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ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Note by Spain --

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More documents related to this discussion can be found at <http://www.oecd.org/daf/competition>.

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1. The Act 3/2013, adopted by the Spanish Parliament on 4th of June 2013, created a new Authority in charge of both competition and regulatory matters, the new Spanish National Authority for Markets and Competition. The new Authority merges the former Competition Authority, the National Competition Authority (CNC), with several sectoral regulators responsible for telecommunications, energy, railways, postal services, audio visual products and airports. It will therefore have a hybrid mandate: promoting and enforcing competition and regulating a wide array of economic sectors.

2. The new multifunctional Authority was introduced above all to guarantee the coherence between competition rulings and sectoral regulation, and to achieve much needed synergies. At the same time, it was designed as a response to the momentous changes that these sector have been experiencing for the past decade, especially in the telecommunications, energy and transport industries.

3. The importance and scope of the functions that the CNMC has been charged with¹ place the Spanish Authority as a fundamental element to ensure the correct operation of the economy, to bolster its potential for growth and help in the solution of many deep-seated problems of the Spanish society that have worsened as a consequence of the recent economic crisis.

4. It is common knowledge that in matters of importance neither shortcuts nor choosing the path of least resistance are usually effective strategies. The roadmap that leads to the consolidation of the timid recovery of the Spanish economy during the first few months of 2014 hinges on a sustainable increase in productivity.

5. In turn, firms will only be more productive if the economic and regulatory authorities provide a level playing field and a predictable economic environment. To boost productivity, it is necessary to persevere in the path of structural reforms initiated in 2007, although their necessity had already been frequently stressed by international organisations (among others, see ECB, 2012; OECD, 2012 and 2013; IMF, 2013; European Commission, 2013 and 2014). In this new stage of the Spanish economy, the CNMC can be a dynamic factor and an important link in the process of structural reform, sometimes as the engine and sometimes as the main tool.

1. The motivation/rationale for the change

6. The origin of independent regulatory agencies in Europe is closely related to the opening to competition of services traditionally provided by the public sector such as telecommunications, energy, and postal or transport services. However, the first independent regulator, the Interstate Commerce Commission, had appeared many years before in the United States to regulate railways. The use of this sort of agencies as regulatory tools by the American government was confirmed by the establishment of the Federal Trade Commission in 1914 and with the development of the antitrust policies (Dudley and Brito, 2012, especially chapters 1 and 6).

7. European countries opted instead for the correction of market failures through public services nationalization or via the creation of public enterprises. The first independent agency established according to the American model was the Independent Television Authority, created in Great Britain in 1954. Successive British governments confirmed the drift of the regulatory model away from the rest of Europe

1. According to the legislation, the main functions of the CNMC are to “ensure, preserve and promote the correct operation, transparency and effective competition in all markets and economic sectors”. (Act 3/2013, Art. 5, 1). Besides, it will have specific responsibilities in certain areas, in particular “the electronic and audio-visual communications markets, the electricity and natural gas sectors, railways tariffs and the postal services” (ibid. Art. 5, 3).

by establishing many varied independent authorities throughout the sixties and the seventies (Baldwin et al., 2012: pp. 4-5).

8. In the nineties many European countries took advantage of the development of the common market to carry out an ambitious liberalizing programme, based in the theoretical and empirical developments of Industrial Organization.² This process produced reforms that had as a common goal a more efficient behaviour of strategic markets that are critical for economic development and for the welfare of consumers and businesses.

9. In Spain the liberalizing trend gained momentum in the second half of the '90s and brought about the creation of the first independent regulatory agencies, now integrated into the CNMC. The two basic statutes dealing with the energy sector were Act 54/1997 of the Electricity Sector, and Act 34/1998 of the Hydrocarbon Sector, which introduced the National Energy Commission (Comisión Nacional de la Energía – CNE). On the other hand, Act 12/1997 of Liberalization of Telecommunications created the Telecommunications Market Commission (Comisión del Mercado de las Telecomunicaciones – CMT).

10. During the first decade of the twenty-first century the process of public services liberalization continued, and with it new independent regulatory agencies were established: Act 39/2003 of the Railways Sector created the Railways Regulatory Commission (Comité de Regulación Ferroviaria); Act 23/2007 introduced the National Postal Service Commission (Comisión Nacional del Sector Postal); finally, four years later, the Royal Decree-Law 11/2011 established the Airports Economic Regulation Commission (Comisión de Regulación Económica Aeroportuaria), whose functions were later combined with those of the Railways Commission until the creation of the CNMC.

2. Agencies in charge of the defence and promotion of competition

11. Almost a decade before the liberalization and regulation of strategic sectors started, the Spanish government had already adopted Act 16/1989 of Defence of Competition, which created the Defence of Competition Tribunal and the Defence of Competition Service. Since then, the promotion and defence of competition has been confirmed as one of the most important economic policy tools at the disposal of governments, especially in the context of the European Union (EU) and the Single Market. This general agreement is assumed by the EU in its fundamental statutes (Treaty on the Functioning of the European Union – TFEU: Title VII, Chapter 1, Articles 101-109), based upon the conviction that free competition between firms results in higher economic growth and increased social welfare. As part of the policies of supply, the promotion of competition is complementary to other regulatory measures and a first-rate tool to boost input productivity and the general competitiveness of the economy.

12. An important reform of the EU legal framework for competition took place in 2003 and 2004,³ so that it was necessary to update the Spanish legislation on competition with Act 15/2007 of July 3 on Defence of Competition. The new statute's goal was to strengthen the existing mechanisms with a more adequate institutional structure such as the creation of the National Competition Authority (Comisión Nacional de la Competencia – CNC). The CNC was a public body reporting to the government with the mandate to defend and promote effective competition in the national markets. It is generally acknowledged that the agency has performed with professional competence in spite of the inherent difficulties of its task.

2. See the panoramic view offered by Vickers and Yarrow (1988) and Newbery (1999), although the latter is specifically focused on services related to network industries.

3. Council Regulation 1/2003/EC of December 16 2002 on the implementation of the rules on competition laid down in Articles 81 y 82 of the EC Treaty (now articles 101 and 102 of the TFEU); and Council Regulation 139/2004/EC of January 20 2004 on the control of concentrations between enterprises.

3. The single regulator model

13. When the trend towards liberalization became widely accepted in Europe, an intense debate arose on whether the sectors that had been recently opened to competition should remain under the general rules of competition in each country or whether they should be supervised by independent sectoral regulators. Spain chose a functional separation between the sectoral authorities and the competition authority. Among other activities, sectoral regulators would ensure the vertical separation of firms that operate both in regulated and unregulated sectors, would mediate in conflicts between operators and would guarantee access to essential infrastructures. In turn, the competition authority would focus on uncovering and sanctioning anticompetitive practices, and on evaluating merger proposals (vid. Act 3/2013 of creation of the CNMC, Preamble, I).

14. It was reasonable then that the Spanish government considered a new model. The previous regulatory model for the energy and telecommunications sectors, based on specialized regulators, had been designed at the beginning of the liberalization process. However, the reality of these two industries is quite different at present, due mainly to the higher level of competition and—to a lesser extent—to the convergence between sectors. This new reality advised to improve the coordination between sectoral regulations, as well as between the sectoral regulations and the application of the competition rules. It is the only way to ensure that competition can be promoted all across the economy.

15. The new model answers also the need to ensure a predictable business environment and legal certainty for the firms. These two conditions are indispensable for network industries—where huge investments are required—but also and for the rest of the business community if investment and innovation are to be promoted. On the other hand, the integration of a sectoral approach with the defence of competition endows the CNMC with a global perspective of the economy that allows the consideration of the external effects of strategic sectors like energy or telecommunications. When this global approach is combined with the required independence, regulatory capture is a lot more difficult, preventing the alignment of the authority's performance with sectoral interests.

16. Moreover, the objectives of the reform that resulted in the new model of the Spanish regulatory and competition authority were coherent with other goals of the legislator, such as the reduction in the number of regulatory bodies, in line with the recommendations of the community initiative for “smart regulation” (Communication COM (2010); Baldwin et al., 2012: chapter 19). They were also consistent with the need for austerity, although this second factor was in fact of secondary importance (Valiente, 2014: p. 2) in spite of being explicitly mentioned in the Preamble of Act 3/2013.

4. Essential features of the model

17. The new model can be characterized by three essential features. First, independence from the government, to isolate regulatory decisions from the political cycle and generate trust for investors; but also independence from the firms, to guarantee that markets will operate as competitively as possible according to their economic nature, without undue consideration to private interests, and to ensure that the regulated activities do not burden the consumers with excessive costs. This independence is tantamount to minimizing the risk of regulatory capture and regulatory opportunism, and it is a particularly crucial element for multisectoral authorities.

18. Second, integration of the functions of regulatory oversight and competition defence with the common goal of creating efficient markets that may benefit consumers and businesses.

19. Last, but not least, transparency before markets and citizens (Act 3/2013 establishes the mandatory publication of decisions, agreements and reports, once they have been communicated to the

parties), and especially before the Parliament, to which the CNMC is accountable. These accountability mechanisms ensure that the performance of the new authority is aligned with the public interest.

20. Let us take a closer look to the second element, which is especially important. The CNMC is an integrated authority in a twofold sense: it is a multisectoral regulatory authority that is in charge of the task of regulatory oversight over all regulated network industries, and it is a convergent authority that receives a clear mandate for both regulatory supervision and defence of competition activities.

5. Functions and structure of the CNMC

21. The independence of the CNMC from any political interference is clearly established in Act 3/2013 as well as its three main functions: regulatory supervision for the regulated industries (energy, telecommunications and audio visual products, transport and postal services), defence of competition and providing advice to the government regarding competition and the correct operation of markets. More specifically, It is mandatory (Act 3/2013, Art. 5.2 a) that the CNMC evaluate the legal initiatives from the competition perspective, and at the same time the statute charges the authority with the task of submitting to the government structural reforms that may foster competition.

22. The CNMC's structure and operation are designed to guarantee that the single regulatory and competition authority remains independent, behaves with transparency and is effectively accountable to the Parliament:

- The decision-making body or board is the Council, consisting of ten members (Chairman, Deputy Chairman and eight members). To ensure their independence, the government will appoint the members of the Council for a six-year non-renewable term, and they are explicitly forbidden to accept or ask for instructions from the government. They can only be removed for very serious misbehaviour that is explicitly enumerated in the CNMC's statute. Moreover, it is a full-time job for them that cannot be made compatible with other professional activities during their tenure and two years after leaving their position.
- The Council can operate in two Chambers or in plenary session, with coordination mechanisms in place that guarantee the global and consistent approach expected of a single authority. The Competition Chamber is devoted to ordinary matters regarding competition enforcement, and the Regulatory Chamber is devoted to regulatory supervision, but each Chamber may issue an opinion on the files considered by the other. Besides the Council can sit in plenary session whenever there is a divergence between the Chambers. Likewise, when a given number of members of the Council so decide, a matter may be subject to the Council Plenary's approval.
- There are four Directorates with investigation powers: a Competition Directorate in charge of general competition enforcement and three Regulatory Directorates: Energy, Telecommunications and Audio Visual Sector, and Transport and Postal Services. The Competition Directorate will keep all the powers established for the CNC in the 2007 Competition Act. The CNMC's Council will appoint the Directors of the Directorates for a four-year renewable term. It is also a full-time job for them that cannot be shared with other professional activities. As an additional precautionary measure when punitive sanctions against firms are being considered, the CNMC structure guarantees a functional separation between the activities of the four Directorates and the Council.
- The Chairman of the CNMC is in charge of the direction, coordination, supervision and evaluation of its different units, and is also its institutional representative at home and abroad.

23. The CNMC has adopted a Strategic Plan incorporating comments and suggestions from relevant stakeholders. The pillars of the Strategic Plan are three commitments: to rigorously apply all the available tools to the markets and regulated sectors; to maintain strict independence and act with transparency; and to ensure legal certainty for businesses and investors. The last point is particularly important and should be—as was mentioned above—one of the advantages of the new model of authority. Legal certainty should not be understood as maintaining the status quo but as minimizing regulatory risk. The CNMC could indeed contribute to it with predictable and argued decisions that remove any threat of arbitrariness.

24. It is too soon to assess the performance of the new authority, and it will take time until the pre-existing parts of the CNMC are completely integrated into a new and coherent institution with a single institutional culture and an effective and cohesive strategy. However, the first months of activity seem to indicate that a single and independent authority could have huge potential benefits for consumers and for the Spanish society.

Figure 1. Structure of the CNMC

