

ADVOCACY RECOMMENDATIONS FIRST SEMESTER 2017

The CNMC was established in October 2013 as a result of the merger between the CNC (Competition Authority) and a number of network regulators including the CMT (Telecommunications), the CNE (Energy), the CRFA (Railroads and Air Tariffs) and CNSP (Post).

The economic rationale that underpins this innovative structural design, and the main driver of the CNMC as an institution, is the systematic defense and promotion of economic efficiency in the traditional sectors and the new digital economy as a mean to increase consumer's welfare. For accomplishing this goal, the CNMC's staff is ameliorating the advocacy, antitrust and regulatory toolbox at a fast pace, with distinctive emphasis on transparency, independence, legal certainty and advancement of internal synergies.

Nonetheless, there is urgent need to reinforce the Authority by, on the one side, clarifying and fortifying the regulatory competences of the CNMC vis-à-vis the sectorial Ministries in the respective regulated network sectors, and on the other side, providing the CNMC with the necessary and crucial management capabilities of its own human resources to carry out its mandate in an independent, rigorous and efficient way.

The following recommendations draw on the work that the CNMC, as Competition and Regulatory Authority, has been doing in the fields of **competition advocacy, efficient economic regulation and structural reforms**. Some of the issues mentioned are newcomers to the European and Spanish economic agenda; others are pending tasks of a multi-generational effort that could be starting to bear fruits.

In order to enhance competition benefits and economic efficiency and, thus, consumer welfare, job and growth creation and competitiveness, in 2017 special attention will be given by the CNMC, vis-à-vis the Spanish administrations, to the following markets.

New models for online service delivery and the sharing economy:

Disruptive innovations in information and communication technologies, together with the generalization of the Internet and the smartphone, the willingness of consumers to reveal its identity on the social media, and cumbersome sectorial regulations, are giving rise to new models for service delivery and sharing-economy models.

Transport and tourism are the main sectors where the first procompetitive effects and regulatory challenges are being noticed, at a local and global scale.

There is a clear opportunity for Spanish society as a whole to benefit from these new developments and for consumers to get better prices, quality and variety of products and services.

This goal could only be materialized through enhanced competition in efficiently regulated (or deregulated) markets. Thus, regulators, at all administrative levels, need to rigorously avoid the introduction of unjustified barriers to entry or activity of new providers; for instance, with the introduction of groundless legal norms or uncompetitive red tape. It is also necessary to systematically review existing sectorial regulations (without excluding the need to adapt horizontal legislation: that is, taxes and social security influxes) to fully tap the economic benefits of the disruptive innovations appearing in the markets.

The regulatory adaptation should be done urgently, with full respect of European market unity and antitrust norms, case by case, at the most appropriate administrative level.

The standing regulations must be uncluttered and purged from unfounded barriers to competition. If new restrictions were to be introduced, they must be first checked against the “necessary” and “proportionate” principles, to guarantee that the rules are not “incumbent tailored”, but strictly aligned to the general interest objectives that should be accomplished (*overriding reasons of public interest*).

To that end, a number of lines of work are being followed by the CNMC:

a. Public consultation on the preliminary findings of the market study on new models for service delivery and on sharing economy

After the first public consultation launched by the CNMC on the new models for service delivery and the “sharing economy”¹ and once the preliminary report including the findings of the market study on new models for service delivery and on sharing economy was concluded, the CNMC has launched a second public [consultation to request public opinion on these preliminary findings](#).

The ultimate purpose of this study is to issue a series of recommendations from the independent standpoint of the Competition Authority, aimed at ensuring efficient economic regulation of the affected markets. It also provides an overview of the state of development of the “sharing economy” in Spain.

¹ <http://cnmc.es/en-gb/promotion/sectoralreportsandstudies/studyonthesharingeconomy.aspx>

It focuses in two specific industries in particular, passenger road transport and tourist accommodation, where new models for service delivery have already irrupted in the markets.

A public consultation was launched in order to request opinion from stakeholders and civil society on the 14 preliminary recommendations of the study.

A total of 1,150 valid responses have been received through electronic means. The responses show that members of competition authorities and regulators, consumer organizations and universities perceive the sharing economy as an opportunity to improve social welfare, regulation and competition. On the contrary, the perception of unions for these new economic models has been negative, being especially critical of the need to ensure payment of taxes.

The consultation participants particularly appreciated the opportunities offered by the collaborative economy to act as a supplier to these markets and have access to a wider range of products and services.

b. Other advocacy initiatives

During 2016, the advocacy department of the CNMC has actively engaged in different working groups, workshops, roundtables, international meetings, etcetera, related to the sharing economy phenomenon, to share its view and recommendations on the topic and to be an active participant on the public debate.

Universities:

Universities decisively contribute to the development of human capital, as well as to a country's competitiveness as a whole. In principle, there are arguments for both public intervention and for safeguarding the beneficial effects of competition – such as to better attract and generate innovation, knowledge, talent and entrepreneurship. However, many experts have pointed out that one of the main reasons why the Spanish university system fails to be at a top level internationally speaking is the lack of incentives for efficiency and competition among universities.

Consequently, the CNMC is currently conducting a study on the efficiency of regulation and effective competition among universities in Spain. The aim of this study is to see how the Spanish university system adapts to the global paradigm of competition in terms of quality, and the role played by its current regulation.

Public consultation on competition and efficient regulation among universities in Spain

The CNMC, in order to collect opinions and ideas from experts and stakeholders, launched in June 2016 a [public consultation on the university system in Spain](#) based a set of questions on both general issues about the university teaching and research, and more specific aspects related to competition, efficiency and the current model.

It received a total of 605 valid responses from different groups: university students and teachers, researchers, administration and management personnel from both public and private universities or public servants. The results show a general rating of the university system in Spain of 2.48 over 5.

Among the different reform proposals, the competition in the partnership with companies, the introduction of incentives to attract the best students, the design of a more flexible framework to easily adapt degrees to a changing environment or the introduction of multiple-criteria assessments are the most supported initiatives.

Initiatives undertaken in the framework of the Market Unity Act in higher education services

Regional restrictions on competition between universities have been addressed in the framework of the Market Unity Act. In July 2016, the CNMC has challenged in the National Court a decision of Aragón's regional government which hinders both entry and the capacity to compete of universities in Aragon's higher education system, in particular banning other universities from offering the same titles as the University of Zaragoza – the traditional incumbent - and requiring universities to prove that there is a social demand in order to obtain administrative approval to offer new titles. The [Economic Report](#) issued for this jurisdictional challenge explains the benefits of fostering effective competition between universities, analyses many obstacles to competition in the Spanish higher education system, and shows how recent entry dynamics in the Aragon region – the establishment of a private university in 2005 – has triggered positive competitive effects which have proven beneficial for users in several dimensions.

Professional services

The reform of the access to professional services has been -and still is- one of the main concerns of the Spanish competition authority. Both the former CNC and the current CNMC have supported reforms in the sector through reports such as the Report on professional colleges after the transposition of the services directive².

² [Informe de 2008 sobre el sector de servicios profesionales y los colegios profesionales](#) y el [Informe de 2012 sobre los Colegios profesionales tras la transposición de la Directiva de Servicios](#)

The well acknowledged need for reform resulted in the redaction of the Draft Bill on professional services, which was finally withdrawn by the Government in spring 2015, therefore postponing the response to the urgent need to undertake a structural and procompetitive reform of the professional services' regulatory framework.

The CNMC has issued several reports on professional associations lately. Late in 2015, two reports were produced, one on the draft statutes of architects' professional Association -IPN/CNMC/022/15- and the second one on real estate administrators - IPN/CNMC/025/15-, including some recommendations on this purpose. Early in 2016 three additional reports on draft statutes of professional associations – IPN/CNMC/004/16 on rural engineers, IPN/CNMC/005/16 on economists, and IPN/CNMC/008/16 on forestry engineers- have been issued by the CNMC, as well as a report on the criteria to select architects as forensic experts –INF/CNMC/005/15-. All of them recommend the removal of compulsory affiliation as a means of avoiding barriers of entry and promoting competition and send a clear message to the Government in order to pass a new law on professional services and professional associations which promotes real competition on these areas.

Restrictions on competition in professional services have also been addressed in the framework of the Market Unity Act, especially in the domain of reserved tasks. In September 2016, the CNMC has challenged in the National Court a local administrative act in the Valencia region which establishes an exclusive reserved task for architects in the evaluation of building standards. As highlighted by the [Economic Report](#) issued by the CNMC for this jurisdictional challenge, reserved tasks in architectural services are extremely restrictive in Spain compared to other European countries and they negatively impact productivity growth. Consumer welfare losses arising from these entry barriers are significant, as the report shows.

Retail trade

Restrictions on competition in retail trade have been analyzed by the Spanish Competition Authority in several market studies and reports over the last decades. Although some progress has been made through the transposition of the Services Directive to the Spanish regulatory framework, several restrictions remain in the retail trade sector at the national, regional and local levels. Unjustified access regimes or authorizations restrict entry in the majority of Spanish regions. The ability of operators to compete is still hindered by unjustified regulatory provisions, such as bans on below cost selling and restrictions on opening hours and Sunday/holidays trading.

Moreover, in contrast with some reforms carried out in recent years, further advance seems to be stalled or even in risk of reversal. Several municipal and regional authorities have already shown their will to step back.

Restrictions on competition in retail trade have been addressed in the framework of the Market Unity Act. In 2015, the CNMC challenged in the National Court an administrative act of Valencia's regional Government that limits opening hours and Sunday/holidays trading in the local retail market. The [Economic Report](#) issued for this jurisdictional challenge provides an economic analysis of these restrictions, and in particular shows how regional governments may use regulatory tools originally designed to remove restrictions on opening hours in certain areas – in the so called, *zones with a high degree of touristic attendance* – in a discriminatory fashion, distorting effective competition. In addition, in July 2015 the CNMC challenged an administrative act of the Balearic Islands' Government that denied an authorization to establish a large retail outlet alleging that it would be contrary to land use regulations.

Retail Distribution of Medicines

In October 2015 the CNMC published a study on the [Market for Retail Distribution of Medicines in Spain](#) in which restrictions on competition imposed by current regulations were analyzed.

The CNMC, with the goal of improving economic efficiency in the distribution of medicines while maintaining or enhancing current levels of public health protection, recommended the elimination of: (i) Restrictions on the population units and minimum obligatory distances between pharmacies and between pharmacies and health centers. (ii) Restrictions on the activity of dispensing medicines by allowing the sale of non-prescription medicines in other establishments, over the Internet providing that such medicines are dispensed, if needed, by a qualified professional. (iii) Restrictions on ownership of pharmacies, such as the obligation to be officially registered pharmacists, the ban to own more than one pharmacy, or the restriction on the vertical integration of pharmacies, as well as, *inter alia* (iv) The requirement that owners and pharmacists in pharmacies be officially registered with the guild (*Colegio profesional*).

As a follow up, during 2016 the CNMC has continued to actively engage on the public debate regarding this topic, underlining the importance of a liberalized and well-functioning retail distribution of medicines market.

Public procurement and other forms of public provisioning

Public procurement accounts for 18.5% of Spain's GDP. The transposition of the new EU Procurement Directives provides a great opportunity to enhance the Spanish regulatory framework for public procurement, in-house providing and concessions, with the ultimate objective to improve competition and efficiency for the benefit of all. When addressing this task, the Government should take into account the two reports produced by the CNMC in 2015, assessing the intended transposition of the fourth package of European Union law concerning public procurement into internal law -the first on [public procurement](#) and the second on [utilities procurement](#)- from the point of view of effective competition in markets and efficient economic regulation.

During 2016 CNMC has been putting strong emphasis on efficient and procompetitive design of demand aggregation initiatives. To this aim, it has produced four reports of tender documents for centralized purchasing of office supplies, furniture, audiovisual devices and computers. Each of these reports stresses the need for carefully balancing scale efficiency gains vs. undesired market closure effects when designing these sort of contracts.

Last but not least, avoiding bid rigging is a top priority for CNMC, although current detection mechanisms have serious shortcomings. With this objective in mind, authorities have to put in place effective measures that improve training, screening and cooperation among public administrations. Administrative remedies and judiciary appeals should also be reinforced. Private operators should be encouraged to improve their compliance programs in this field, increasing their aversion to collusion, and incentives should be created for contracting units to take a proactive approach on this matter.

Postal services

In the same line as in previous years, the CNMC has continued to grant lot of attention to postal services in 2016. Advocacy and regulatory actions in this field aim at promoting competition in postal markets, protecting new entrants and avoiding excesses in the definition and compensation of universal postal services and other public service obligations, thus getting the best possible consumer welfare. Following its own report on postal services in electoral processes – INF/DTSP/004/2014- with recommendations mostly ignored by the Government in subsequent electoral processes, as well as a Decision by the European Commission opening a formal investigation procedure on State Aid to Correos S.A., the CNMC would suggest a recommendation on this issue in the framework of the European semester.

Automotive Fuel:

Concentration in the refinement and retail distribution of fuel is higher in Spain than in other EU countries of similar size, hindering Spanish competitiveness. More competition needs to be introduced simultaneously upstream and downstream, so to curb the market power of wholesalers and increase the overall competitive benefits and efficiency of the sector.

This is the reason why the CNMC has carried out several reports on this market. In June 2015 a [Study on the level of competition in the wholesale market for road fuels in Spain](#) was published. It revealed the persistence of numerous barriers to entry and expansion of new entrants in the wholesale market, which limits the effective competition on the market, the competition constraint posed by imports and results in higher prices for consumers, independent operators and the national industries that need fuel or road transport as an input.

Few months after the publication of the report, the three operators with refining capacity in Spain no longer continue in the transport network company (CLH).

In July 2016, the CNMC has adopted a [report on the regulation of the market for distribution of road fuels through unmanned petrol stations](#). The report identifies several barriers to entry and expansion of this format of petrol stations, which restrict the freedom of companies and consumer choice on the basis of (i) the maintenance of employment, (ii) the facility safety or (iii) consumer protection, against evidence available in the European Union and Spain. However, the regulation stands out as a particularly unjustified imposition, which does not correspond with the evidence available in the European Union and Spain.

Among other findings, the report points out that agricultural cooperatives have supplied fuels for many decades without significant incidents and without having the burden to necessarily have a physical person on the ground

Consequently, the CNMC proposes a series of recommendations to increase competition in the market for retail distribution of road fuels and to promote the general interest: (i) to remove any regulatory provision which prohibits or discriminates automatic or unmanned petrol stations; (ii) to avoid the quantitative restriction limiting the ability of agricultural cooperatives to supply road fuels to non-members; (iii) to ensure that the regulation applicable to cooperatives is applied, without restrictions, in a non-discriminatory basis to all kinds of automatic or unmanned petrol stations; (iv) to give alternative wordings to the requirements included in the regulation guaranteeing that these requirements are justified under the principles of necessity and proportionality; (v) to avoid any provision that restricts the effective competition or the development of the market for retail distribution of road fuels through petrol stations.

Acces regimes and land use regulations restrict the opening of other types of gas stations, such as hypermarket fuel stations. In July 2015 - in the framework of the Market Unity Act - the CNMC challenged in the National Court an administrative act of the Balearic Islands' Government that restricts competition in road fuel retailing. In March 2016, the National Court finally admitted the appeal. The [Economic Report](#) issued by the CNMC for this jurisdictional challenge shows how regional regulations hinder entry by hypermarkets road fuel stations, in particular resorting to land use regulations and policies. The Economic Report provides evidence on the positive effects triggered by the entry of hypermarkets and low cost fuel retailers, undertakes an economic assessment of how land use regulations may hinder entry in the retail downstream market, and estimates consumer welfare losses due to these restrictions in the local market analyzed in which the report focuses.

Market for Electricity Generation in Spain:

The CNMC is currently conducting a study on the [level of competition and efficient functioning of the generation electricity market](#). The activity of electricity generation is experiencing important structural and technological changes that impact both supply and demand. These changes will likely have a great impact on the functioning of the Spanish electricity generation market and its regulatory framework. Moreover, electricity is an essential input for every production process and a basic good for households.

Among other important aspects, the study will aim to clarify whether certain operators hold market power capable of altering the normal functioning of the market, especially those with strategic assets (plant location, access to hydroelectric resources, access to fuel, transportation restrictions, inherited contractual rights, etc.) which are not replicable and give them a non-replicable competitive advantage; it will assess the adequacy of the current design of capacity mechanisms in the Spanish electric system; it will analyze the so-called procedure for the resolution of technical restrictions; it will study the suitability of the current remuneration system of renewable plants; or the new regulation of self-consumption and its implications in terms of efficiency and competition.

Urban water and wastewater services

Urban water and wastewater services are essential to life, not only directly, through the provision of water fit for human consumption, but also indirectly, through the impact of these services on the environment. The environmental dimension of these services has been addressed through legislation (both European and national) for some time now. However, the economic dimension remains broadly unexplored in Spain, especially in what concerns competition, efficiency and transparency.

This is why the CNMC is currently undertaking a market study on urban water and wastewater services in Spain and looking into different possibilities to introduce competition and enhance efficiency. In Spain, the water sector falls within the municipalities' responsibilities, which decide whether to provide the service themselves or contract. Unlike other countries, Spain does not have a regulator nor official statistics for the urban water sector.

The study aims at analysing 1) whether there is scope to introduce competition in some parts of the urban water cycle, which has traditionally been considered a natural monopoly as a whole, 2) how to improve efficiency in a sector characterised by large economies of scale, 3) the possibility of introducing techniques of competition by comparison (such as benchmarking), 4) how to enhance transparency in a fairly unknown sector, 5) the role of a potential market regulator.

As part of this study, the CNMC is following developments in other countries, which may help draw useful lessons and conclusion for the Spanish case.

Telecommunications

During 2016, the CNMC has continued to promote the implementation of well-designed competitive tenders in this area, mainly concerning the granting of State aid to broadband developments in rural areas, where several reports have been issued regarding rural broadband deployment programs, for instance in Galicia, País Vasco, Canarias and Castilla-León.

Main recommendations in this area include: i) use of competitive tenders where possible, ii) preference for price and other objective and quantifiable criteria over abstract, not sufficiently developed criteria, iv) reduction of duration of concessions to the minimum possible taking due account of constraints such as maturity of investments, v) avoidance of substantial modifications of concession during their life, in order to ensure that concessionaires assume an adequate amount of the

risk inherent to the business they develop. In case those substantial modifications are deemed to be necessary for the public interest, it might be advisable to retender the concession in order to preserve principles such as fairness and equal treatment among competitors.

Transport

Restrictions on competition in the **urban passenger transport sector** have also been addressed through the jurisdictional challenge mechanism foreseen in the Market Unity Act. In June 2016, the CNMC has challenged in the National Court certain provisions established in the Royal Decree 1057/2015, of November 20, 2015 and the Ministerial Order FOM 2799/2015, of 18 December, 2015, which regulate passenger transport services through private hire vehicles (PHV). These regulations establish quantity restrictions on PHV authorizations, hinder PHV sharing, or incorporate geographical restrictions to service provision throughout the Spanish territory, among other restrictions. These regulations are extremely costly for consumers. The [Economic Report](#) issued by the CNMC for this jurisdictional challenge provides an economic analysis of these restrictions and quantifies its cost in terms of consumer welfare loss: a minimum of 324.3 million euros per year in the Spanish economy.

The Spanish **road freight transport sector** stands out for the relatively low degree of its productivity and the relatively small size of its firms. Firm size distribution is biased towards relatively small firms due to regulatory restrictions on competition and the special fiscal regime applying to this sector, which distorts firm size distribution and lowers productivity. In previous years, competition advocacy activity in the Spanish road freight sector has been intense, namely through the publication of several regulatory reports.

In March 2015 - within the framework of the Market Unity Act - the CNMC challenged in the National Court an administrative act of Valencia's regional Government that restricts competition in the road freight sector, as highlighted in the [Economic Report](#) issued for this appeal. The act applies some restrictive provisions established in an Order of the Ministry of Transport and Public Works. These regulatory provisions – which were also challenged in the proceeding - refer to unjustified requirements on minimum fleet size – three trucks -, maximum vehicle age, and minimum vehicle weight. The judicial decision is still pending.

As regards rail transport, the CNMC considers that the stall of the liberalization process due to the end of the parliamentary term gives the opportunity to rethink this process taking into account the recommendations issued in the 2014

discussion paper on the process for liberalizing rail passenger transport as well as in subsequent reports, such as the one on the new draft bill regulating rail sector issued in 2015. The CNMC has continued its activity in the field of railway professions, participating in a public consultation launched by the European Commission on train drivers, in support of professional mobility of these workers.

For input on this document you may contact dp@cnmc.es with subject “*Advocacy Recommendations*”

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