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OECD Global Forum on Competition

**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- SPAIN --

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SPAIN

The objectives of Competition Law and the Optimal Design of a Competition Agency within the Overall Government

1. Introduction

Like in many other economies, over the last decades, Competition policy in Spain has been growing in relevance in line with the liberalisation process concerning important sectors of the economy. In consequence, some parallel legislative adaptations have looked for more transparent and agile procedures and for more efficient means of control.

In terms of enforcement the trend has been very similar, the Spanish Competition Authorities having experienced a considerable growth of the number of files assessed. Now, the analysis has grown in complexity and in significance because of the type of firms and the sectors involved. Moreover, the general importance and the economic efficiency and consumers welfare implications of some dossiers have contributed to popularise this policy in Spain. Hence, citizens know more than before the advantages of having more competitive markets but at the same time they are prepared to require more from the Competition Authorities.

In this framework, how to enforce the antitrust laws in an even more efficient, rational, precise and agile way becomes the principal challenge nowadays. This exercise implies to bear in mind that competition analysis should be founded on the use of dynamic tools to be applied to dynamic and more global markets constantly adapting to economic activity and technological development. Then, Competition Authorities actions should basically aim at removing entry barriers allowing potential competition to discipline markets.

Provided there are different potentially efficient models to implement the antitrust policy, each one fitting better in a particular jurisdiction or economy, the practical enforcement of the particular model chosen determines, or contributes to determine to a great extent, its degree of efficiency, transparency and predictability. Most of these issues have no links with the designed model but more with the “enforcement style” of the Competition Institutions.

The design, features and objectives attributed to the Competition Authorities is of course something that matters but also the practical enforcement of the legislative framework and, provided some minimums; different alternative models should not be excluded.

2. Objectives of the Competition Policy

The Competition Policy is a necessary instrument and a natural companion to support and consolidate sector liberalisation. Even more, Competition Policy, in the framework of economic integration processes, becomes a key internal tool to preserve flexible and efficient markets and economies when traditional policy instruments are not be able anymore to be implemented domestically.

In that context, the Competition Law and Policy should pursue a precise objective, as to preserve the competitive operation of markets and ensure the existence of effective competition in them. This objective should be considered as a public interest issue and thus be identified at the highest legislative

level in the Constitution of the jurisdiction by means of any general economic interest principle, which may enclose that main Objective. This general objective includes others which may not necessary to be specified literally, as protecting consumers and promoting competitive prices, product choices, innovation and efficiency. To fulfil those objectives efficiently, the decisions of the Competition Authority should only be based on a competitive operation market criteria; The Competition Authority can always take into account “economic efficiencies” (in production, distribution, international competitiveness and consumer interest), but it should asses, first of all, if such efficiencies or economic progress compensates the competition distortion or the negative effect on competition and, secondly if, in any case, the efficiencies should be able to be transferred to consumers.

Provided the general objectives are always maintained, the practical enforcement of the Competition Law may identified specific objectives in a specific period of time: a concrete sector with structural problems, a lately liberalised sector, a strategic economic sector, some type of behaviour, etc. To be preserved as an effective tool, competition enforcement policy needs to adapt to the evolution of market conditions and practices. This becomes very relevant when defining the objectives, aims and optimal design of Competition Institutions in economies that necessary evolutes and develops and so its different markets.

Along with the enforcement of competition legislation, the other significant instrument to attain the objectives mentioned before is advocacy. Advocacy activities acquire considerable relevance concerning legislative and regulatory procedures; the participation in the process of establishing the legislative or regulatory framework for a specific sector gives more impetus to enforcement itself which, alone, could not be sufficient to attain the objective fixed. Hence, the assignment of roles to the Competition Institutions appears to be a key element of the optimal design of a Competition Authority.

Finally, Competition Law and Policy should not be the means to reach other different objectives which are not related to preserving the effective competition in markets. This would lead to the introduction of a big degree of uncertainty in competition enforcement and, therefore, to a reduction of legal certainty and predictability. Competition Law and Policy cannot substitute other type of legislation or policy instruments.

3. The Optimal Design of the Competition Agency

Considering the different alternative systems existing in countries with experience and tradition in this issue, there are three basic elements (as minimums) any model should always have.

1. The model should fit with the jurisdictional system of the country where is going to be settle and with its uses and tradition, and so the administrative or judicial nature of the organs to be created.
2. Competition Law should be a horizontal discipline fully applicable to all sectors of the economy.
3. The Competition Authority should be a technical and independent body in order to guarantee a technical enforcement of the Competition Law. Along with it, it could be adequate in some cases to have specialised courts to deal with the appeals against the decisions taken by the Competition Authority.

3.1 *Administrative versus judicial authority system*

To determine whether the competition authority will be administrative or judicial will rely to a great extent on the jurisdictional tradition of a country in particular and on its practical structure and functioning.

For many countries, the judicialisation of competition enforcement should not fit with the need to have temporary limits in resolutions, the public interest being defended, the economic and specialised analysis of files, etc. Administrative models may offer the possibilities of a more flexible and agile system which, in any case, should be always subject to judicial review.

3.2 *A single institution model versus a two-institution model*

The two-institution model usually goes along with a specific procedure which divides instruction from resolution and assign each task to different institutions. This model:

- Without prejudice of the judicial review, this model allows the existence of a revision and a verification of the file before the final decision is taken. Some experts defend this approach when lacking of codified rules as it happens in the competition field where analysis and decisions are taken on a case by case basis.
- It may be the most pertinent in order to guarantee the legitimate rights of economic agents, in particular, the transparency and procedural fairness. This would also include certain procedural guarantees under which private parties have the so-called “rights of defence” that competition authorities should observe in all proceedings in which sanctions may be imposed. Such “rights of defence” in favour of firms involved in administrative proceedings before a competition authority could include:
 - the right for parties to proceedings under the domestic competition law to have access to the agency or court applying the law and to be informed of the objections of the authority to their conduct.
 - the right for such parties to express their views within a fair and equitable procedure in advance of an adverse decision addressed to them.
 - the right to be notified of a reasoned final decision detailing the grounds on which such a decision is based.
 - the right to appeal such administrative decisions by competition authorities and to have them reviewed by a judicial body.

3.3 *The powers of the Competition Authority*

The optimal design of the Competition Authority is also related with the roles and powers of the institutions to be created, and also with the proceedings. The latest should be shorts and agile, and the participation of the economic agents been guaranteed.

3.4 *Resources*

The Competition Authority should have enough financial and human resources to fulfil with the mission which has been entrusted with. Having an optimal design, an antitrust system will not be efficient, in any case, if it lacks of the political drive along with the necessary resources.

4. **The Spanish Model**

In Spain, Competition, as the guiding principle of any market economy, is an inseparable element of our society's model of economic organisation. In the sphere of the individual liberties, it is the first and foremost way in which corporate liberty is exercised and manifested. Therefore, in accordance with the requirements of the general economy and if needs be, of planning, defence of competition is conceived as a mandate for the public authorities, directly related to article 38 of our Constitution.

Therefore, the Spanish Act 16/1989, of 17th July, for Competition Defence, was drawn up to meet this specific objective: to ensure the existence of sufficient competition and protect it against any attack contrary to the public interest. It is compatible with other laws that regulate the market according to other legal or economic requirements, be they public or private.

The Act is built upon the solid pillars of experience because it is inspired by the community regulations on competition policy, which have played a transcendental role in creating and operating the common market.

Under its first chapter, "Restrictive or abusive agreements and practices", the Act lays down a system for flexible control of the agreements that limit competition on the domestic market, prohibiting the abuse of economic power and unilateral conduct that may distort competition by disloyal means. The second chapter, "Economic concentrations", establishes a merger control system to avoid altering the structure of domestic markets to the detriment of the public interest. The third chapter, "State aids", establishes a system for analysing them according to competition criteria and if necessary, to correct their undesirable effects.

The application of the Act, to all sectors of the economy without any exclusion, is entrusted to two administrative bodies: the Tribunal de Defensa de la Competencia (TDC) with the functions of resolution and proposition and advocacy, and the Servicio de Defensa de la Competencia (SDC), in charge of instructing the proceedings. The TDC is given an independent and technical status as a body formed by ten members (President, Vocales and Secretario, from which 7 economist and 3 lawyers) appointed by the Government for a five-year period, which may be renewed just once.

The applicable procedure foreseen in the Act, abides by the principles of economy, speed and effectiveness, as well as the guarantee of the right of defence of the interested parties. It includes the special proceedings required by its very nature, envisaging in certain cases the participation of Autonomous Communities and the Council of Consumer Associations.

Finally, a sanctionary regime is laid down to ensure compliance with the formal and substantive aspects of the Act.

Over the last two years, important efforts have been made concerning resources of enforcement agencies. At present, the budget of the Competition agencies is around 7 million euro (2,4 corresponds to the SDC y 4,6 to the TDC). There is a staff of about 135 people. The SDC has a staff of 95 people (from which 13 economist, 16 lawyers and 9 other professionals and a support staff). The TDC is a body of 10

members (President, *Vocales* and *Secretario*, from which 7 economists and 3 lawyers) which is supported by an additional staff of more than 30 people.

Over the last two years, the Spanish agencies, in a framework of public budget balance, have increased its resources substantially. Concerning the SDC, a new unit was created in 2001 with new staff which has freed the other two units specialised in mergers and anticompetitive practices. This new unit has resulted in a new staff of 12 people in 2002. Finally, the new General Direction has been very recently created with the incorporation of a Director, exclusively dedicated to competition, which is having in the next months an additional support unit.

As for the TDC, its budget increased more than 20% last year. This rate of increased is going to be higher in the present year with an additional 35%. This trend will continue and intensify next year in which it is envisaged a considerable increase of the TDC financial resources of about a 100%. At the same time, new staff (probably about the double of present human resources, pending of approval) is also envisaged for next year.

Concerning the SDC, a 45% of human resources are applied to enforcement against anticompetitive practices, a 40% to merger review and enforcement and a 15% to advocacy efforts.