

Structural Reform of Sector Regulatory Bodies: The creation of the National Market and Competition Commission

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I. Introduction

On February 24, 2012, the Council of Ministers analyzed a report prepared by the Ministry of the Presidency on the Bill for the Reform of Supervisory Bodies (the "Bill"), which aims to introduce a series of measures to restructure the organization and functioning of the various sector regulatory bodies (the "Regulators").

According to the information made public by the government on February 24, 2012, the most immediate and visible consequence of this reform will be the integration of various Regulators into one larger body, the National Market and Competition Commission ("CNMC"). Its scope of action will be composed of the competencies entrusted to the various Regulators comprising it up until now.

II. Analysis¹

The purpose of the government's proposed reform is to integrate seven independent Regulators. It only leaves regulatory bodies with competencies in the financial markets (that is, the Spanish Stock Exchange and the Bank of Spain) and the Nuclear Security Council outside of its scope.

Until 2011, there were four Regulators in the Spanish legal system, aside from the ones mentioned above: the Spanish Energy Commission ("CNE"), the Telecommunications Market Commission ("CMT"), the Spanish Competition Authority ("CNC") and the Spanish Postal Sector Commission ("CNSP"). All of these bodies were granted independence and varying levels of autonomy.

In 2011, two new regulators were created: the Spanish Gaming Commission ("CNJ") and the Commission for the Regulation of Airports ("CREA"). Additionally, the Spanish Audiovisual Communication Act 7/2010, of 31 of

¹ This analysis has been prepared on March 1, 2012 prior to the publication of the Bill.

March contemplated the creation of an additional sector regulator: The State Council on Audiovisual Media ("CEMA"), which in the end did not come into being.

So, through this Bill, the government is attempting to curb the proliferation of these bodies as well as redundancies in their respective competencies. For this reason, it intends to merge the CNE, CMT, CNSP, CNJ, CREA, CEMA and CNC into a single body under the Ministry of Economy and Competitiveness.

In the government's opinion, the Bill targets three main objectives:

- Competencies clarification. For the sake of legal certainty, it attempts to avoid overlaps in the activities of the various Regulators in the scope of their competencies. Thus, the government considers that the action of a single regulator could facilitate the application of analogous criteria. Therefore, it could limit certain discrepancies in the analysis of criteria that are applied to the same situation by various Regulators, which has led to divergent findings in specific cases that have affected certain businesses whose behaviour, over which the sector regulator did not act, has been put into question or even fined by the CNC.
- Efficient allocation of resources. The government aims to reduce costs by reducing the number of Regulators, thereby following Germany, which concentrated its energy and telecommunications regulators into a single body (the *Bundesnetzagentur*). With the restructuring contemplated by the government, the new CNMC would be composed of only nine councillors, compared with the 52 current number councillors. These councillors will be nominated by the government and their appointment must be ratified by the Parliament by an absolute majority.
- Increase of the professionalism, neutrality and independence of its members. According to published information, the government believes that combining the human and technical resources of the various Regulators will optimize the supervisory quality of the resulting body as well as the independence and neutrality of its members.

III. Assessment

In the absence of greater specification regarding the measures taken by the government, the proposed reform raises some doubts about its real impact and effectiveness as regards the Regulators.

First, it seems, as one might interpret from the name chosen for the Bill, that the government wants to reduce the competencies of market "regulation" conferred upon the Regulators up until now, thereby limiting them to "supervisory" work. This situation, depending on the manner in which the reform is eventually implemented, could create a more coherent and efficient system of controlling the markets.

Nevertheless, it is worth considering the appropriateness of merging bodies that do not necessarily have overlapping functions and have policy instruments of different natures into a single body. Thus, unlike the CMT and CNE, which predominantly have *ex ante* control in their respective sectors to guarantee open markets, the CNC is responsible for ensuring and promoting effective competition and to have *ex post* control over agreements and decision taken by businesses that restrict competition and have already had effects.

Indeed, against the beneficial effects sought by the government, it is worth noting, on one hand, the potential dangers of joining the functions of an *ex ante* regulator and an *ex post* supervisor into a single institution and, on the other hand, the possible risk of loss of expertise that characterizes the Regulators.

It should be recalled that the model established in Germany involves two independent bodies, the sector body and the competition body (*Bundeskartellamt*), which aim to efficiently allocate public resources while simultaneously ensuring the independence between the sector regulator and the competition authority, as well as the specialized knowledge of the Regulators.

Moreover, it is worth questioning up to what point the new body will have the capacity and means to resolve the numerous cases that have to be decided by each regulator integrated into the new CNMC, which are not limited to competition issues.

In any case, we have to wait until the Bill is published to have more detailed and in-depth knowledge about what the government wants to put forth and what will be the main effects for businesses and consumers.

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