parts of a manufacturer or even the supply of specific technical information and support services of each manufacturer products can become a differentiated relevant product market.
8. Another common point in several of the submitted cases is the essential nature of the product/service provided by the operator in the primary market to compete effectively on the downstream market.
9. These narrow product market definitions have allowed the CNMC to identify the existence of high market shares, have made easier to justify the existence of market power (even dominant positions) and were very relevant in the analysis of the anticompetitive effects of the investigated practices.
10. Regarding the abuse of a dominant position cases, the CNMC could verify that the dominant company had abused from its position in the market, as the primary product/service was essential to compete, no alternative sources of supply existed and there was no objective justification for the exclusionary practices.

¹ The current name is Comisión Nacional de los Mercados y la Competencia (CNMC) and the former one, Comisión Nacional de la Competencia (CNC). Both names can be used equally in this paper.

² Global System for Mobile Communications - Railway

11. Finally, the CNMC has based its approach in these cases taking into account the potential effects of the exclusionary conduct. According to the applicable case law in Spain, it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors (or make more difficult the entry or the expansion of those competitors in the concerned aftermarket), leading to probable consumer harm, in form of less competitive alternatives or higher prices.

2. Relevant Recent Aftermarkets Cases in the Spanish Jurisdiction

2.1. Cases in the lifts sector

Relevant markets

12. The CNC has analyzed this sector several times in antitrust and merger procedures and has considered the following relevant markets:

- Manufacturing and commercialization of lifts and other elevators (escalators)
- Manufacturing and commercialization of spare parts (original spare parts)
- Maintenance and repair of lifts and other elevators

13. The lift maintenance business in Spain can be outlined by the following features: (i) a high level of concentration from the supply side³; (ii) customers hardly shift from a maintenance company to other, and they often are kept bound to the company that installed their lift for its maintenance; (iii) the relatively long duration of most of the maintenance contracts (in many cases the first maintenance contract signed by the developer or contractor of the building is routinely extended by the new building owners) and (iv) a closer dependence of many maintenance companies on manufacturers and installers for the supply of specialized tools and spare parts they need for their business.

14. These features of the Spanish market help to explain why the degree of effective competition among different companies is frequently very low in this market.

15. To this respect it is necessary to point out the major role technological and technical advances in the design and construction of new lifts are playing in the relationship between maintenance companies, on one hand, and manufactures and installers, on the other, whose first effects are the narrowing of the existing competition. The technology “card” provides manufacturers and installers with a huge competitive advantage (they control the new technological improvements) and contributed to strengthen the vertically integrated structure of many of them, increasing significantly their market position and status.

16. Most of the antitrust cases in Spain in this sector are related to misconducts of manufacturers and installers, who are vertically integrated, towards independent maintenance companies and independent dealers. Those misconducts are generally: (i) refusal to supply spare parts (ii) advertising campaigns intended to confuse customers with misleading information about the technical inability of competitors (iii) unfair practices to reduce competition.

17. Case description in Annex 1.

³ Most of the merger operations that took place in the Spanish market during the last years have been take-overs and acquisitions of small or medium size companies operating in the market for maintenance and repair of lifts and other elevators.

2.2. S/DC/0557 NOKIA (GSM-R equipment)

Background

18. On July 2014, ADIF (the only railway network operator in Spain) issued a tender for the maintenance and evolution of several communications technologies in its railway network, among them GSM-R, with a duration of 10 + 2 years. The contract would replace sixteen previous maintenance contracts related to different high speed corridors in Spain, then in force but with due date in the next eighteen months, and two kind of activities: maintenance services and renewal of equipment to keep the technologies updated.

19. The tender, mainly aimed at reducing costs and homogenize solutions, requested bidders two kind of documents as regards GSM-R technology. An interoperability certificate ensuring interoperability between products of various vendors and a letter of support from the manufacturer of the equipment owned by ADIF ensuring its maintenance.

20. The contract was awarded to the only bidder, Nokia Solutions and Networks Spain⁴ (NOKIA).

Complaint

21. On May 2015, Kapsch Carriercom Spain⁵ (Kapsch) presented a complaint against NOKIA. Kapsch alleged that Nokia enjoyed a dominant position in the market of GSM-R equipment in Spain and had abused of it through its refusal to supply the letter of support mentioned above and through an economic proposal for this support⁶ at a wholesale price which would have caused a margin squeeze to Kapsch. Accordingly, Kapsch did not bid finally as, in its view, it would have caused losses.

22. After a preliminary investigation, the CNMC decided to initiate formal proceedings against NOKIA and sent a Statement of Objections to the company, which focused on NOKIA's economic proposal submitted to Kapsch and the alleged abuse of dominant position, under the form of a margin squeeze⁷.

23. The resolution of this case is pending at the moment of drafting this contribution, but it will be issued before the roundtable takes place.

Relevant markets

24. GSM-Railway or GSM-R is a digital cellular network that is a derivative of the GSM cellular standard and is specifically dedicated for communications between staff, trains and control centers. The GSM-R system is composed of two subsystems. The

⁴Nokia Solutions and Networks Spain is the Spanish subsidiary of Nokia Solutions and Networks, a global technology leader.

⁵ Kapsch Carriercom Spain is the Spanish subsidiary of Kapsch Carriercom. As an end-to-end GSM-R solution provider, Kapsch offers an extensive portfolio of products and services that covers all aspects of the GSM-R system, including radio access elements, core network and others.

⁶ The support includes level 2/3 of maintenance. There are three levels of maintenance: level 1 is very simple and can be provided by any company in the sector but level 2/3 can be provided only by the manufacturer.

⁷ It couldn't be proved that the letter of support was essential, as the tender documents considered that in the lack of it, the awardee could replace the technology of its competitor, cost free to ADIF, by its own technology.

network switching subsystem (NSS or core system), which includes mobile switching controller (MSC) and other elements, and the base station subsystem (BSS), which includes base transceiver stations (BTS), along the tracks, and base station controllers (BSC), nearby MSC.

25. ADIF's GSM-R network includes NSS, with NOKIA technology, and BSS, with NOKIA (80%) and Kapsch (20%) technology, which have passed interoperability tests among them. They are the only two certified suppliers in Spain, and ADIF is the only purchaser.

26. As regards GSM-R technology, all tenders of ADIF, up to the 2014 one, included not only the deployment of the different equipment and technologies but also its maintenance for a period of time.

27. However, in the 2014 tender, just one provider of maintenance services was requested for the maintenance of equipment and technologies of two different manufacturers (NOKIA and Kapsch). Later on, during the implementation of the tender, the winner should also upgrade part of the equipment.

28. Therefore, in principle, any bidder needed the support and the wholesale services of Nokia and Kapsch in order to participate and win the 2014 tender, which covered almost all ADIF's needs with the GSM-R technology for the next 12 years.

29. In view of the above, the preliminary proposal of the CNMC has considered the existence of the following relevant markets in Spain:

- Manufacturing and supply of GSM-R network equipment (BSS & NSS)
- Wholesale support for the maintenance of NOKIA's GSM-R network equipment
- Maintenance of ADIF's GSM-R network equipment

Assessment

30. The preliminary proposal of the CNMC assessed if NOKIA had incurred in an abuse of a dominant position.

31. Firstly, the preliminary proposal of the CNMC stated that NOKIA had a clear dominant position in the markets of maintenance of GSM-R network equipment and wholesale support for this maintenance, which are vertically related. Nokia holds a very high market⁸ share in the manufacturing and supply of GSM-R technology in Spain, so that ADIF is highly dependent on NOKIA, as maintenance is essential for a proper operation of the network and for safety reasons⁹. Moreover, it would be costlier for ADIF to replace NOKIA's deployed technology and, finally, the weight of ADIF in the GSM-R worldwide revenues of NOKIA is very small.

32. Second, the preliminary proposal of the CNMC assessed if NOKIA's pricing decisions in the run-up to the tender, on the one hand, the wholesale prices offered to Kapsch for the support (level 2/3) of its GSM-R technology (and the refusal to provide a support letter) and, on the other hand, the retail prices offered in the tender for the maintenance of ADIF's GSM-R equipment, might constitute an abuse of its dominant

⁸ About 80% before 2014 tender. In addition, all the corridors already awarded but not yet operating at that time were going to be equipped with Nokia technology.

⁹ GSM-R is an element of the European Rail Traffic Management System (ERTMS), an overall advanced and interoperable train signaling and communication system.

position, by generating a margin squeeze without an objective justification, which excludes Nokia's only real competitor in the 2014 tender, Kapsch.

33. In particular, the preliminary proposal of the CNMC assessed that the margin squeeze excluded Kapsch from the 2014 tender, which covered almost all the secondary market for the maintenance of ADIF's GSM-R network equipment for the next 12 years.

34. According to case-law, a margin squeeze exists if the difference between the retail maintenance price and the wholesale support cost of the dominant undertaking does not cover the remaining retail costs, so that it would not be profitable for a competitor at least as efficient as the dominant undertaking to provide the maintenance service to final consumers. A margin squeeze test requires, therefore, a comparison between expected income from the provision of GSM-R maintenance service and its retail and wholesale costs.

35. The preliminary proposal of the CNMC considered that the support offered by NOKIA was indispensable to enter/to develop maintenance activities on the retail market. As a consequence of ADIF's request in the 2014 tender, just one provider should cover maintenance services for both Nokia's and Kapsch GSM-R equipment.

36. Moreover, due to the weight of Nokia's equipment in ADIF's GSM-R network, it was not viable for an alternative competitor offering to change Nokia's equipment in order to avoid Nokia's wholesale support. Therefore, there were no alternative sources of supply. In this particular point, the preliminary proposal of the CNMC took into account the particular conditions of competition in the secondary market where there are only two players with asymmetric market shares. Finally, the preliminary proposal of the CNMC considered that ADIF'S tender represents a very substantial part of the market of maintenance of GSM-R equipment in Spain for the next 12 years.

37. The preliminary proposal of the CNMC concluded that NOKIA's conduct, from its position of dominance, caused a margin squeeze, which would have excluded, at least potentially, unjustifiably, in the tendering procedure of ADIF in 2014, the sole competitor of NOKIA capable to provide this retail service of maintenance of GSM-R equipment's in Spain.

38. According to case law, the practice must have an anticompetitive effect on the market, but the effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors (or make more difficult the entry of those competitors onto the market concerned).

39. The fact, alleged by NOKIA, that Kapsch was not really excluded from the market as it was awarded a new contract after 2014 tender, due to its competitive prices, was not considered by the preliminary proposal of the CNMC as a relevant element to reverse the existence abuse of a dominant position. As mentioned above, it is only necessary to demonstrate that the pricing practice produces an anticompetitive effect, at least potentially. Furthermore, the CNMC considered that Kapsch's capacity to compete in the market is questioned when it relies on a wholesale offer by the dominant undertaking, which is the case in the 2014 tender, and not when it depends in itself to bid, which is the case in the tender awarded¹⁰.

¹⁰ The tender covered the deployment and maintenance of GSM-R technology in a new corridor

40. The preliminary proposal of the CNMC considered, finally, that even if NOKIA's prices in 2014 tender would have been lower than in other tenders, as alleged by NOKIA, it does not mean that the prices are objectively justified. The preliminary proposal of the CNMC found that lower prices might be due to NOKIA's large scale or to the inclusion of several technologies and several corridors, as is the case in 2014 tender. In addition, the preliminary proposal of the CNMC found that in those tenders with real competition between NOKIA and its competitor, NOKIA's offer was well below maximum tender prices, while in the 2014 offer it was only 1% lower than the maximum tender price. Thus, ADIF costs in the 2014 tender could have been lower if Nokia had not excluded competition in this tender with its conduct.

2.3. S/DC/0540 ISTOBAL (Vehicle washing machinery)

Complaint

41. On May 2014, the CNMC received a complaint from a company dedicated to the maintenance and repair of vehicle washing machinery and equipment against ISTOBAL¹¹. After a preliminary investigation, the CNMC initiated formal proceedings against ISTOBAL considering it was incurring in anticompetitive agreements and abuse of dominant position through its refusal to supply spare parts and technical information to independent technical assistance services (SATs), and the share-out of the market of repair and maintenance services with its authorized SATs.

Relevant markets

42. In addition to the market of manufacturing and commercialization of vehicle washing machinery and equipment, the CNMC considered there was sufficient evidence to prove the existence of a differentiated market for spare parts of ISTOBAL's washing machinery and equipment. These spare parts are tailor-made pieces and essential for the functioning of the washing machines manufactured by ISTOBAL. Thus, these pieces do not have actual or potential substitutes in the market.

43. In view of the above and of the activities of ISTOBAL, the CNMC considered the following relevant markets:

- Manufacturing and commercialization of vehicle washing machinery and equipment
- Manufacturing and commercialization of spare parts of ISTOBAL's vehicle washing machinery and equipment.
- Repair and maintenance services of vehicle washing machinery and equipment

Assessment

44. The CNMC assessed if ISTOBAL had incurred in anticompetitive agreements and abuse of a dominant position. Regarding anticompetitive agreements, CNMC proved the existence of an agreement to refuse the supply of spare parts and technical information to independent SATs, and a market-sharing agreement between ISTOBAL and its authorized SATs.

¹¹ ISTOBAL is a Spanish undertaking that manufactures and commercializes vehicle washing machinery and equipment. It also provides technical assistance services for these machineries and equipment through its authorized SATs and itself.

45. The refusal to supply such pieces took place through (i) an implicit agreement between the third-party manufacturers (who exclusively manufacture pieces for ISTOBAL) and ISTOBAL itself. According to this agreement, these manufacturers were not allowed to supply spare parts to independent SATs. And (ii) an implicit agreement between ISTOBAL and its authorized SATs not to supply spare parts to independent SATs. From the competition viewpoint the criteria demanded by ISTOBAL for the supply of these spare parts (customers and owners of ISTOBAL machinery) are not justified, because they are arbitrary requirements and are intended to prevent independent SATs to provide maintenance and repair services for ISTOBAL's vehicle washing machinery and equipment owners.

46. In addition, in 2008 ISTOBAL began to supply relevant technical information to repair its vehicle washing machinery and equipment through the platform ISTOSATTA, to which just authorized SATs had access.

47. In the case of the market sharing agreement, it was proved that each authorized SAT could only sell spare parts to those customers and owners of ISTOBAL machinery and equipment located in its assigned area. ISTOBAL itself was responsible for the supply area in those geographical zones without an authorized SAT. In this way, independent SATs did not have access to the market because authorized SATs were not allowed to supply them with spare parts and ISTOBAL refused to supply them.

48. Regarding article 2, abuse of a dominant position, two conditions must be fulfilled simultaneously: the undertaking must have a dominant position in the relevant market, which allows it to act independently of other relevant operators in the market, and its conduct must be abusive and significantly distort competition (at least at a potential level).

49. Firstly, the CNMC stated that ISTOBAL had a clear dominant position in the market of manufacturing and commercialization of spare parts of its own brand as they are pieces that can only be obtained through ISTOBAL. As mentioned above, they are an indispensable input for the proper functioning of its washing machines and there are no real or potential substitutes for these pieces in the market.

50. Second, the CNMC stated that ISTOBAL, from its dominant position, denied the supply of such parts to independent SATs through ISTOBAL itself, its authorized SATs or third-party manufacturers, with which it had exclusivity agreements, thus excluding independent SATs from the provision of maintenance and repair services for ISTOBAL's vehicle washing machinery and equipment owners.

51. This conduct implies a reduced choice of repair shops for owners of ISTOBAL machinery and washing equipment, resulting in a potential risk of higher prices and its transfer to final consumers.

Annex 1 - Cases in the lift sector

S/0302/10 ORONA/OMEGA

Ex-officio: In the aftermath of a merger in which the Spanish lift manufacturer and installer ORONA took over OMEGA's installation, maintenance and repair division, ORONA and OMEGA signed an addendum to the sale agreement for OMEGA to restrict the sale and supply of equipment and spare parts to its customers. ORONA claimed this addendum should be considered as a part of the non-competition clause laid out in the sale agreement and therefore a legal instrument under the umbrella of the regulation on economic concentrations of undertakings.

The CNC considered, on the contrary, that the addendum went far beyond the scope of the non-competition clause and was an infringement of the competition rules.

Assessment: The CNC assessed if ORONA and OMEGA had incurred in anticompetitive agreements.

Before sending a Statement of Objections, both parties submitted a joint commitment, which was accepted by the CNC: the addendum of the sale agreement was removed and OMEGA could sell and supply equipment and spare part to its customers without any restriction. The CNC ended the investigation with a commitments decision.

S/0502/14 ORONA/EXCELSIOR

Complaint: On November 2013, the CNC received a complaint against ORONA and EXCELSIOR from a provider of spare parts to maintenance companies. After a preliminary investigation, the CNMC initiated formal proceedings against both companies, considering they could be abusing their dominant position through its refusal to supply spare parts to independent wholesalers who resell them to maintenance companies.

Assessment: The CNC assessed if ORONA and EXCELSIOR had incurred in an abuse of a dominant position.

Many maintenance companies prefer to rely on independent wholesalers for the supply of spare parts, since the manufacturers typically ask them for details of the location of their customers' lifts. This is seen as a way to constrain effective competition in this market, as this commercial information is very sensitive. In order to reverse this practice, ORONA and EXCELSIOR submitted some commitments to the CNC, pledging to offer the same price, delivery and commercial terms to both maintenance companies and wholesalers (resellers) without asking the first ones for details of their customers' lift location. The CNMC ended the investigation with a commitments decision.

S/0410/12 ASCENSORES 2

Ex-officio: On April 2012, the CNC initiated formal proceedings¹² against some companies operating in the markets of manufacturing, commercialization and maintenance of lifts, regarding a possible anticompetitive behaviour consisting on sending misleading information about competitors to customers, in order to reduce

¹² This investigation started after consultations and complaints of some agents and consumers.

competition in the market of maintenance, and thus, incurring in unfair competitive practices, which distorted competition.

Assessment: The CNC assessed if several vertically integrated companies, ZADOYA OTIS, SCHINDLER, ASCENSORES ENINTER and ASCENSORES IMEM had incurred in unfair competitive practices.

Those vertically integrated companies were found responsible for unfair and anti-competitive practices such as sending mailings to customers containing distorting and misleading information about non-vertically integrated competitors in the lift maintenance and repair market. The main purpose of these mailings seemed to be discouraging costumers to seek maintenance companies other than theirs. The above mentioned companies were heavily fined by the CNC as result of this anti-competitive conduct.

S/DC/0522/14 THYSSENKRUPP

Complaint: On September 2014, the CNMC received a complaint from a consumer against THYSSENKRUPP. After a preliminary investigation, the CNMC initiated formal proceedings against this company considering it was incurring in unfair competitive practices through the same practice for which the previously mentioned companies had been fined (S/0410/12 ASCENSORES 2). The practice was the delivery of misleading mailings to some customers with the purpose of getting rid with its competitors in the maintenance and repair market.

Assessment: Before sending a Statement of Objections, THYSSENKRUPP submitted two commitments in order to dissipate the competition concerns arisen from its investigated conduct. The first commitment was to send a letter to the whole commercial network warning its managers that any mailing or writing addressed to customers with contents infringing competition rules will under no circumstances be allowed by the company. The second one was to publish on its newsletter (on paper and on-line) some guidelines about how to conduct commercial communication with customers in line with the competition rules. The CNMC accepted both commitments and ended the investigation.