

Unclassified

DAF/COMP/LACF(2013)16

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

24-Jul-2013

English - Or. English

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

LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

Contribution from Spain (CNC)

3-4 September 2013, Lima, Peru

The attached document from Spain (CNC) is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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JT03343166

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session III: Unannounced Inspections in Antitrust Investigations

CONTRIBUTION FROM SPAIN (CNC)

1. Legal authority to conduct unannounced inspections

1. The Spanish Competition Authority (Comisión Nacional de la Competencia, CNC) has extensive powers to investigate potential breaches of Spanish competition Act and also to investigate on its own behalf or on behalf of the European Commission or any other National Competition Authorities (NCAs) breaches of European Union competition rules. Thus, under Council Regulation (EC) 1/2003 (the Regulation), the CNC is empowered to carry out dawn raids on its own behalf and on behalf of the European Commission or other competition authorities.

2. These powers are similar to those of the European Commission and include the power to conduct unannounced dawn raids to gather information or evidence about alleged breaches of Spanish and/or EU competition rules, including anti-competitive agreements and abuses of dominance, being authorized by the Director of Investigation.

3. According to the Spanish Act, the undertakings and associations of undertakings are obliged to submit to the inspections that the Director for Investigations has authorized (article 27 Act 3/2013, of 4 June 2013, and previously article 40 Competition Act 15/2007, of 3 July 2007, and article 13 Royal Decree 261/2008, of 22 February, which approves the Regulation on the Defence of Competition, hereinafter referred to as RDC).

4. Nevertheless, to avoid the risk the affected undertaking or association of undertakings do not consent to the dawn raid and/or to seal business premises, the CNC may request the corresponding judicial authorization, in any case without given advance notice to the targeted undertakings or association of undertakings and within a maximum period of 48 hours. Therefore, the Director for Investigations may request a court warrant "*inaudita parte debitoris*", with the assistance of the General Attorney Office which represents the CNC before the Court. In that case, the Court issuing a warrant requested by the CNC undertakes a formal review of the legal requirements necessary to issue such warrant.

5. The CNC inspectors are designated by an Order signed by the Director for Investigations, and could be accompanied by experts or specialists in the matters addressed or in information technologies, all of them duly authorized by the Director of Investigation. Besides, the public authorities shall provide the necessary protection and assistance to the CNC officials including requesting the police to fulfill the court warrant if it is the case.

6. Most dawn-raids are on offices but dawn-raids may also be conducted on the homes and vehicles of directors or employees, if the CNC believes that relevant information or evidence is kept at those locations and the dawn raid can last an entire business day or longer.

7. Dawn-raids are usually the result of *ex officio* investigations carried out by the Spanish Competition Authority, following complaints filed at the CNC by third parties (customers, consumers or any other party with information) or the presentation of leniency applications, always in light of the possible existence of an infringement and under the suspicion that relevant information are possibly at the premises to be inspected which would be tampered with, concealed or destroyed if they were requested.

2. Scope of inspection powers

8. In conducting investigations, according to article 27 Act 3/2013, the inspectors authorized by the Director for Investigations are entitled to:

- enter any premises, land, or means of transport of the undertakings and associations of undertakings and the private homes of the entrepreneurs, managers and other members of staff of the undertakings involved and also the homes of directors, management or other staff of the firms involved (homes by judicial warrant only);
- examine any book or business record, regardless of form or whatever medium there are stored (all electronically stored data, such as laptops, desktops, tablets, mobile phones, CD-ROM, DVD, USB-key and so on);
- take or obtain in any form copies of or extracts from such books or records;
- retain such books or documents for a maximum period of 10 days;
- seal any business premises, books or records for the period and to the extent necessary for the inspection; and
- ask any representative or employee of the staff of the undertaking and associations of undertakings being investigated for oral on-the-spot explanations of the documents and of facts referred to in the documents and record the answers.

9. For this purpose, the inspectors may not only use any built-in (keyword) search tool, but may also make use of their own forensic IT tools and the undertaking inspected must fully and actively cooperate with the inspection. This means making available IT staff during raids to explain the systems and give administrator access rights.

10. The CNC dawn raids tend to focus heavily on documentary evidence: invoices, delivery dockets, price lists, correspondence between competitors (including e-mails, sms, whatsapp, mobile devise and so on) diaries, expense accounts, minutes/records of meetings, notes on hotel headed notepaper or electronic records.

11. Therefore, the inspectors may examine any document to determine whether it is relevant to their investigation, except for correspondence affected by legal privilege (only between the firm and its independent not in-house legal advisors). This legal professional privilege (LPP) does not extend to correspondence with the firm's in-house lawyer or communications which are made in the furtherance of illegal purpose, fraud or abuse of statutory powers. In case firms claim that documents are privileged, they must provide evidence that the documents qualify for such treatment and the CNC inspector may take a brief look at that documents to determine whether there are likely to contain privileged information, leaving these documents if there are clearly privileged. If it is not clear whether LPP applies, the document will be sealed in a container and brought to the CNC premises for its consideration with that undertaking to establish or not that privilege.

12. That privilege is that of the client –undertaking- not of the lawyer and consequently, if the undertaking wishes, it may be waived.

13. In any case, the data and information obtained in a dawn raid shall only be used for the aims set out in the Competition Act.

3. Leniency programmes and inspection powers

14. Since entering into force on 28 February 2008, the Spanish leniency programme has displayed positive results in terms of the number of leniency applications presented and also in the results obtained from the investigation and valuation of these leniency application presented.

15. Thus, this tool together with the new investigatory powers, have provided a major boost to the detection of cartels by the Spanish competition authority, in line with one of the key objectives of the Competition Act, in terms of fighting the most harmful practices, particularly cartels.

16. As cartels are among the very serious offences specified in the Spanish Competition Act, offending economic agents, firms, associations, unions, or groupings are liable for a fine of up to 10% of their total sales in the fiscal year immediately preceding that in which the fine is imposed.

17. Under the leniency programme, however, the CNC can exempt a firm or a natural person immunity from payment of the fine, if the firm or person in question is the first to provide evidence that, in the opinion of the CNC, enables it to order an inspection in relation to a cartel, provided, at the time of providing such evidence, there is not already sufficient evidence to order such an inspection, or to verify a cartel, provided at the time of providing such elements, the CNC does not already have sufficient evidence to establish the existence of the offence.

18. Now that the Spanish leniency programme has been in force for more than 5 years, attention needs to be drawn not only to the large number of leniency applications filed but also to the consequences of implementing this programme to fight cartels, including a significant increase in the number of dawn raids performed by the CNC since the programme came into force.

19. These dawn raids have also led to the opening of new proceedings, other than that relating to the original leniency request, as a result of information obtained in certain cases.

4. Experience in conducting unannounced inspections

20. Dawn raids are, in the majority of cases, almost the only effective tool available to the CNC Investigation Division to gather the necessary information about anti-competitive practices, and are particularly decisive in detecting and dismantling cartels. According with the powers given by the Spanish Competition Act, the CNC has considered dawn raids as an essential tool in investigations into anti-

competitive practices, especially in cases involving unlawful agreements between competitors and use this tool frequently due to facilitate the cartel detection to the standard of evidence required to initiate a viable investigation and obtain relevant information that would not otherwise be attainable, ensuring greater legal certainty, effectiveness and speed in the actions against cartels in the investigatory phase. One of the success factors being, of course, the surprise element, necessary in order to reduce the risk of destruction of evidence during the dawn raid and to seize and secure evidence collected.

21. With the powers established in the Competition Act (essentially, increasing the authority of inspectors, the premises to which they can have access, the ability to seal off premises or documents or assets of the inspected undertakings, to seize original documents for a maximum period of 10 days), dawn raids have played a pivotal role in investigations and allowed the CNC to obtain information on conducts contrary to the Competition Act that would otherwise have been very difficult to obtain. For this reason, the number of dawn raids carried out during the last years increased considerably over the levels of preceding years before the entry into force of the Competition Act 15/2007 of 3 July 2007, which quite clearly reflects the fact that dawn raids are regarded as a genuinely valuable tool in finding evidence of prohibited conduct which would otherwise be difficult or even impossible to access.

22. From September 2011 until September 2012, 31 dawn raids were carried out by the CNC, in many different sectors and increasing human resources are being allocated every year to these activities in order to improve efficiency. A clear internal guidance and permanent technical training about preparation, development and post inspection procedures as been set into force and constantly being revised.

23. The CNC inspection team conducting a dawn raid typically consists between five to ten officials, one of them the team leader and several forensic IT experts. The team may be also accompanied by officials from the Regional Competition Authorities when the premises inspected are located in that Autonomous Community. The officials will be acting pursuant the Investigation Order and this document must specify the subject-matter, scope and purpose of the investigation and the penalties for no cooperation or giving incomplete information.

24. This Order and the report for the General Attorney Office requesting the warrant before the Court (in case it is requested) must be prepared at least one or two weeks before the date of the dawn raid.

25. During the dawn-raid, the undertaking inspected may consult a legal advisor. However, the presence of a lawyer is not a legal condition for the validity of the dawn raid. The inspection team is empowered to enter the premises, to notify the decision ordering the inspection and proceed to occupy the offices without waiting for the undertaking to consult with its lawyer and any such delay due to this legal consultation must be kept to the strict minimum.

26. At the end of the dawn raid, the minutes of the inspection will be signed by a CNC official of the inspection team and by the person before whom the inspection has been conducted. In case this person refuses to do so it will be signed by two of the CNC's team members, having proof value that minutes once it has by signed by two CNC officials. Attached to these minutes there will be a list of all copied documents, as well as a copy thereof and, if applicable, the list of those retained documents temporarily forwarded to the CNC by the inspection team.

27. In case the inspection team decides to seal business premises and books or records, a minute will be drafted and the undertaking must ensure that seals that have been affixed are not broken until the seals are removed again by the inspection team, who will record the state of the seals when they were removed.

28. The inspection team will issue a copy of the minutes and of the rest of the documents and the data copied by the inspection team to the undertaking concerned, in electronic or paper format.

29. The documents and the data copied during a dawn raid will be covered by the provisions of Article 42 of the Spanish Competition Act concerning professional secrecy. If, at a later stage of the procedure, it becomes necessary to grant other parties access to these documents and data, the undertakings will be asked to identify any business secrets or other confidential information contained in the documents or data, to justify those claims and to provide non-confidential copies for the purpose of granting access to the file.

30. A post inspection report will be sent to the judge who has signed the authorization of the inspection, and minutes should be attached.

31. For an effective implementation of its inspection powers, the Spanish Competition Act foresees effective sanctions if undertakings or associations of undertakings subject to a dawn raid refuse to submit to an inspection, to fail to allow access to required books or other records related to the business in a complete form, to breach seals affixed during the course of a dawn raid and to give incorrect, misleading or incomplete answers to questions asked. These fines may be up to 1% of its total turnover in the preceding business year.

32. The CNC imposed fines for obstruction of an inspection, due to different incidents during the dawn raid which made it difficult for the CNC's official to obtain access to certain documentation, removing documentation, hindering the development of the dawn raid or delaying the beginning of the inspection.

5. International cooperation

33. Regarding fight against cartels, Competition Authorities increasingly aim to coordinate their dawn raids so as to maintain the surprise element, being international cooperation a successful enforcement tool in the fight against cartels.

34. Continuous and close cooperation between the CNC and the European Community and with other ANCs, particularly within the European Union, is highly necessary in tackling cross-border cartels, and it is particularly important to insist on this at international forums.

35. The CNC is a member of the European Competition network (ECN) which is based on an effective legal framework to enforce European competition rules against undertakings who engage in business practices affecting trade between Member States. Regulation 1/2003 provides NCAs with several cooperation tools. In particular, Article 22 of Regulation 1/2003 allows for a NCA to request another NCA for assistance in order to collect information on its behalf in the context of the enforcement of Articles 101 and 102 TFEU and also, at the request of the European Commission, the NCAs shall undertake the inspections on behalf of the European Commission or assisting the European Commission officials with inspections. This is essential for the efficient enforcement of competition rules in cases where the undertakings involved are established outside the territory of the requesting NCA.

36. Nevertheless NCAs are bound to apply their national procedural rules when acting for another NCA or the European Commission, providing the requested NCA with all the information needed in order to allow that Competition Authority to use its national investigative powers.

37. Moreover, it is up to the competent national judge in the Member State in which the inspections have been performed under Article 22 to exercise judicial review.

38. As an example of this international cooperation, on March 2nd 2010 the Italian Competition Authority carried out dawn raids following a request issued by the CNC at one of the leading producers and sellers of plastic containers for fruit and vegetable packaging located in Italy on the basis of an alleged

anticompetitive agreement among fruit packaging producers in Spain. The joint dawn raids in Spain and Italy resulted to be very fruitful and the cooperation did not face any practical obstacle. Moreover, this case represents an example of an effective and smooth cooperation with regard to some legal aspect and in particular to the confidentiality regime of the collected documents. As a result of these coordinated dawn raids on 10 May 2010 the CNC opened formal proceedings on the basis of the Spanish Competition Act and of Article 101 TFEU, the CNC Council on its Resolution (2nd December 2011) concluded that this cartel in the market for plastic containers for packing and protecting fruit and vegetable products from 1999 until 2006/2007 campaign qualified as a single continuing offence, consisting of price fixing and market sharing which were repeated each year at the beginning of the marketing campaign and which together constituted a plan aimed at restricting or distorting competition in the fruit and vegetable containers market.

39. More recently, and also pursuant to Article 22 of Regulation 1/2003, simultaneous dawn raids in Portugal and in Spain have been carried out at the request of the CNC to the Portuguese CA. As a result of the coordinated dawn raids carried out simultaneously on 16 February 2011 at the premises of leading polyurethane foam manufacturers in Spain and Portugal, on April 2011 the CNC decided to open formal proceedings on the basis of the Spanish Competition and Article 101 TFEU. On its Resolution of 28 February 2013, the CNC Council imposes sanctions for a price fixing and market sharing cartel, which has been in operation since January 1992.

40. To sum up we may conclude that international cooperation is a key part of a successful enforcement tool, particularly in fighting cartels, and that joint dawn-raids are the best example of this cooperation. Therefore, mutual trust and a good understanding when cooperation takes place is critical, not only in the preparation and conduction of dawn raids, but also clearly defining effective procedures to facilitate information exchanges between Competition Authorities.