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Working Party No. 2 on Competition and Regulation

STANDARD SETTING

-- Spain --

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The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 June 2010.

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1. Introduction

1. The **experience of the CNC in cases dealing with standard setting and certification** is basically limited to standardisation agreements established by business associations and to cases dealing with “certification in succession” or the refusal to renew certain certificates. In the context of the powers conferred by article 26 of the Spanish Competition Act, the CNC is working on a Report based on a Market Study on **Quality and Security Certification activities**, soon to be released.

2. The Study, initiated *ex officio* upon request of the CNC Council, responds to the need to conduct an in-depth sector investigation “in light of the reiteration of complaints in the certification sector and of competition concerns about certification systems¹”. The draft Report focuses on the analysis of likely competition restrictions in the certification of technical standards on quality, industry security and environment.

3. The present contribution to the WP2 of the OECD Competition Committee is based on information gathered as a result of both the investigation and resolution of cases and the work in progress on the said Report.

4. The CNC is aware of the **potential benefits of standardisation and certification**. Indeed, the Study will state the CNC’s opinion that those activities help solve problems of imperfect and asymmetric information between producers and consumers, improve the quality and security of products, enhance competition, guarantee interoperability, foster innovation, reduce production costs, and ease market creation, efficiency and integration. For all these reasons, the CNC admits that cooperation between competing firms in this field can be beneficial as long as it is not associated to potential anticompetitive effects.

2. Standard setting

5. Royal Decree 2200/1995² defines standard-setting bodies as non-profit private entities whose aim is the development of standards. The **Spanish Association for Standard Setting and Certification** (*Asociación Española de Normalización y Certificación*, AENOR hereinafter) is the only standard setting body in Spain, as established by Royal Decree 2200/1995, and is responsible for the elaboration of Spanish standards, so called “UNE standards”. Besides, AENOR represents Spain in international bodies, as a member of both ISO and European standard setting organisations such as CEN, CENELEC and ETSI. As such, its activities are subject to compliance with the internal rules of these international organisations.

6. Members of AENOR include natural and legal persons, public and private, interested in the development of standards and of certification activities in Spain. Current membership of AENOR includes around 1.000 undertakings of the Spanish industrial sector.

7. According to Royal Decree 2200/1995, all sectors concerned and a representation of the Public Administrations (appointed by the *Coordinating Council for Industrial Security*) should participate in AENOR’s decision bodies. As a result, AENOR’s Statute establishes that, of the 70 members of its Board of Directors, 10 will represent the Public Administrations.

8. The **Coordinating Council for Industrial Security** just mentioned, is an administrative collegiate entity attached to the Ministry for Industry, Tourism and Trade. Its main functions are the

¹ Proceedings S/0143/09 AENOR.

² Royal Decree 2200/1995, of December 28th, regulating the infrastructure for industrial quality and security.

designation of representatives of the Public Administrations in the governing bodies of standardisation and accreditation bodies, as well as the drafting of strategic plans for standard setting, the design of Annual Standardisation Plans aiming at integrating and coordinating standard-setting bodies' and Public Administrations' needs, the promotion of the issuance and use of Spanish standards, and the transposition of EU ones, the evaluation of results of standardisation works in the fields of quality and industrial security in Spain, and Government counselling on standard-setting related matters.

9. AENOR's standardisation activity takes place within the **Standardisation Technical Committees** (STC). AENOR's internal functioning rules determine that STCs are set up by the Board of Directors. The first step is a proposal by a number of member firms belonging to a certain field of activity, or by the representatives of the Public Administrations. The new STC must have a balanced representation of all actors involved in the concerned activity, including manufacturers, service providers and clients or consumers, and must also be open to, inter alia, Public Administrations, laboratories and research entities. Besides, AENOR's non-members can also take part in the STC's activities after a request is made and approved (by simple majority). In principle, certification bodies can participate in STCs.

10. The initiative to elaborate a standard may come from the sector-related STC, from the Public Administrations, from other STCs, from any legal or natural person, or may be just the result of international agreements. It is the sector-related STC finally approving the beginning of the works.

11. There are two kinds of UNE standards: **the purely national standards and the ones transposed from either European or International standards**. Purely national standards have typically been elaborated as a result of a specific interest by the public sector to regulate areas not covered by the European or the International rules, but this is an increasingly rare event. Indeed, only 20% of UNE standards contained in the AENOR's Catalogue –28.030 in 2008– are purely national, while 80% are transposed standards from either European or International standards (mostly European: 73,6%).

12. Nonetheless, AENOR is not completely independent when elaborating purely national UNE standards, since certain disclosure and information requirements towards EU institutions and standard-setting organisations need to be fulfilled in this case. Thus, Royal Decree 1337/1991³ states that, except for identical or equivalent transpositions of International or European standards, AENOR must inform the European Commission, the European standard-setting organisations and the national standard-setting bodies of EU member States, about the new areas where it has decided either to establish or to amend a standard. In addition, AENOR must submit its draft standards to the European Commission and to the European standard-setting organisations, if they so request, publish the drafts in order to make them available for public consultation in the whole territory of the EU, grant the national standard-setting bodies of EU member States the right to participate either actively or passively in AENOR's works, and allow for its standardisation work to be discussed at European level, without taking any action which may prejudice a further decision at such European level.

13. As mentioned before, the Spanish Competition Authority has dealt with **standardisation agreements established by business associations**. In this context it has found that agreements fulfilling certain conditions are not to be considered as infringements of competition law, i.e., those unable to prevent, restrict or distort competition because of their object -they are not aimed at price fixing, at agreeing on common commercial conditions or at market sharing-, but tending instead to, for example, set up common nomenclatures or greater limitations to the exercise of activities than those established by

³ Royal Decree 1337/1999, of July 31st, regulating the transfer of information on standards and technical rules and regulations regarding the services of the information society. This rule transposes Directive 98/34/EC, of the European Parliament and the Council, of June 22nd, and Directive 98/48/EC of the European Parliament and Council of July 20th.

sector regulation in order to protect the general interest, provided standard fulfilment is voluntary and third operators are not excluded⁴.

14. On the other hand, as a result of the Study about to be published, the CNC has learned that stakeholders are satisfied with AENOR's policy to allow **participation of all interested parties in its standardisation activities**. In addition to this, AENOR's Manual of Procedure provides that an UNE standard must be established with the participation of all interested parties, and that compliance with it is not mandatory.

15. The Spanish Competition Authority has not investigated any cases concerning **disclosure rules and terms of access to technology required by a standard (FRAND licensing terms)**. However, its recently published Guide for Business Associations⁵ states that "*[i]n certain sectors it may be desirable, for efficiency reasons, to establish technical or quality requirements to be met by products or services. Partnerships can facilitate the adoption of such standards whether technological, quality or otherwise. However, those standardisation agreements introducing unnecessary restrictions to competition are prohibited, for example, those imposing unjustified barriers to entry or those making the standard mandatory for companies operating in the sector*".

16. The question whether AENOR is equipped with rules ensuring that its members disclose relevant IPR during the standard-setting process and that they later grant licenses on the relevant IPR in FRAND terms, is becoming less and less relevant as the already low number of strictly national standards keeps decreasing. Moreover, these standards are usually unrelated to matters susceptible to be affected by such codes of conduct or commitments.

3. Certification

17. Royal Decree 2200/1995 defines certification bodies as public or private entities set up with the purpose of establishing conformity, upon voluntary request by interested agents, of a particular company, product, process, service or person with the requirements described in standard or technical specifications.

18. Certification includes three main evaluation areas: certification of products, processes or services; certification of Management Systems, and certification of persons⁶.

19. According to ENAC, the national accreditation body, there are 51 entities authorised to certify **products, processes or services** in Spain. Most of them specialise in certification of agricultural products, and only a minority certifies industrial products. AENOR is the only certifying body recognised as such in a legal text.

20. ENAC provides information on 142 types of products for which authorised certification bodies exist. Out of those 142 types of products, 62 are authorised by a single certification entity, which in most cases is either AENOR or AIDIT.

⁴ Decision of April 30th 1993 on Proceedings *Bancos Españoles*, Decision of December 20th 1993 on Proceedings 51/93 *Fenacor*, Decision of April 12th 2000 on Proceedings A 267/99 *Almacenistas de Hierros*, Decision of May 26th 2000 on Proceedings A279/00 *Conducta Empresarial FEBE*, Decision of November 10th 2000 on Proceedings A 274/00, Decision of March 7th 2005 on Proceedings 575/04 *Fabricantes de Cartón 2*.

⁵ http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=35543&Command=Core_Download&Method=attachment (yet only available in Spanish).

⁶ It certifies that a natural person is able to carry out a certain specific technical task.

21. The small number of competitors in many types of products may be due to limited demand for certification as a result of the specificity of products, as well as to the fact that product certification requires in many cases laboratory testing and auditing activities, which drives up entry costs.

22. The activity of **Management Systems (MS)' certification** is concentrated in two main areas: Quality Management, with 25 certifiers, and Environmental Management, with 17. Accreditation for MS' certification is not given in general but for a particular field, such quality or environment. The standards which are certified most in these two areas are, respectively, ISO 9001 and ISO 14001.

23. ENAC differentiates 102 sectors where these kinds of MS' certification are done. The number of certifiers in each sector is quite high; there are no sectors with single certifiers, and sectors with only two are rare.

24. Thus, contrary to what happens in the area of products' certification, competition in MS' certification is intense. *Bureau Veritas* leads the list of certification entities by number of ISO 9001 and ISO 14001 certificates with 32% market share, closely followed by AENOR, with 30% market share (AENOR has recently been losing market share for the benefit of *Bureau Veritas*), and distantly followed by *LRQA*, *SGS ICS Ibérica* and *APPLUS+CTC*, with less than 10% market share each. There are slight differences by certification fields, being the most significant that AENOR is the main provider of ISO 14001 certificates.

25. The certification of **persons** (welders, management systems auditors or gas installers, for instance) constitutes a minor field of action in which large certification entities, such as AENOR or *Bureau Veritas*, do not operate. Nowadays, seven entities accredited by ENAC issue person certificates.

26. Several **Decisions by the Spanish Competition Authority** have analysed competitive restrictions within the certification sector. Typically, these Decisions have dealt with problems associated to the so-called "*certification in succession*"⁷ or have followed complaints against AENOR on grounds that it refused to renew certain certificates⁸.

27. **The CNC Report analyzes different possible restrictions to competition in the certification sector** stemming, in principle, from the following circumstances: AENOR's dual position as standard setter and certifier, the composition and operation of the STCs for products, the role of the Public Administrations as certification services' applicants, and the absence of mutual recognition agreements among product certification entities.

28. **AENOR is both the only national standard setting body and the main certification entity in Spain.** This dual role may be placing AENOR in a privileged situation on the certification markets and, thus, may be resulting in a distortion of competition in such markets. Several reasons would support this argument. First, AENOR technicians participating in standard-setting processes could be better prepared to evaluate conformity with such standards *ex post*. Second, since companies and associations are present at the STCs, special links may emerge between AENOR and these companies and associations, which are potential users of certification services. Third, AENOR operates in the market under a special status, since it is the single standard-setting body in Spain as well as the Spanish representative at European and international standard-setting organisations. Fourth, AENOR could influence the selection of standards to

⁷ Decision of September 4th 2000 on Proceedings 469/99 *AENOR*, and Decision of May 5th 2009 on Proceedings S/0087/08 *AENOR*.

⁸ Decision of March 3rd 2009 on Proceedings S/0010/07 *AENOR-I*, and Decision of July 28th 2009 on Proceedings S/0143/09 *AENOR*.

be developed or the standard-setting processes to the benefit of its own certification activity⁹, even though, as it has previously been stated, AENOR's independence to elaborate standards is very limited. Fifth, AENOR could finance its certification activities with public subsidies granted for standardisation activities (cross-subsidisation). Sixth, the public sector has a significant influence on AENOR's activities, since it takes part in its Board of Directors and may propose the set-up of new STCs and the beginning of standardisation processes, and this could pose the problems that typically arise when an operator in a market is also involved in its regulation.

29. MS certifiers make their decisions on the basis on the opinions of their own technical experts. However, some product certifiers, and this is the case of AENOR, have chosen to establish **Committees made up of technical experts but also representatives of companies** active in the relevant sector, as well as consumers and Public Administrations. The fact that AENOR is organized in this way may raise competition concerns, given its importance in the market for certification of certain products. On the one hand, the presence in these Committees of firms or industry associations could put at a disadvantage those companies seeking certification services that are not represented on the Committee, since they are to be evaluated by a Committee where their competitors have voice and vote¹⁰. On the other hand, AENOR could favour its own network of laboratories at the expense of competitor laboratories.

30. The current legal framework encourages Public Administrations to acquire standardised products. Also, quality certificates are usually required in public procurement processes. In this context, it would be undesirable from a competition point of view that **Public Administrations bestow a more favourable treatment to certain certifiers discriminating against the others**. As a matter of fact, the Spanish Competition Authority's Decision on case 469/99 AENOR, of September 24th 2000, ruled that Public Administrations were favouring AENOR. Nonetheless, the Public Sector Contracts Act (Act 30/2007, of October 30th), establishes that "unless otherwise justified by the object of the contract, technical specifications should not mention an exclusive manufacturing method, nor make any reference to any specific brand, patent or product origin, with the aim of favouring or disqualifying certain firms or products".

31. There are two kinds of international **mutual recognition agreements** in the certification sector. Those signed between accreditation entities and those signed between certifiers. The former allow accreditation bodies recognised in one country to operate in other countries¹¹. The latter imposes mutual acceptance of the certificates issued by each other.

⁹ This was one of the arguments alleged in the complaint initiating Proceedings 469/99 *AENOR*.

¹⁰ In fact, the CNC's Decision of July 28th 2009 on Proceedings S/0143/09 *AENOR*, discussed a possible restriction of competition to foreign products in the Spanish market resulting from a decision taken at a STC in AENOR. A Portuguese company sued AENOR for having suspended its certificate in order to protect the companies within a Spanish association of manufacturers. In the relevant STC, not only the association of manufacturers participated but also one of its members was the director. However, the CNC did not consider that AENOR had committed an abuse of dominant position because, among other reasons, the STC's decision to suspend the certificate was adopted by consensus and thus there was no need to vote. However, the CNC drew attention to the possible harms to competition that might arise from the composition of STCs.

¹¹ ENAC has signed several mutual recognition agreements as a member of the international qualification body named *International Accreditation Forum*. Mutual recognition between EU accreditation entities is possible after passing an evaluation, as stated in Regulation (EC) N° 765/2008 of the European Parliament and of the Council of 9 July 2008, setting out the requirements for accreditation and market surveillance relating to the marketing of products.

32. At international level, the recognition of certifications issued by a member of IQNet (International Certification Bodies Network) is automatic for the rest of IQNet members. Nevertheless, the CNC is not aware of any mutual recognition agreements signed by Spanish certification bodies.

33. The lack of mutual recognition between certification entities may result in the so-called “certification in succession”, which happens when a certain certifier certifies a product only on the condition that all inputs incorporated in the product have also merited certification by the same certifier. This could lead to the expulsion from the certification market of those input certifiers whose certificates are not recognised by product certifiers. However, Spanish certification entities do not consider that the lack of mutual recognition is a problem, especially after the Spanish Competition Authority issued its first Decisions on the matter.