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**Working Party No. 2 on Competition and Regulation****Independent Sector Regulators – Note by Spain**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

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## Spain\*

1. This contribution addresses the subject of the roundtable on “Independent Sector Regulators and their Relationship with Competition Authorities”, to which the OECD has asked for contributions regarding the meeting of the Competition Committee, on December 2<sup>nd</sup> 2019. This contribution focuses mainly on the Spanish experience concerning its competition and regulation system. Namely, in 2013 a new institution was established integrating all sectoral regulators of the real economy (telecommunications, energy, transport, post and audio-visual) and the competition authority in one single organism. The resulting scheme has proven to be beneficial overall, allowing to take advantage of synergies and to deliver a more efficient and coherent regulation and competition service. It is vital for maintaining a proper functioning of the markets that the regulatory architecture evolves according to innovation and the new realities that arise. Indeed, the digital economy raises a number of challenges for regulators and competition authorities that are currently being discussed.

2. For that purpose, this note is structured as follows<sup>1</sup>. The first part briefly describes the evolution of the Spanish system of regulatory bodies and the competition authority until its current configuration, which has the form of a single multifunctional agency. The second part discusses pros and cons of this structure, based on theoretical contributions and on the experience gathered so far in Spain. The third part makes a few considerations on how the Authority’s independence is guaranteed. The fourth part compiles some ideas on how to improve the functioning of the CNMC and the overall system of sector regulation in Spain. Finally, the last part addresses the challenges that digitisation imposes on regulation and competition enforcement.

### 1. The origins

3. As in many other European countries, the origin of independent, sectoral regulatory agencies in Spain 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.

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\* Contribution prepared by CNMC.

<sup>1</sup> This contribution seeks to cover the most relevant questions for the CNMC raised in the Call for Contributions by the OECD (on August 5th) regarding this roundtable. It describes and discusses the structure of the independent regulators and its relation to the competition authority (questions 2 and 4), and discusses provisions made to guarantee the Authority’s independence (question 3). It also deals with proposals for improving the system, including the consideration of new regulatory bodies (question 1). The last part deals with regulatory implications (related to questions 3, 4, 5, 8 & 9), with general recommendations which can be applied cross-country (instead of changes to specific pieces of domestic legislation).

4. In Spain, the liberalizing trend gained momentum in the second half of the '90s and continued during the first decade of the twenty-first century, bringing about the creation of sectoral independent regulatory agencies<sup>2</sup>.

5. In parallel to the establishment of the regulatory system, the Spanish government shaped the mechanisms to defend competition in the markets through the 1989 Competition Law (Law 16/1989), which created the Competition Service (a specialized service within the Ministry of Economy in charge of case handling) and the Competition Tribunal (an autonomous, administrative body in charge of case resolution).

6. Following the reform of the EU legal framework in 2003 and 2004, the Spanish legislation on competition was reviewed with the 2007 Competition Law (Law 15/2007). With the goal of strengthening the existing mechanisms with a more appropriate institutional structure, it created the National Competition Commission (Comisión Nacional de la Competencia – CNC), by merging the Competition Tribunal and the Competition Service. The CNC was an autonomous, administrative body with the mandate to defend and promote effective competition in all national markets.

7. In 2013, the Spanish government undertook a transformation of the existing model. A new authority was created: the National Commission for Markets and Competition (Comisión Nacional de los Mercados y la Competencia – CNMC) that would integrate not only all of the existing sectoral regulators of the real economy, but also the National Competition Commission on into one single institution.

8. The main reasons for this change were the following: First, regulated industries had evolved since the liberalization process, in a way that made it advisable to improve coordination between sectoral regulators, as well as between sectoral regulators and the competition authority. Second, the combination of a sectoral approach with competition goals would endow the CNMC with a global perspective of the economy, allowing the consideration of the external effects of strategic sectors like energy or telecommunications, and enhancing legal certainty for operators<sup>3</sup>. Third, it would make regulatory capture more difficult, preventing the alignment of the authority's performance with sectoral interests<sup>4</sup>.

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<sup>2</sup> Act 34/1998 of the Hydrocarbon Sector introduced the National Energy Commission (Comisión Nacional de la Energía – CNE). Act 12/1997 of Liberalization of Telecommunications created the Telecommunications Market Commission (Comisión del Mercado de las Telecomunicaciones – CMT). Act 39/2003 of the Railways Sector created the Railways Regulatory Commission (Comité de Regulación Ferroviaria) and Act 23/2007 introduced the National Postal Service Commission (Comisión Nacional del Sector Postal). Finally, Act 7/2010 created the Audiovisual Media State Council (Consejo Estatal de Medios Audiovisuales), and 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.

<sup>3</sup> Take, for example, the [case against Abertis Telecom S.A.U.](#), where the CMT rejected to submit a report, required by the CNC, pleading that the CNC hadn't provided enough information.

<sup>4</sup> Marín Quemada, J. M. (2014). La Comisión Nacional de los Mercados y la Competencia: una nueva etapa para la competencia y la supervisión regulatoria en España. *Información Comercial Española, ICE: Revista de economía*, (876), 7-16.

9. Moreover, the reform was coherent with other goals of the legislator, such as the reduction in the number of regulatory bodies, in line with the recommendations of the European Commission for “smart regulation”<sup>5</sup>.

10. Lastly, they were also consistent with the need for austerity, although this second factor was in fact of secondary importance.

## 2. Pros and Cons of the “Super-regulator”

11. There is one clear conclusion from the review of the existing literature on the matter<sup>6</sup>: when comparing regulatory models, one needs to be cautious, as none is *a priori* superior to others. It is understandable that, at the time of the reform, back in 2013, there were some concerns about its outcome, considering the scarcity of precedents (apart from Spain, only the Netherlands, in the EU, has such an integrated system). However, as mentioned above, there were a number of reasons for the creation of a multifunctional agency in Spain. Now, six years after the reform, it is possible to revisit the theoretical pros and cons of such an integrated system, and assess how they have played out in the case of the CNMC.

12. The most voiced drawbacks of an integrated multisectoral regulatory and competition body are the risk that a multisectoral agency would lose the specific knowledge of the industry<sup>7</sup> and the risk of reducing the enriching discussion in conflictive situations<sup>8</sup>, where sectoral and competition regulation have different perspectives.

13. However, these concerns can be mitigated through a proper institutional design:

### 2.1. Independence

14. As reflected in the legislation<sup>9</sup>, the current model of the CNMC ensures greater independence and greater accountability to the Parliament and to society, for a number of reasons<sup>10</sup>.

15. For example, the CNMC is a legally independent and structurally separate regulatory body from the ministries. The President and the members of the Board are

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<sup>5</sup> Commission Communication 'Smart Regulation in the European Union', 8.10.2010, COM(2010)543.

<sup>6</sup> Baldwin, R. (1995): *Rules and Government*. Oxford: Oxford University Press. Baldwin, R.; CAVE, M. y Lodge, M. (2012): *Understanding Regulation. Theory, Strategy and Practice*. 2<sup>a</sup> ed. Oxford: Oxford University Press. Radaelli, C. y De Francesco, F. (2007): *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*. Manchester: Manchester University Press.

<sup>7</sup> Ottow, A. T. (2014). Erosion or innovation? The institutional design of competition agencies—A Dutch case study. *Journal of Antitrust Enforcement*, 2(1), 25-43.

<sup>8</sup> Marín Quemada, J. M. (2014). La Comisión Nacional de los Mercados y la Competencia: una nueva etapa para la competencia y la supervisión regulatoria en España. *Información Comercial Española, ICE: Revista de economía*, (876), 7-16.

<sup>9</sup> Act 3/2013, of the creation of the National Markets and Competition Commission.

<sup>10</sup> For the complete list of provisions to guarantee independence go to Spanish contribution to the Global Forum on Competition, held in 2016, on Independence of Competition Authorities – from Designs to Practices.

elected for fixed staggered non-renewable terms of six years (a duration longer than that of the government), and there are clearly defined grounds for their early dismissal, such as disciplinary sanctions, infringement of confidentiality issues or conflicts of interest. In addition, the board formulates long and short-term strategic plans according to their independent priority setting without any reference to the government, so that strategic steering can only come –and in the broadest sense– from hearings before parliamentary committees.

16. Apart from *de jure* independence, the CNMC has earned significant *de facto* independence through a successful enforcement record that has enhanced its reputation as an impartial authority. Moreover, the CNMC has often had to establish its credibility in opposition to big interest groups and to the government.

17. However, *de facto* independence also requires having the capacity to adapt to changing circumstances. A first condition is being able to manage its human and budgetary resources when needed. Although the CNMC has financial resources, its independence in the area of human resources is still limited.

18. A second condition is the Authority's competencies. In some sectors subject to regulatory supervision, the CNMC still does not have the final say as regards market access conditions<sup>11</sup>.

## 2.2. Specialization

19. A loss of specific knowledge could occur if the merged agency suffered a reduction of its technical resources. Indeed, the coexistence of different sectoral departments under the same roof can lead to a better use of existing synergies between them. After all, network sectors, whichever service they deliver, often face similar problems, with a similar economic rationale lying behind them, like regulating the obligations for the owner of the essential facilities, regulating the access of third parties to these infrastructures, price regulations, or determining the methodology for assessing the replicability of tenders<sup>12</sup>.

20. The exploitation of synergies is especially salient in the activities related to the defence of competition, where being able to immediately access the knowledge of sectoral regulators boosts efficiency in the process. In the case of the CNMC, the experience so far shows the benefits of having in the same entity qualified professionals both in the field of competition and regulatory supervision. In fact, overlapping between both areas is becoming more frequent as the technological transformation and digitisation move forward, so an integrated institution can better respond to market needs. In short, the integration of the defence of the competition and the regulatory supervision allows the CNMC to be better prepared, thanks to the knowledge and the expertise accumulated in both areas, to face problems, and offers a broader array of instruments that make the agency

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<sup>11</sup> This is indeed a matter that has raised concerns from the European Commission in the past. For example, the [infringement procedure](#) (which has already been amended) that the European Commission opened against Spain in 2016 because it had not correctly transposed Directives 2009/72/CE and Directive 2009/73/CE regarding the competencies that the regulation authority should have.

<sup>12</sup> Marín Quemada, J. M. (2014). La Comisión Nacional de los Mercados y la Competencia: una nueva etapa para la competencia y la supervisión regulatoria en España. *Información Comercial Española, ICE: Revista de economía*, (876), 7-16.

more effective and efficient in the pursue of its duties<sup>13</sup>. It is fair to say that, before the integration, there were mechanisms to facilitate coordination between the different authorities, but they were not so agile and often did not work.

### 2.3. Conflicting objectives

21. Another typical criticism to multifunctional agencies is the risk of eliminating the debate between the sectoral regulation and the competition enforcement perspectives.

22. However, this can be easily overcome, since there are different units inside the single authority that can still have different views and hold discussions, although the close collaboration between them will make it easier to achieve enriched but unified conclusions. In addition, some authors<sup>14</sup> argue that having different agencies can lead not only to extra transaction costs (through the duplication of teams and coordination costs), but also to “turf wars” between them, jurisdictional chaos, as well as forum shopping by complainants.

23. In spite of the multiple cases where exploitation of synergies between regulatory and competition departments has proven to be beneficial, there are still some areas that could be improved to better seize the advantages of an integrated system.

### 2.4. Operating savings

24. The creation of the CNMC has also led to significant savings in the operating costs of the organism in comparison to the total costs of the previous separate agencies, thanks to the exploitation of cost synergies in technical, legal, economic and administrative services. Namely, according to a report submitted by the Spanish Court of Auditors (Tribunal de Cuentas), the creation of the CNMC meant a reduction of 10.6% in personnel costs, and a reduction of 20% in supply and external services costs<sup>15</sup>.

### 2.5. Regulatory capture

25. The integration of all independent regulators and the competition authority in one single body reduces the risk of regulatory capture, since individual sectors or ministries become relatively less important for the Authority, so it becomes more difficult to steer the policy of the agency towards private or government’s interests.

26. In order to avoid capture, however, it is essential to guarantee the independence of the Authority, as we shall see below.

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<sup>13</sup> Marín Quemada, J. M. (2018). La CNMN: cinco años favoreciendo el correcto funcionamiento de los mercados y la competitividad de la economía española. *Información Comercial Española, ICE: Revista de economía*, (905), 59-71.

<sup>14</sup> Ottow, A. T. (2014). Erosion or innovation? The institutional design of competition agencies—A Dutch case study. *Journal of Antitrust Enforcement*, 2(1), 25-43.

<sup>15</sup> Informe de fiscalización de la Comisión Nacional de los Mercados y la Competencia, ejercicio 2014, Tribunal de Cuentas.

### 3. Future challenges: digital economy regulation?

27. The current digitalisation of the economy brings about challenges in many fields. The disruptive effects of platforms in the markets, the rising market power of big tech giants and big data governance issues are among the key concerns of competition, consumer and data protection authorities at national and international level. The dynamic and transversal nature of these phenomena has revealed the increasing need for ever-faster and flexible responses that the current legal frameworks may find challenging. Even though many initiatives have been promoted from different angles, the debate on the desirability of new approaches is open.

#### 3.1. Recent activity overview

28. Relating to competition and consumer protection authorities, their involvement has been increasing in the past years, concerning both enforcement and advocacy. At the European level, the European Commission (EC) has proven to be very active, bringing antitrust actions against several platforms for abuse of dominance and reviewing in depth some related mergers<sup>16</sup>.

29. In addition, national competition authorities have already taken action or have ongoing investigations, deriving from both competition and consumer protection<sup>17</sup> law breaches<sup>18</sup>. For its part, the US antitrust and consumer authorities are gaining track, and they have just launched an investigation over several of the larger platform companies in 48 states to investigate whether they have unfairly leveraged their services to dominate the online advertising market<sup>19</sup>. Other authorities, such as the Japanese Fair Trade Commission and the Competition Commission of India have also launched investigations against big platforms during 2019.

30. From the advocacy point of view, a significant number of reports, market studies and opinions from national competition authorities have been issued in the past few years, relating to digital markets from both a broad and a specific perspective. The German *Bundeskartellamt* started in 2016 a series of papers on digital economy and published a market study focused on the online advertising market, including an online advertising report, which highlights the potential harm that big players may provoke on the market in

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<sup>16</sup> The EC has issued three decisions against Google in the past years : [Google Android](#), [Google Search \(Shopping\)](#) and more recently [Google AdSense](#). It fined [Facebook](#) in 2017 relating to the information provided during a merger processes and it is currently investigating [Amazon](#) for missusing data from retailers.

<sup>17</sup> The British, Italian, German and Dutch competition authorities, among others, also hold consumer protection competences

<sup>18</sup> The Bundeskartellamt has prohibited [Facebook](#) from combining user data from different sources and has recently closed its abuse of dominance proceedings against [Amazon](#), after an amendment of the general terms of business for sellers on its marketplaces. The Italian competition authority fined [Facebook](#) in 2016 for violation of italian consumer protection regulations and recently announced an inquiry against [Google](#) over abuse of market dominance.

<sup>19</sup> In a different procedure the FTC and Google recently reached a [settlement](#) of a \$170 million fine for alleged violations of US Children's Privacy Law.

terms of restrictions of access and data processing<sup>20</sup>. The Dutch Authority for Consumers and Markets looked into the online video platforms and did not find any competition issues although acknowledging potential risks in the near future<sup>21</sup>. In addition, the Australian Competition & Consumer Commission released a report on digital platforms, which highlights the implications of growing market power from big platforms and includes recommendations oriented to tighter merger controls, privacy legal framework reforms and the idea of a holistic approach that takes account of the close links between competition, consumer and privacy issues<sup>22</sup>.

31. In addition, the French Autorité de la Concurrence (AC), the UK Competition and Markets Authority (CMA) and the Spanish CNMC are currently working on online advertising market studies.

32. Regarding the data protection perspective, important novelties have arisen within the EU, as access to processing and control of data have emerged as critical issues in recent years. The right to data portability, introduced by the new General Data Protection Regulation<sup>23</sup>, is an important novelty within the EU data protection landscape and aims to be a game-changing milestone. It comprises, first, the right to receive a copy of the data provided to the data holder; second, the right to transmit those data to another controller and third, the right to request a direct transfer from one controller to another on an attempt to empower individuals by granting them more control over their data.

33. Additionally, the EC has performed a review of the Public Sector Information Directive<sup>24</sup> earlier this year, aiming to encourage Member States to facilitate the re-use of public sector data with minimal or no legal, technical and financial restraint. The Directive introduces the concept of “high value datasets”<sup>25</sup>, which are subject to a separate set of rules ensuring their availability free of charge, in machine-readable formats, provided via Application Programming Interfaces (APIs) and, where relevant, as bulk download.

### 3.2. The convenience of a digital regulatory body

34. In this context, the use of regulatory tools as an effective complement of antitrust instruments and the need of new independent digital authority/regulator in charge of these matters are gaining momentum in the current debate. A number of proposals have already been made. Along with the observations made by national competition authorities abovementioned, other reports share a number of findings about the key issues at stake.

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<sup>20</sup> «[Online advertising](#)», Bunderkartellamt (2018)

<sup>21</sup> «[A Close look at online video platforms](#)», Authority of Consumers&Markets (2017)

<sup>22</sup> «[Digital Platforms Inquiry](#)», Australian Competition&Consumers Commission (2019)

<sup>23</sup> [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

<sup>24</sup> [Directive \(EU\) 2019/1024](#) on open data and the re-use of public sector information

<sup>25</sup> Defined as “documents the re-use of which is associated with important benefits for the society and economy” (article 2)

35. The EC recently summarized its position on a report entitled “Competition Policy for the Digital Era”<sup>26</sup>, where it calls, first, for stricter merger controls. Second, the shift of the burden of proof in highly concentrated markets. Third, it calls for soft law guidance or data regulation, but it leaves open the question on how to implement it.

36. The so-called Furman Report (2019)<sup>27</sup> goes further and highlights the convenience of creating a “Digital Markets Unit” within the UK’s CMA or operating as an independent body. It would be in charge of developing a code of competitive conduct and promoting data openness and greater personal data mobility and systems with open standards.

37. In the same line, the Report from the Stigler Center (2019)<sup>28</sup> also suggests governments should consider the creation a “Digital Authority”, with similar competences. Among others, it proposes it would impose the use of open standards, mandating portability of and accessibility to data and assisting the Federal Trade Commission (FTC) and the Department of Justice (DoJ) -agencies in charge of antitrust action in the US - in merger control reviews. In this case, it suggests the Authority to be a subdivision of the FTC, in order to avoid capture issues.

### 3.3. Digital regulators’ functions

38. Besides, the idea of a multidisciplinary regulator is also on the table. Indeed, it is widely recognized that the boundaries between sectors, especially in the digital economy, are increasingly hard to draw. This is why calls for a holistic approach are on the rise.

39. On 14 March 2017, the European Parliament adopted a resolution on 'fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law-enforcement'<sup>29</sup>, which included a call for "closer cooperation and coherence between different regulators”.

40. The European Data Protection Supervisor (EDPS) established in 2017 the ‘Big data and Digital Clearing House’, in response of the European Parliament call. The idea is to establish a forum where agencies from all the areas involved in the field of digitalisation - competition, consumer and data protection authorities- come together, in order to discuss how best to enforce all kind of rules in the interest of protecting individuals in digital markets.

41. The EDPS considers also that data protection, consumer and competition law each “in theory” serve common goals, but in reality, they generally work in silos, and “they will be more effective if they work in tandem”.

<sup>26</sup> «[Competition Policy for the digital era](#)», Crémer, J, de Montjoye, Y-A and H. Schwietzer (2019)

<sup>27</sup> An independent report for the UK Government, led by Jason Furman «[Unlocking digital competition, Report of the Digital Competition Expert Panel: An independent report on the state of competition in digital markets, with proposals to boost competition and innovation for the benefit of consumers and businesses](#)» (2019)

<sup>28</sup> [Stigler Committee on Digital Platforms, Final Report](#). Chicago’s Stigler Center for the Study of the Economy and the State at the University of Chicago Booth of Business (2019)

<sup>29</sup> [http://www.europarl.europa.eu/doceo/document/TA-8-2017-0076\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/TA-8-2017-0076_EN.html?redirect)

42. Think tanks like the Centre of Regulation in Europe or the European Consumer Organisation (BEUC) also endorse this idea<sup>30</sup>. Furthermore, in a recent report published by the BEUC, it is suggested that “introducing clear procedures for information sharing and consultative opinions between agencies” would be positive when it comes to exploring different co-operation models.

43. In conclusion, there is a growing concern on the challenges posed by the ongoing digital revolution in some markets. Some commentators advocate a flexible and effective new approach to tackle these challenges. Competition enforcement tools are highly useful, but they may be too slow to redress harm to competition in some of these rapidly evolving markets. On the other side, horizontal regulation may not take sufficiently into account market specificities that pose competition challenges in those markets. Some hybrid form of intervention between ex post competition law enforcement and horizontal regulation (e.g., ex ante market-based regulation) could be an alternative to explore, combining ex ante tools with market-based analysis, targeting those markets/activities/sectors where market malfunctioning be identified<sup>31</sup>.

44. Such hybrid form of intervention would possibly require the creation of a dedicated agency, given the high degree of specialization required. In that event, strong cooperation would be required between the agency and the competition authority. Actually, if a regulatory body were to be created for digital markets with the objective to establish some sort of market-based rules, it would make sense for it to join forces with the competition enforcer. As the CNMC’s experience shows, synergies between ex ante and ex post intervention are clear as regards market monitoring and the assessment of market power, competition concerns, or remedies.

45. Given the global scope of these markets and operators, international cooperation seems crucial in order to keep intervention coherent. Cross border harmonisation is desirable too – at least at EU level – so that the risk of inconsistency is minimized.

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<sup>30</sup> See: [Cerre White Paper. Ambitions ofr Europe 2024. Digital Platforms, Data Governance, Artificial intelligence, Media&Content. Digital Infrastructure](#), Cerre (2019) «[The Role of Competition Policy in Protecting Consumer’s well-being in the Digital Era](#)», BEUC (2019)

<sup>31</sup> Regulatory intervention should have an activity-based approach, instead of monitoring certain operators, in order to address specific market failures. A good example of such an approach is the Second Payment Service Directive (PSD2) in the European Union, which regulates access to data in the financial system.