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English - Or. English

5 November 2020

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

The Role of Competition Policy in Promoting Economic Recovery – Note by Spain

2 December 2020

This document reproduces a written contribution from Spain submitted for Item 2 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/promoting-economic-recovery.htm>

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JT03467989

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1. This contribution addresses the Role of Competition Policy in Promoting Economic Recovery, a topic that will be discussed at a roundtable at the forthcoming OECD Competition Committee meeting in December 2020.
2. All economies are facing serious challenges due to the COVID-19 crisis. Although there is a high degree of uncertainty, forecasts suggest that the economic crisis is likely to have a major and long-lasting economic impact. One of the most cheap and efficient policy options to contribute to a fast, inclusive and sustainable recovery is to promote competition and efficient regulation.
3. Competition and efficient regulation deliver great benefits at a low budgetary cost: they promote an optimal use of scarce economic resources, boost firms' productivity and production levels, multiply business opportunities and create more and better jobs. They facilitate cheap, varied, high quality goods. They also accelerate the adoption of new technologies, and encourage both innovation and training. Finally, more competitive and innovative firms tend to succeed in international markets, increasing foreign income, profits, investment and employment. All this, moreover, works as a virtuous circle, since a competitive and innovative company will spur its competitors to compete and innovate. These benefits boost growth and accumulate overtime, vastly increasing prosperity in the long run.
4. Competition authorities are particularly well positioned to defend and promote competitive markets and efficient regulation. First, they have the power to enforce competition laws vigorously to curb anticompetitive conducts. Second, they can prevent undesirable market concentration through merger control. Third, competition authorities can assist policymakers to both promote pro-competitive structural reforms and prevent unjustified regulatory barriers. Fourth, they can educate society about the importance of competition and efficient regulation. Last, these authorities can help preserve competitive neutrality in the use of public funds and in public procurement. This is particularly relevant in the EU, since different state-aid levels could distort competition within the single market.
5. Competition policy can thus play a key role in promoting economic recovery, and therefore it is fundamental to analyse in detail the concrete measures that competition authorities could adopt. For that purpose, this note is structured as follows¹. The first part analyses "*The 'new normal': a challenging scenario for competition authorities*". The second part addresses "*What has CNMC done so far during the pandemic?*". The third part answers "*How can competition policy promote a strong economic recovery?*". Finally, section four summarizes the main conclusions.

1. The 'new normal': a challenging scenario for competition authorities

6. The Covid-19 pandemic has created a major health and economic crisis. Focusing on the economic crisis, the consequences of the pandemic are devastating: since the start of 2020, lockdowns have affected more than half the world's population, hundreds of millions of people have lost their jobs, and, according to the World Bank, 100 million

¹ This contribution seeks to cover the most relevant questions for the CNMC raised in the Call for Contributions by the OECD (on August 10th 2020) regarding this roundtable.

people could have fallen into extreme poverty. Some sectors, such as transport or tourism, have reduced their activities to minimum levels, and uncertainty is hindering recovery.

7. In this situation, governments and central banks around the world have implemented major stimulus plans to minimize the short-term impact of the pandemic and boost long-term economic recovery. These plans have three main objectives. First, avoid bankruptcies of viable firms due to liquidity shocks. Second, minimize job destruction. Third, prevent households from falling into poverty. To achieve these three goals, policymakers have resorted to ultra-expansive monetary policy, the provision of public guarantees and bailouts for private firms, bold job retention schemes and new basic income programs, among other measures.

8. Spain has been no exception to this: To fight the downturn, among other measures, the Government put in place a battery of policies. For instance, an ambitious job retention scheme (*ERTEs*, in Spanish) that protected more than 3 million jobs, an expansion of unemployment benefits and a flexibilization of the payment schedule of some corporate taxes. In addition, the state has supported firms through a 148.000 € million public guarantees program. Moreover, the Spanish Government created a 10 € billion bailout fund in July, which is already studying different operations.

9. So far, the public aid programmes developed by Spain in response to the COVID crisis are mainly horizontal. The differences in conditions to perceive public aid are based on size rather than on the sector of activity, since some of the public grants lines have been awarded exclusively to SMEs and self-employed workers. Also, a recovery programme was approved to specifically address the needs of firms considered strategic. Yet, there have been some public aid programmes aimed at supporting specific sectors, with lower budgets than the horizontal programmes. Some examples include R&D in sanitary products (23 million euros in two separate programmes) and culture (20 million euros). Additionally, it is important to remark that, in general terms, public aid has been channelled through guarantees rather than direct subsidies.

10. These measures have been key to prevent a worse slump. However, the economic situation poses other challenges to competition, and policymakers along with competition authorities must address them in order to prevent that a decline in competition levels weakens the recovery and reduces prosperity in the long run. These challenges include, among others, the higher collusion risk due to closer collaboration between firms during the pandemic, increased market concentration as a result of bankruptcies, potential competitive distortions due to State aid and stronger public intervention in the markets. Moreover, some governments are studying to implement protectionist measures to produce certain goods domestically in order to prevent future value-chain breaks in strategic sectors.

11. In this scenario, competition authorities are key to maintain the principles and standards required to sustain highly competitive markets and good regulation. In particular, these authorities can help to avoid that short-term objectives –for instance, saving firms from bankruptcy- cause long-term damage to competitive markets and thus weaken economic recovery. Competition authorities can provide guidance to the private sector when cooperation agreements are required, enforce competition laws when firms incur in anticompetitive conducts, assist policymakers to design pro-competitive measures, act to prevent unnecessary or unjustified regulatory barriers and intervene to avoid that public intervention unnecessarily damages competitive neutrality in markets.

12. In the next two sections, we address, first, what CNMC has done so far during the pandemic and, second, what role can CNMC have to boost economic recovery in the long run.

2. What has CNMC done so far during the pandemic?

13. During the first weeks of March 2020, events developed very fast, forcing governments to react drastically. Hard lockdowns were required, and CNMC, as the rest of society, had to quickly adapt to the new working conditions. The Spanish government declared a State of Alarm on March 14, which included a suspension of all administrative deadlines, with the possibility of continuing the procedures in specific cases for the protection of the general interest or the basic functioning of services. Therefore, CNMC continued with some proceedings in order to avoid anti-competitive practices or market manipulation, and to guarantee the proper functioning of markets for the benefit of consumers and users.

14. The pandemic created numerous challenges; the immediate one after the declaration of State of Alarm was to reorganize CNMC's work organisation to assure the continuation of CNMC's functions during the lockdown. During the first months of the pandemic, the CNMC was particularly vigilant regarding infringements such as price fixing, price gouging, and market sharing. For instance, CNMC closely followed the production of ethanol needed for gels due to the acute increase in ethanol prices in order to identify and, where appropriate, sanction any anticompetitive behaviour in this sector².

15. CNMC also reviewed its annual plan in order to realign CNMC's priorities with social needs and enhance our effectivity, and published the revised 2020 annual plan in May 2020. The new plan did not modify the principles and main guidelines of CNMC action, but it adapted them to the new circumstances and introduced a series of measures to confront the new scenario. In particular, the new plan underlines that the coordination between CNMC, policymakers and other agents, such as consumer associations, is key to preserve competitive markets. It also highlights the need to reinforce efforts to curb anticompetitive conducts in some sensitive sectors, as sanitary products, financial sector or funerary services. The plan indicates that CNMC will provide guidelines to policymakers to boost growth and accelerate economic recovery, with a specific focus on state aid, public procurement and good regulation.

16. The CNMC also set up a Covid-19 mailbox on March 31 (covid.competencia@cnmc.es), which helped strengthen CNMC's competition enforcement effort during the pandemic. Specifically, the mailbox objective was to centralize all complaints and queries related to the enforcement of competition rules in the context of the COVID-19 outbreak and, thus, defend consumers and firms affected by anticompetitive conducts during the crisis, as well as provide legal certainty to firms on their ability to collaborate with other firms while respecting competition law. It has been a successful tool, which received over 700 complaints. As a result, CNMC has started several investigations, mostly related with especially sensitive sectors during the pandemic, as financial services or the funeral services sector. CNMC has been fully coordinated with the European Commission and with other national authorities affected by the same issues as well as with consumer organizations.

17. Even though administrative deadlines were suspended, 15 mergers were cleared during the state of emergency (from March 14 to June 21, 2020) due to urgency reasons. The suspension of deadlines finished on June 1, 2020, so merger procedures continued on a regular basis from then on.

² https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/20200407%20NP%20Balance%20Buz%C3%B3n%20Covid_20200407_eng.pdf

18. CNMC also provided quick guidance to the private sector to enhance legal certainty and minimize any anticompetitive effects related with the cooperation agreements required to face the pandemic. In particular, the CNMC provided informal guidance upon request on the compatibility of certain cooperation agreements with competition rules. In line with EU case law on Article 101.3 of the Treaty, firms involved must justify that cooperation agreements are necessary, proportional, and temporary, according to the exceptional circumstances to face COVID-19. CNMC was aware of the urgency conditions due to the crisis, and therefore we provided all these informal assessments within record time: less than 10 days despite the suspension of administrative procedures during the state of alarm. CNMC received numerous inquiries about possible cooperation agreements regarding different sectors, as health insurance compensation schemes in private hospitals, medical devices, and health products, the implementation of the EBA guidelines in the financial sector and, more recently, retailers at the airports³.

19. Fast CNMC advice was also crucial during these first months of the pandemic. The Spanish government regulated on pharma and healthcare, transport, tourism and hospitality sectors, among others, mainly to make some goods accessible and to reduce contagion rates. CNMC informally advised the government about some of the market-related emergency measures, such as price caps on facemasks and hydro-alcoholic gels. In this regard, CNMC defended that public health and competition are not necessarily conflicting goals and, indeed, there are many win-win policies. For instance, competition can help maintain the supply of critical goods in the fight against Covid-19 at lower prices. Moreover, when public health and competition are conflicting goals, competition authorities may help to find efficient regulatory interventions (i.e. those that secure public health needs while at the same time minimizing negative impacts on competition). Thus, CNMC advised policymakers about how to achieve public health objectives without affecting competition levels more than strictly necessary.

20. Regarding state aid, according to Article 11 of the Spanish Competition Act, the CNMC, ex officio or at the instance of the Public Administrations, may analyse the criteria for awarding public aid in relation to its possible effects on the maintenance of effective competition in the markets. It may issue reports as well as address proposals to the Public Administration in order to maintain competition. Likewise, the CNMC shall issue an annual report on public aid awarded in Spain, which shall be public. In the context of state emergency due to Covid-19, this formal consultative role has not been used by the government. However, the CNMC has followed the different national public aid schemes closely and gave its opinion to policymakers informally, always ensuring agility in decision making. In addition, CNMC's Advocacy Department has also had the opportunity to give its informal advice to policymakers regarding EU state aid temporary frameworks.

21. Finally, it could also be highlighted that some of the documents that CNMC produced before the pandemic are now as relevant as ever to guide policymakers and firms, such as the Guidelines on Public Procurement and Competition⁴, the Guidelines for Business Associations⁵ and the Guidelines on Regulation to Public Administrations⁶.

³ <https://www.competitionpolicyinternational.com/cpi-talks-with-cani-fernandez/>

https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/20200602_NP_BALANCE_COVID-19%20ENG.pdf

⁴ https://www.cnmc.es/sites/default/files/1185705_7.pdf

⁵ https://www.cnmc.es/sites/default/files/1185646_7.pdf

⁶ https://www.cnmc.es/sites/default/files/1185792_7.pdf

3. How can competition policy promote a strong economic recovery?

22. Like many countries, the Spanish economy is going to face major challenges during the next few years. Hence, it will need to implement new policies and structural reforms in order to address these challenges and accelerate recovery. In this regard, reinforcing competitive markets and good regulation are one of the most effective and efficient policies to promote a sustainable and inclusive recovery.

23. Indeed, the last economic crisis showed how important competitive markets and structural reforms are to accelerate economic recovery. Some examples of these key structural reforms in Spain during the last economic crisis are the financial sector reform, the labor market reforms and the public finances framework reforms, and other measures to boost competition such as Law 20/2013 on Market Unity⁷, Law 2/2015 on De-indexation⁸ or 14/2013 Law on Entrepreneurship and Internationalisation⁹.

24. It will be challenging to enforce competition rules. The handling of procedures will be harder as a result of more difficulties to access relevant information due to the need to adopt extra health safety measures to carry out dawn raids. Cooperation agreements between firms could also harm competition, and thus CNMC will have to assess carefully the application of Article 101.3 of the Treaty. Merger control could also be harder, especially the assessment of mergers that involve firms in difficulties calling for the failing firm defence.

25. Advocacy will have to play a bigger role in the coming years to support competition and foster better regulation, focusing particularly on preventing regulatory barriers to market entry and competition, preserving competitive neutrality in the use of public funds and in access to public procurement, advising policymakers to foster competitive markets and good regulation and educating society about the benefits of competition. Regarding the emergency regulations and measures adopted during the pandemic, competition authorities should identify the regulations that distort competition and recommend their elimination or modification once they are no longer required.

26. CNMC has traditionally engaged in advocacy efforts to advance competition culture and to promote public intervention that follows minimal competition distortion and efficient economic regulation principles. This role has become even more relevant due to the pandemic, as a result of the major number of public interventions and the urgent need to accelerate a sustainable and inclusive recovery. Among its advocacy tools, the CNMC has the power to issue formal opinions in the form of market studies or regulatory proposals, which include recommendations to all government levels aimed at removing or preventing unjustified obstacles to competition in laws, regulations and administrative decisions.

27. In particular, CNMC is currently working on several market studies on sectors particularly affected by the pandemic, such as the wholesale pharma market, intercity passenger transport by coach or ports. The CNMC is also preparing a market study on online advertising, which will contribute to identify regulation and competition challenges in digital sectors, a major issue that has become even more important as digitalization is accelerating due to the Covid-19 pandemic. Another ongoing report will analyse the

⁷ Law 20/2013, of 9 December, of Market Unity Guarantee. <https://www.cnmc.es/en/sobre-la-cnmc/normativa>

⁸ Law 2/2015, of 30 March, on De-indexation of the Spanish Economy https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3443

⁹ Law 14/2013, of 27 September, on Support of the Entrepreneurship and its Internationalization <https://boe.es/buscar/act.php?id=BOE-A-2013-10074>

relationship between competition and the labour market, a fundamental issue in Spain, since unemployment problems have been one of the country's biggest economic problems. Indeed, Spain's unemployment rates have frequently been well over 15%, during the last few decades, and the IMF forecasts that they will be at 16.8% at the end of 2020. Furthermore, CNMC's Advocacy department plans to work on guidelines to policymakers to boost growth and accelerate economic recovery, with a concrete focus on state aid, public procurement and good regulation, as pointed out in the revision of CNMC's 2020 annual plan. In addition, the EU has recently selected a programme from the Advocacy Department for assessing the impact of competition advocacy and market unity reforms in Spain. This programme will allow us to analyse the degree of fulfilment of CNMC's recommendations and to make an estimation of the economic impact of some cases.

28. Regarding public aid, it will be of utmost relevance to help economic recovery since it can prevent bankruptcies of efficient firms due to liquidity crisis. Yet, it could create competitive distortions if not correctly designed. In addition, competition in the EU internal market may be distorted since some countries have deeper pockets and, thus, they can provide greater support to their country's firms. Competition authorities can have a key role in ensuring that State aid does not unduly distort competition. Even though the European Commission is responsible for enforcing State aid rules, competition authorities, like CNMC, can provide guidance to governments to make sure that public aid is competitively neutral. The CNMC can issue reports regarding public aid and address proposals to the Public Administration in order to maintain high competition levels.

29. Finally, competition authorities have to work with policymakers to assure a high quality public procurement framework that allows the State to obtain the best goods and services while maintaining a level playing field for firms. Indeed, public procurement will be particularly relevant in the next few years since the public sector is expanding its role in our economies and thus it will increase its procurement needs, and also since firms will rely more on public demand due to the crisis. Therefore, competition authorities, like CNMC, have to give advice and work together with the public sector more than ever to guarantee an efficient and competitive public procurement framework.

4. Conclusion

30. The pandemic is having a deep economic impact and will likely change the role of the public sector in our economies at least in the next few years. In this context, governments and competition authorities must work together to design the best policies in order to achieve three key objectives: preserving public health, reducing the immediate economic impact of the pandemic, and accelerating a strong, sustainable and inclusive long-term recovery.

31. Competitive markets are key to achieve a fast, sustainable and inclusive recovery. Competition authorities must act to defend and promote competitive markets and efficient regulation, which are key to long-term prosperity.

32. In Spain, CNMC has worked intensely since the outbreak of the pandemic to adapt its efforts and objectives to the current circumstances, provide guidance to firms and advice policymakers. Finally, CNMC introduced a Covid-19 mailbox to strengthen CNMC's competition enforcement, which has received more than 700 complaints and led to several market investigations.

33. Given the relevance of efficient and competitive markets, CNMC's role during the coming years will be key, since we can encourage and improve pro-competitive reforms, prevent anti-competitive measures and help preserve competitive neutrality. In this regard,

CNMC plans to produce guidelines to policymakers with a specific focus on public aid, public procurement and good regulation. Cooperation and coordination with different Public Administrations could be strengthened, particularly in an economic crisis context, so that CNMC's voice is heard formally prior to the approval of any new regulation. This could be done by the integration of the CNMC, as an independent organism, into working groups and/or through the elaboration of formal reports on the issue. Furthermore, CNMC is preparing market studies on online advertising, pharma market, transport, ports or employment, which will take into account the new challenges posed by the pandemic. Finally, CNMC will keep a strong commitment with competition law enforcement, and will not reduce its standards in merger control.