

Ever doubted the “convergence” of competition and regulation? Spain integrates its sector regulators and the Competition Authority under a single agency roof

Pedro Callol García
*Competition Partner, Roca Junyent,
 Madrid/Barcelona*

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1. Background

The new Act of Parliament creating the National Competition and Markets Commission (CNMC) (CNMC Act)¹ breaks away from the current model of regulatory oversight in Spain. Hitherto, there have been in Spain a number of independent regulatory agencies or national regulatory authorities (NRAs) dealing with sector-specific areas. These included the telecoms, energy, postal and transportation (railways, airport) regulatory agencies. Competition enforcement nationwide was left to the National Competition Commission (NCC). The CNMC provides a single institutional framework for all of those regulatory agencies plus the NCC. Other agencies, i.e., Nuclear Safety Agency, Bank of Spain, Securities and Exchange Commission, are not affected by this reform and remain in their current form.

The CNMC Act does not affect substantive or procedural rules applicable to antitrust and regulatory proceedings. One of the declared goals is to achieve economies of scale and an integrated application of the law, following the trends observed in some other countries (although only one country springs to mind). There have been some remarkable disputes between the NCC and

sector regulators in the past, notably the Telecoms NRA, with severe conflicts arising in areas such as, for instance, the prosecution of price-squeeze.² The new law may also be trying to eliminate those types of conflicts and provide a higher degree of legal certainty.³ The CNMC Act reviews the competences conferred to the pre-existing NRAs, removing those that do not require the intervention of an independent authority and transferring them to the competent government departments (ministries).

As indicated, this institutional model is not without precedents. Germany has in the past merged some of their regulatory authorities: the German Bundesnetzagentur (BNetzA) has regulatory powers in the telecommunications, postal, electricity, gas and railway industries. But an independent national competition authority (NCA), the Bundeskartellamt, co-exists in Germany along with the BNetzA. The closest and most immediate precedent of the type of super-regulator Spain has implemented is in the Netherlands. In April this year, the Dutch NCA merged with the Postal and Telecommunications NRAs and the Consumer Authority. The new Authority, i.e. the Authority for Consumers and Markets (ACM), seems to share some key features with the new Spanish Authority, most remarkably, its role as sector regulator and competition enforcer.

The creation of the CNMC Act has been criticised from different perspectives. For instance, the hitherto independent NRAs (in particular the telecoms and energy NRAs) as well as the NCC, published different reports disapproving the merger. Academics, practitioners and even current officials of both the NCA and the NRAs have (privately and reservedly) expressed their worries and misgivings.

The European Commission has publicly stated its doubts concerning the independence of the new regulator. The Vice President of the European Commission, N. Kroes wrote to the Spanish authorities stating the Commission's fears that the NRAs would, as a result of the reform, lose independence and be deprived of many of the functions required in order to ensure the effective and impartial regulation of the telecommunications sector.⁴ The Commissioner's letter further states the difficulty of understanding how a transfer of powers from the telecommunications NRA back to the executive power would be compatible with the 2009 Community telecommunications regulatory framework.

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¹ Law 3/2013, of June 4, of creation of the National Competition and Markets Commission, entered into force on June 6, 2013.

² A good example of the tensions between the telecommunications NRA and the Competition Authority is in the price squeeze Decision of the Competition Authority of February 8, 2012, *Transporte Televisión*, exp. S/207/09. In the foregoing, the Competition Authority expressly remarked on its public Decision the *lack of cooperation and loyalty of the Telecommunications NRA*. It is a rather extreme example, but given the date of that Decision, it may well have had some bearing on the initiation by the Government of the legislative process leading to the merger of NRAs and Competition Authority into the CNMC.

³ There are other instances of past clashes between NRAs and the NCA. For an illustration of past instances of this type of regulatory conflict you may see my study with the CUTS research institute at <http://www.iica.in/images/Harmonising%20Regulatory%20Conflicts.pdf> [Accessed October 2, 2013].

⁴ See the letter by N. Kroes to the Spanish authorities (available at <http://ep00.epimg.net/descargables/2013/02/24/bc2701232a3b4f5a7d199cb40af021e0.pdf> [Accessed October 2, 2013]). The concerns expressed by the Commission may have had some impact in the legislative process, since the final CNMC Act addresses some of those concerns.

2. Institutional design

It is envisaged that the CNMC will have a dual structure reflecting on its regulatory and competition enforcement roles. Both functions will be carried out at two levels: (i) the governing bodies (the Council and the President); and (ii) the investigation bodies (four investigation directorates).

The Council has 10 members divided in two chambers of five members each; one chamber for competition matters led by the President of the CNMC and another for regulatory supervision presided over by the Vice President. The President has a quality vote in case of a tied vote at the Council. The CNMC Act envisages that both chambers will be closely linked and members will rotate between the two; each chamber must issue reports for the proceedings it hears that affect or relate to matters for which the other chamber is responsible.

The plenary session, with both chambers meeting together, shall also act as a governing body. Both chambers must meet together if there are discrepancies between them in any given matter,⁵ or if the importance of the matters discussed so requires. The Council of the CNMC is formally vested with the decision role of the CNMC. In that condition, the role of the Council has a tremendously wide scope. Given that the CNMC has all the supervisory and enforcement powers previously attributed to the expert regulators already indicated, its role includes tasks as diverse as enforcing competition in non-regulated sectors, dealing with price regulation in regulated areas, supervising investment plans for power transmission grids, or ensuring equality in the access to railway infrastructures, to name but a few.

The appointment of the Council members, including the President and the Vice President, is entrusted to the Government upon proposal of the Ministry of Economy and Competitiveness for a non-renewable term of six years. Parliament may veto the appointment by absolute majority vote.

Four directorates are envisaged.

- (1) Competition Directorate, which is in turn subdivided into:
 - Sub Directorate of Industry and Energy.
 - Sub Directorate of the Information Society.
 - Sub Directorate of Services.
 - Sub Directorate of Leniency and Cartels.
 - Monitoring Sub Directorate.

This internal division of the Competition Directorate is exactly the same as that existing under the NCC, which gives hope for some continuity regarding the work of the NCC.

- (2) Telecommunications and Media Directorate, in turn sub-divided in:
 - Sub Directorate of electronic communications regulation.
 - Sub Directorate of analysis of electronic communications markets.
 - Technical Sub Directorate of electronic communications.
 - Media Sub Directorate.
- (3) Energy Directorate:
 - Electricity Sub Directorate.
 - Natural gas Sub Directorate.
 - Regulated prices and economic-financial regulation Sub Directorate.
 - Sub Directorate of energy derived markets.
- (4) Transport and Postal Sectors Directorate:
 - Airport fares Sub Directorate.
 - Railway sector Sub Directorate.
 - Postal sector Sub Directorate.
 - Market analysis Sub Directorate.

The above structure resembles the structure of the Dutch ACM and provides for a comparable functional organisation.

The Directorates of the CNMC have the general powers of investigation and proposal to the Council of binding decisions. On competition matters, the Directorate of Competition assumes most of the roles attributed to the Directorate of Investigation under the pre-existing institutional design. The Competition Directorate is empowered to the effect of executing streamlined referrals under EC Regulation 139/2004, on concentrations⁶ and co-ordinating policies and actions with the European Commission and other NCAs under EC Regulation 1/2003, on implementation of the rules on competition laid down in arts 101 and 102 TFEU.⁷

The Statute also foresees a department for promotion of competition. Promotion of competition has had an important role in Spain and the NCC has been active in issuing publications on important sectors of the economy and publicising the relevance of competition law and the enforcement track of the NCC. Again, the establishment of this department of promotion of competition may be read as a continuation of the NCC's work.

Finally, a General Secretary is envisaged which deals with human resources, training, maintenance, management of the merger filing fee, etc. It is also divided into three Sub Directorates: for human resources, statistics and documentation and information technology systems.

⁵ This may be a useful tool to avoid conflicts, which arose in the past, between the competition and sector expert regulator. See point 1, above.

⁶ EC Regulation 139/2004, [2004] OJ L24/1, January 29, 2004.

⁷ EC Regulation 1/2003, [2003] OJ L1/1, January 4, 2003.

The CNMC's budget is approved pursuant to the general rules on the State budget so it does not have full budgetary independence; although the President of the CNMC may authorise small variations of the budget (up to 3 per cent increase in expenditure).

3. Allocation of regulatory and competition enforcement powers: the immediate future

Regarding *competition* matters, no significant changes take place. If at all, there is some general, concealed fear, that the CNMC will slow down the frantic anti-cartel activity unfolded by the NCC. Nominally, the law grants the CNMC almost all the functions of the NCC. Moreover, the law foresees specific powers of investigation and inspection in line with those under EC Regulation 1/2003, cited.

Regarding the *energy* sector, there is a transfer of powers to the Ministry of Industry, Energy and Tourism. In particular:

- (a) The inspection, initiation and instruction of some specific disciplinary proceedings, the attention to the complaints raised by consumers, amongst others.
- (b) The most significant change is that responsibility concerning the merger authorisations in the energy sector, which was attributed to the Energy NRA (the "Function 14", which became well-known internationally subsequent to the *Endesa* takeover saga) now falls under the jurisdiction of the Ministry, notwithstanding the area of merger control, which is retained by the CNMC.⁸

Concerning the *telecommunication* sector, the CNMC retains the powers of the pre-existing NRA in connection with key areas such as defining relevant markets, identifying operators with significant market power and establishing *ex ante* obligations when required. In relation to *media* matters the law transfers to the Ministry of Industry, Energy and Tourism some functions which were formally carried out by the Telecommunications NRA, such as the reception of communications concerning the initiation of relevant activities and the supervision of the Registry of Media Service Providers. Also the definition of media events of general interest is now a task attributed to the Government.

In the *postal* sector, the law assigns the CNMC the tasks of the National Commission of the Postal Sector: supervision of the provision and financing of the universal postal service and network access matters. The Ministry

of Development (*Ministerio de Fomento*) keeps the duties concerning the information to users, management of complaints and complaints of users for the breach of duties of the postal operators, and inspection and disciplinary powers related to the above.

Finally, regarding the *transport* sector, the CNMC will supervise the transparency and consultation procedures for modification or upgrading of airport fares and the fairness of tenders for public railway services on the national network, guaranteeing equality between companies and infrastructure managers regarding standards, fees and certain aspects of international passenger rail services.

After the adoption of the law, the Council of Ministers has the task of approving the Statute of the CNMC through a Royal Decree. Immediately after, the Government will appoint the members of the Council of the new CNMC and, finally, as set forth in the law, the CNMC will start to operate in four months from the entry into force of the law.

The indicated (ambitious) calendar has largely been fulfilled. The Statute of the CNMC was approved at the end of August.⁹ The functioning of the CNMC is described there in detail. The competition and regulatory procedures initiated under the pre-existing authorities will be dealt with by the pre-existing organs and officers, which keep their roles under the new CNMC. The members of the CNMC Council are afforded treatment of high state officials and they are subject to a regime of incompatibility with other roles or jobs. The Statute also envisages the approval by the Council of the regime of rotation whereby individual Council members will alternate between chambers.

The Council of the CNMC has already been appointed. The President is an economics professor who has had various roles with relevant companies and, since 2000, is a member of the Council of the Bank of Spain. The Vice President is a career officer with the central state administration. One of the members of the Council was also a member of the Council of the NCC. The others are mostly academics, career officers and some politicians. As one would expect, the appointments have been characterised as political by some opposition parties.¹⁰

It now remains to be seen whether the CNMC is up to the task and manages to navigate through the many challenges and away from the criticism spilled in connection with the CNMC's birth. A good indicator will be whether the CNMC is able to maintain the current intensity of competition enforcement. In particular, the NCC has been amongst Europe's most active NCAs since

⁸ This "function 14th" was used by the Spanish authorities in the years 2005–2006 as a tool to block the unsolicited public offers for Endesa, Spain's largest utility at the time. In a case that led to substantial litigation both in Spain and before the Luxembourg Courts, the Court of Justice ended up declaring the unlawfulness of this national provision under arts 43 and 56 of the EC Treaty—freedom of establishment and free circulation of capital (ECJ judgment of July 17, 2008, *Commission of the European Communities v Spain* (C-207/07) [2008] E.C.R. I-111). The "function 14" currently survives under the form of a simple communication procedure, and remains an authorisation when the acquisition of a regulated energy company is carried out by a non-EU company.

⁹ Royal Decree 657/2013, of August 30, approving the Statute of the National Commission for Markets and Competition.

¹⁰ See Expansion, September 6, 2013, p.18, for a full report on the appointed members' profiles.

the entering into force of EC Regulation 1/2003, cited.¹¹ In the Netherlands, some have voiced concerns that the ACM has been less active in its anti-cartel activity since its inception.¹² One can only wait and see whether the CNMC will continue its predecessor's intense anti-cartel activity.

Other, largely unknown challenges will doubtlessly arise. Informally, some have expressed concerns that the new super-regulator will have access to consolidated information on companies' conduct; and that this information, perhaps acquired in the framework of a sector regulation file, could be used, for instance, in connection with an antitrust investigation.¹³ There are also concerns that the clashes that have in the past arisen between sector regulators and the NCA will continue to exist, albeit in a much more concealed manner, which may be too simplistic a solution. Likewise, the devolution of regulatory powers to the Government, it has been suggested, may be contrary to the EU Directives on sector liberalisation.¹⁴ It has also been suggested¹⁵ that the risk of capture of the regulator may increase as a result of the

said devolution, because government departments are more dependent than independent agencies on party politics.

As with all new things, only time will tell.

Of relevance is also the recent judgment of the General Court of September 6, 2013, *Deutsche Bahn v Commission* (T-289, 290, 521/11). An argument made in that case was that the Commission inspections were not proportionate, since the data should have been collected by the sector regulator, the Bundesnetzagentur in Germany (the investigation concerned the railway sector). This argument concerns the possible interaction between inspections for the purposes of enforcing competition law versus investigations in the context of sector regulation enforcement. The argument is rejected on other grounds, i.e. that the Commission is not bound by national authorities' decisions when investigating arts 101, 102 TFEU infringements. But the question argued may well be applicable to inspection activities by a merged Authority such as the CNMC.

¹¹ See the European Competition Network statistics regarding enforcement by NCAs available at <http://ec.europa.eu/competition/ecn/statistics.html#2> [Accessed October 2, 2013].

¹² "The area of cartels has been relatively quiet recently. One explanation appears to lie in the merger of the various regulators to create the ACM, which has demanded a lot of inward looking attention" (F. Ten Have and C. Swaak, *Global Competition Review, The European Antitrust Review*, 2014).

¹³ The case law of the European courts may provide the reasoning for dealing with this kind of problems; one could resort *mutatis mutandis* to the reasoning of the European Court in matters such as *Nexans France SAS v European Commission* (T-135/09) [2013] 4 C.M.L.R. 6 (judgment of the General Court of November 14, 2012) and argue that evidence gathered with a particular purpose or for the purposes of a single investigation is barred from being used in other investigations. According to the General Court in the *Nexans* case, cited, "[...] when the Commission carries out an inspection at the premises of an undertaking under Article 20(4) of Regulation No 1/2003, it is required to restrict its searches to the activities of that undertaking relating to the sectors indicated in the decision ordering the inspection and accordingly, once it has found, after examination, that a document or other item of information does not relate to those activities, to refrain from using that document or item of information for the purposes of its investigation." This kind of reasoning could well support the notion that evidence gathered by the CNMC in the course of a regulatory file should be precluded from use in a competition file, and vice versa.

¹⁴ See point 1, above.

¹⁵ G. Ariño, J.M. de la Cuetara, *Reguladores Sectoriales y Defensa de la Competencia. Una aportación al debate de su fusión*, G. Ariño, working paper, fn.42, Madrid.