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

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Spain --

15-17 June 2016

This document reproduces a written contribution from Spain submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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SPAIN

1. Introduction

1. Spain's Commission on Markets and Competition (CNMC) wishes to contribute to the discussion on Commitment Decisions in Antitrust Cases to be held at the forthcoming OECD Competition Committee's meeting on 15-17 June 2016, with a brief description of the reference legal framework and some recent examples of commitment decisions adopted by the Spanish Authority.

2. Commitment decisions in competition law infringement procedures are allowed in Spain since 2001, but it is in the last years that they have become more frequent, thanks to some reforms introduced by the Spanish Competition Act of 2007 and to the publication in 2011 of a Commitments Notice by the Spanish Competition Authority that has brought more transparency and predictability to these procedures.

3. Before the enforcement of the Spanish Competition Act of 2007, commitment decisions required that all parties involved, including the complainants and the Competition Authority, expressly accepted the proposed commitments, which made it quite difficult to reach such decisions. In fact, between 2001 and 2007, only three cases terminated with a commitments decision.

4. The new competition act passed in 2007 provides that the proposed commitments shall only be accepted by the Competition Authority to become binding and allow the closure of the proceedings. This reform has resulted in a significant increase of the number of commitment decisions adopted, amounting to 29 cases since the adoption of the Law of 2007.

5. On the 28th of September 2011 the Spanish Competition Authority published a notice on commitment decisions. The main aim of this notice is to set a series of practical guidelines that may steer the action of the authority in these cases and, at the same time, show companies how to proceed and what to expect when they request a commitment decision. Thus, transparency and legal certainty in these proceedings are improved, resulting in a more efficient use of this figure.

2. The notice on commitment decisions. Content and practical application

6. According to the Spanish law, commitment decisions are an atypical way of concluding a competition infringement case, in which the authority decides to accept some binding commitments proposed by the alleged offender and does not issue a statement on the legality of the conducts under investigation.

7. The grounds for commitment decisions are double: first, the adoption of commitments seeks the early restoration of effective competition conditions. It is thus necessary that the proposed commitments are suitable and sufficient to solve competition problems detected. Second, commitment decisions are justified in terms of administrative efficiency, reducing the time of infringement examination. That is why the sooner the request for a commitment decision is made, the more likely it is to be accepted, as it is highlighted in the above-mentioned Notice.

8. The Notice also explains that there are some procedural issues that will be taken into account by the Authority in order to decide whether a request for a commitment decision will be accepted or not. Thus, the Competition Directorate will accept the beginning of the proceedings for a commitments solution when (i) there have been previous positive contacts between de Directorate and the applicant to explore the possibility of such request; (ii) the request is submitted before the deadline

to present allegations to the statement of objections¹; and (iii) the request includes the outline of the commitments that the applicant intends to offer and an explanation about why these commitments are adequate and sufficient to solve the competition issues that have motivated the opening of the proceedings.

9. As for the acceptance of the proposed commitments, the Authority will require that they solve in a clear and unambiguous manner the detected competition issues, that they can be quickly and effectively implemented, and that the surveillance of the compliance is viable and effective.

10. It is not necessary that all the alleged offenders jointly request for the commitment decision, but to be accepted it is necessary that the proposed commitments cover all the alleged infringements of the applicant. Notwithstanding that, the truth is that in all the commitment decisions adopted since the publication of the Notice all the alleged offenders were involved in the solution.

11. However, as a general rule, the Notice stands that the Authority will not accept a commitment decision in the following cases: (i) if the conduct under investigation is an infringement related to a cartel or if its effects are of a one-time nature; (ii) the conduct under investigation has produced irreversible effects on competition for a long time or if they had affected a substantial part of the concerned market; (iii) the alleged offender has been previously punished for a similar competition infringement or has been a party to a similar commitment decision; and (iv) when a declaration of infringement is necessary in order to avoid risking the efficiency and the deterrent function of competition laws.

12. The last part of the Notice on Commitments develops the main aspects of the procedure for the adoption and surveillance of a commitment decision. According to it, it is the Competition Directorate (DC) who evaluates the request and decides whether to initiate or not the proceedings for a commitment decision. It is, therefore, a discretionary decision of the DC, and all the appeals made by the applicants whose requests for a commitment decision have been dismissed: all alleged offenders have the right to request a commitment decision, but this does not mean that their requests have to be accepted².

13. Once the proceedings are initiated, the applicant has to submit a first version of the proposed commitments that can be modified if the DC finds it insufficient. If the second version of commitments is also refused by the Directorate, it will be considered that the applicant has dismissed the request for a commitment decision and the infringement procedure will continue.

14. Every set of commitments submitted to the DC will be conveyed to the Council for its knowledge and to all interested parties, so they can make allegations.

15. If the Directorate of Competition considers that the proposed commitments are adequate and sufficient, it will submit to the Council a proposal for a commitment decision. The Council can decide (i) the termination of the procedure with a commitment decision, if they agree with the DC's proposal; (ii) that the commitments are not suitable to solve the alleged competition problems, urging the DC to continue the investigation; (iii) that the applicant has to submit a new set of commitments to the Council.

¹ According to the wording of the article 52 of the Competition Act of 2007, the request for a commitments decision can be presented anytime before the Directorate of Competition submits the proposal-report to the Council. However, it is very unlikely that the DC accepts a request that is not submitted before the deadline set in the Notice.

² This idea has been highlighted in countless decisions by the Council, like, for example, in the cases R/AJ/271 FABRICANTES DE AUTOMÓVIL, R/137/13 SPECIAL PRICES, AUTO REISEN, R/AJ/391/14 TELEFONICA, and also by the Court of Appeal (Audiencia Nacional) in, for example, the judgement of January 30h, 2013 (complaint 57/2012).

16. The Notice on Commitment Decisions has proved to be a useful tool to improve an efficient use of this way of concluding infringement cases.

17. Since its publication the Council has authorized 12 commitments decisions, out of 16 accepted requests. The Directorate has denied the initiating of the proceedings in 28 cases, mostly because there were no possible commitments to solve the effects of the alleged infringements³.

18. If we compare these figures with those previous to the Notice, we find that the proportion of accepted requests has fall from around 61% to 36%, whereas the proportion of successful commitments decisions has slightly risen from 77% to 80%⁴. This figures show that the action of the Competition Directorate is now more predictable and efficient as once the proceedings for a commitment decision has been initiated it is more likely to succeed.

3. Recent examples of commitments decisions

19. There have been commitment decisions in cases of anticompetitive agreements⁵, of abuse of dominant position⁶ and of unfair competition⁷. These decisions have involved such different markets as sales of vehicles, cleaning services, bullfighters' image copyrights, consulting services, lift maintenance and spare parts, among others.

20. By way of illustration, we can describe some of the most recent commitments decisions adopted by the Spanish Authority:

21. S/DC/510/14 FOOD SERVICE PROJECT: a restaurant franchisor (FSP) was accused of imposing all suppliers and final prices to its franchisees.

22. The commitments solution was possible thanks to the following modifications introduced by FPS in the franchise contracts:

- In relation with the sourcing policy of the franchisees, FSP accepts to modify it in order to clarify what products have to be bought to the suppliers stipulated in order to protect the franchisor's rights, what products of other suppliers need to be authorized by FSP and what products can be freely bought by the franchisees. As for services, in principle franchisees will be free to choose the provider they want, though FSP reserves the right to approve the providers of some specific services to protect the common identity, reputation and quality of the franchise net.
- In relation with the final price policy, FSP will modify the documentation so it is more clear that the franchisee is free to establish the final price, without prejudice to FSP right to establish maximum or recommended prices. Commitments involve the process of printing

³ Only one out of this 28 cases did not end with a declaration of infringement (S/497/13 AUTOESCUELAS GUADALAJARA).

⁴ After the publication of the Notice only 3 requests for a commitments decision have been dismissed, two of them by the Competition Directorate, who found the proposed commitments insufficient, and one by the Council who, contrary to the DC's proposal, considered that commitments where not adequate to solve competition issues in the case S/436/12 DTS DISTRIBUIDORA DE TELEVISIÓN DIGITAL.

⁵ S/338/11 SUBARU; S/386/11 IONMED ESTERILIZACIÓN; S/348/11 UNIÓN INTERPROFESIONAL DE MADRID; S/418/12 ALL SPORT MEDIA; S/337/11 DISTRIBUIDORES DE CO2; S/457/13 GENERAL MOTORS; S/498/13 CLUB EXCELENCIA EN GESTIÓN VÍA INNOVACIÓN; S/DC/510/14 FOOD SERVICE PROJECT.

⁶ S/291/10 MUTUALIDAD GENERAL ABOGACÍA; S/466/13 SGAE-AUTORES; S/DC/502/14 ORONA/EXCELSIOR.

⁷ S/DC/522/14 THYSENKRUPP.

the menus (it will still be centralized but franchisees can ask for personalized menus, with their chosen prices, without extra cost) and improving communications between FSP and its franchisees related to price changes. In addition, franchise contracts will be modified in order to expressly introduce the freedom of the franchisees to carry out voluntary local promotions and to fix the price of the “everyday menu”.

23. S/DC/502/14 ORONA EXCELSIOR: in this case, a reseller of lift spare parts accused two manufacturers of lifts, that were also present in the market of maintenance and repair of lifts (ORONA and EXCELSIOR) of not supplying spare parts to multi-brand resellers. During the investigation carried out by the Authority, the parts assumed the accusation, explaining that, according to their supplying policy, they could only sell spare parts to authorized companies in charge of the maintenance of ORONA and EXCELSIOR lifts. The Authority, after sending a request to other manufacturers, did not find any evidence of third parties carrying out a similar conduct.

24. The commitments offered by the two alleged offenders were similar, and they included: (i) the modification of their supply policy, providing multi-brand resellers with spare parts in fair and non-discriminatory conditions, and without requiring them to give unnecessary information about, for example, the final client; (ii) to inform unequivocally all the resellers that had asked for spare parts in the last two years that they will accept orders in fair and non-discriminatory conditions; and (iii) to submit to the Competition Authority information about the supplies to resellers in the two years following the commitments decision.

25. S/0466/13 SGAE: In this case, SGAE, a collective management society of authors and editor’s intellectual property rights in Spain, was investigated concerning its agreements with television operators in Spain, which covered composer’s intellectual property licenses for the broadcasting on TV of their musical works. These agreements with SGAE are essential to broadcast music on TV in Spain, as SGAE is the only licensor in Spain and without these licenses, it is illegal to broadcast music on TV in Spain.

26. The investigation verified two kinds of abusive practices by SGAE in those agreements.

27. The first abuse happened due to the lack of transparency in the economic conditions agreed by SGAE with television operators in Spain, and resulted in unfair and discriminatory prices and discounts between different television operators, that had no objective justification.

28. The second abuse derived from the limits that SGAE set in its agreements with some television operators in Spain, which established a ceiling to the amount of music edited by those television operators that they could broadcast in their own TV channels.

29. The commitments accepted by the CNMC established a regime of publication in SGAE’s web page of all the economic conditions agreed with television operators in Spain. They also regulated the interpretation and application of the most conflictive terms, and opened to all television operators, with retroactive effects, certain discounts that were initially restricted by SGAE to a small number of television operators, in a unfairly and discriminatory way.

Concerning the second abuse, the commitments eliminated the ceilings to the amount of music edited by television operators that they could broadcast in their own TV channels.

4. Conclusions

30. As these examples above show, commitment decisions can be an efficient way of terminating an infringement investigation, but it requires that the alleged offenders are willing to implement tailored solutions that cover all the competition issues involved. If this goal is achieved both the Competition Authority and the parties will be satisfied, since competition will be restored and there will not be a declaration of infringement.

31. Despite these obvious advantages of commitment decisions, it is not a suitable solution in many cases. The Notice on Commitments helps the companies to discern whether their case is a good candidate for such solution, and show them how to proceed in order to increase their chances of success when requesting a commitment decision. This Notice has proved to be a useful guide for both the Authority and the companies, improving predictability and transparency.