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## Summary

This paper summarizes one of the findings of the workshop 2 held in March 2007: the relationship between ex-ante and ex-post regulation in the electricity sector. In particular, it deals with the mechanisms of coordination established between the Spanish ex-ante regulatory agency in the energy sector (the Comisión Nacional de la Energía) and the ex-post regulatory agency (the Comisión Nacional de la Competencia). The paper highlights the importance of informal and non-institutionalised mechanisms of coordination.

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## I. The National Competition Commission (CNC): Organizational Structure and Role in Competition Control

In Spain, the body responsible for ex-post regulation of competition control is the National Competition Commission (*Comisión Nacional de la Competencia, CNC*) created under the Spanish Competition Protection Act 15/2007, of July 3. This new body is the result of the unification of the two authorities formerly responsible for protecting competition in Spain, the *Servicio de Defensa de la Competencia* and the *Tribunal de Defensa de la Competencia*. It was created with the aim of providing Spain's system of competition protection with an optimal institutional structure in line with institutions in other legal systems, and especially with the European Commission (DG Competition).

The preamble to this Act, with respect to mergers, provides for the strengthening of the *CNC*'s participation in these processes, the limiting of the Government's role and the adoption of substantive principles to guide the policies of these institutions: the *CNC* will have to base its criteria on maintaining effective competition in the markets while the Government will base its intervention (which will have to be "weakened") on protecting matters of general interest to the society.

Therefore, this body is an agent created to be independent with respect to its principal (the Government). Nevertheless, it is not the only institution conferred with the competences of competition protection. This is especially so in the financial sector in the case of energy where the Spanish National Energy Commission (*CNE*: an independent administration whose institutional structure is far from being an independent regulatory body) has recently seen a strengthening of its competences in the assessment of energy company mergers.

Given the diversity of the administrative institutions conferred with competences in ex-post regulation, the Competition Protection Act must regulate the coordination of the *CNC* with other Government created institutions. One of the most obvious examples of the mechanism of coordination is found in Article 19 ("Coordination of Sector Regulators") of the Spanish Competition Protection Act. This article begins with the declaration of a mutual obligation of transmission of information between the *CNC* and sector regulators such as the National Energy Commission, as a matter of regular procedure or upon request of each of these, as well as the obligation of issuing non-binding opinions. Moreover, it confirms the obligation of sector regulators to inform the *CNC* of any activities or conduct they are aware of in their sector which may affect competition in the markets. Finally, this Article 19, provides for the *CNC*'s request for a non-binding report from sector regulators in connection with Merger Control and Restrictive Practices.

Also of interest are functions conferred to the *CNC* in Article 26 regarding the preparation of studies, papers and reports: proposals for liberalization, deregulation or modification of legislation, reports on obstructions in the maintenance of effective competition detected in laws, as well as proposals by the Spanish Department of Finance and Tax for guidelines concerning competition policy that may contain proposals for the preparation and reform of legislation.

Furthermore, Article 26 provides for the *CNC* to protect coherence in the application of competition legislation at a national level, in particular coordinating sector regulator practices and those of the competent bodies of the Spanish Autonomous Regions, and cooperation with competent jurisdictional bodies.

The *CNC* is also called to assist the Spanish Department of Finance and Tax and represent it at international level in competition forums.

## II. CNC's Relation with its Principal, the Government

The National Competition Commission is an administrative body attached to the Spanish Department of Finance and Tax. Although structurally it is the only administrative body with these functions and is independent of the Government, the Department of Finance and Tax has control of its activities, as well as the control of all *CNC* decisions susceptible for revision by its principal.

The Government reserves the right in the Act to intervene in matters where the *CNC* is competent, specifically mergers control, always basing such intervention exclusively on the substantive principles related with protecting matters of general interest to society. The *CNC*, for its part, will base itself exclusively on the criteria of maintaining effective market competition. Furthermore, the Government reserves the right to approve exemptions, by categories, on those agreements which do not affect business between Member States.

The Council of Ministers, in accordance with Articles 14 and 60 of the Competition Protection Act, and on proposal by the Minister for Finance, may intervene in cases of concentration when the *CNC*'s Council resolves, in a second phase (that is, if the Investigation Directorate detects obstructions in the maintenance of effective competition in all or part of the national territory). It may prohibit the concentration or require it complies with certain obligations or conditions. The Council of Ministers can, at this time, confirm the *CNC*'s Council decision, or ignore *CNC*'s opinion and agree to authorize the merger/concentration, with or without conditions.

The reasons it must put forward are, in any case, matters of general interest to society not related to competition protection (Article 10 enumerates, although the preamble states that it is not a closed list - though it may seem so - the following reasons: national defense and security, protection of public health and safety, free movement of goods and services within the national territory, protection of the environment, promotion of investigation and technology development, or a guarantee of an adequate maintenance of sector regulation aims).

In the energy sector, it seems that the two reasons most likely to be put forward by the Council of Ministers are the protection of the environment (although it may be difficult to think of a case where a merger may damage on its own the environment), and, especially, the maintenance of sector regulation aims (a more plausible cause). These "sector regulation aims" may without doubt be used as a weapon making it possible for the Government to "evade", in activities in which electricity companies are involved, the real aims of protecting and maintaining an appropriate level of competition between companies, entrusted to the *CNC*. Nevertheless, it is not difficult to understand the "essential" character of the sector makes it difficult for the Government to completely renounce its intervention in these activities.

## III. Coordination of the CNC with other regulators

### III.1 Coordination with DG COMPETITION

The Competition Protection Act 15/2007, of July 3, dedicates Article 18 to the *Collaboration of the National Competition Commission with the National Competition Authorities of other Member States and the European Commission*. This Article makes the provision that "Upon application of Articles 81 and 82 of the European Community Treaty, the National Competition Commission can communicate with the European Commission and the National Competition Authorities of other Member States and use as a means of proof any element of law or of fact, including confidential information, in accordance with the terms established in community legislation."

Therefore, the National Competition Commission is not only responsible for applying national laws on competition protection, but also is expressly entrusted with the application of Articles 81 and 82 of the European Community Treaty in certain cases.

This Article, which expresses this obligation to cooperate and indicates the aims of this cooperation, is very open. It makes provision for the *CNC* to apply national and EU competition laws in close collaboration with the European Commission, without defining exactly what the mechanisms for this collaboration are.

From interviews to *CNC* members, one basic idea emerges: the Commission in general, and especially DG COMPETITION, as well as the *CNC* itself, are accustomed to methods of working which depend on cooperation in a not very institutionalized manner. It is also true that it is more so in community legislation, in particular the 1/2003 Regulation on the implementation of the rules on competition and some commission communications, where the main elements of this cooperation can be found.

There are two aspects to be noted here: First of all, it must be highlighted that there are rules as well as commitments in the specific area of conferring “jurisdiction” between the Commission and the National Authorities in each particular case and that investigations at the two levels (or even simply among different Member States) may overlap. It is expected that cases be forwarded on request to the National Authorities and the Commission, in both directions, if activities impact more than one Member State or if one Authority is better situated, although this does not occur often. Specifically, it is curious that there is a “Qualified Declaration of Ministers” (of Finance) issued on the occasion of the publication of Regulation 1/2003, which contains a political commitment by which *interferences* between the National Authorities and the Commission should only exist in case the former does not observe the Court of Justice of the European Communities case law or Commission decisions, or in cases where there is a contradiction between the decisions of two National Authorities. However, their high level of coordination makes this difficult, as will be highlighted below.

On the other hand, there are different forums in which the *CNC* participates. Among the most important are: the **ICN** (International Competition Network, a worldwide forum which organizes annual meetings, forums and workshops, provides documents and forms as well as other initiatives. This forum is the original basis for the adoption of the “Leniency System” by many countries.); the **Competition Committee of the OECD** (which is made up of its members and some observers); and in Europe, the **ECN** (European Competition Network, which is headed by the European Commission, represented by all the Competition Authorities of the Member States and based on the whole process of modernization the Competition Law has undergone during the last few years); and the **ECA** (European Competition Authorities, also at a European level but somehow more informal than ECN. The Commission's leadership in ECA is not as strong as in the ECN, and therefore it is easier to tackle issues in which Member States do not agree with Commission criteria and guidelines).

Although the ECA has set up very interesting workgroups, the most productive forum in the EU is the ECN, not only because cooperation in this network is compulsory for all the Member States, but also because it tackles Community Law issues applicable to all the Member States. The ECN makes it possible to comply with Regulation 1/2003, which establishes the wish to decentralize the application of Competition Law and at the same time promote its coherent application. Thanks to this forum, both the Commission and Member States are permanently informed of the new cases, assessment criteria used in different problems that arise, and possible decisions or resolutions any of them is to make in relation to their own cases. They share all this information through regular face-to-face meetings, by sector, and also

through more dynamic means (e-mail, etc.) which prevents them to a great extent from making contradictory decisions.

As we can see, they go beyond their legal obligations of mutual information sharing and cooperation to achieve an authentic unification of criteria and a coherent system of intervention of (EU and National) Authorities and of the application of Competition Law.

### **III.2 Coordination with the Spanish National Energy Commission (CNE)**

Article 17 of the Spanish Competition Protection Act also refers specifically to the coordination mechanisms between the *CNC* and sector regulators and establishes that they will provide each other with information about their practices and with non-binding opinions as a matter of regular procedure or at the request of the respective organization.

At the request of sector Regulators (the *CNE* in this case), and before adoption, the *CNC* must provide information about general circulars, instructions or decisions which may significantly affect competition conditions in the markets they regulate.

Also, the *CNC* may ask the *CNE* for a non-binding report on concentration cases and anti-competitive practices which may affect energy sector companies.

Finally, the Competition Protection Act establishes, as a new mechanism, a “minimum” threshold of cooperation between the presidents of the *CNC* and the *CNE* (in this case) by which they must meet at least once a year to analyze the general orientations which will guide the practices of the bodies they head and to set up other formal and informal temporary mechanisms for the coordination of their practices

The *CNC* has confirmed that contacts with *CNE* are frequent and very useful. Due to the fact that the Competition Protection Act has only recently come into force, the presidents have not yet had the opportunity to begin their annual meetings. However, and even though it was not institutionalized under the previous law, members of both institutions celebrated meetings, met at certain forums, and in particular, held meetings when certain cases needed to be discussed.

Also proven to be very useful is the system established under Article 3 of the *CNE* Regulation by which the *CNE* is obliged to inform the *CNC* of any suspected infringements to Competition Law that may be taking place in its markets. The *Servicio de Defensa de la Competencia* investigated and initiated more than one proceeding and on occasions detected infringements which resulted in a report-proposal, which reached the *Tribunal de Defensa de la Competencia* and were sanctioned.

In relation to the other institutionalized contact point between the *CNC* and the *CNE* (if concentrations and anticompetitive practices take place in *CNE* markets, the *CNE* must submit an evaluative Report), the *CNC* also confirms that this procedure is used frequently and is useful since it helps the *CNC* to understand a particular issue as well as the effects or problems it entails within a particular sector, which is undoubtedly better understood by the sector regulator.

Finally, it is curious that there are other types of contact between the *CNC* and the *CNE*, which could be called “formative”. They consist of reciprocal invitations to courses, seminars, conferences, and talks organized either by the *CNC* or the *CNE* and which are attended by interested people from both institutions. It is an informal yet very effective way of learning and sharing knowledge that could lead, why not, to new criteria of analysis and resolution of cases that could help competition law and sector regulation progress.

It seems then, that there are no mixed workgroups or people specifically in charge of this contact, rather there is a tendency of flexibility, casuistry, and the arrangement of this contact based on “best practice” principles.

### III.3 Coordination with market agents

It is interesting to point out that apart from all the forms of contact between different institutions from different fields which have been mentioned above, there are other ways of bottom-up communication, i.e. communication with market actors which are “overseen” by the *CNC*.

First of all, the *CNC* considers that its own Act, the new Competition Protection Act, is in itself the result of mechanisms of New Governance. In effect, an open process has begun since the publication of the White Paper for the Reform of the Spanish Competition System (*Libro Blanco para la reforma del Derecho de la Competencia español*), in which sector professionals (law firms, companies’ legal departments, university professors, etc) and even consumers through different associations and organizations, have actively participated. There is, therefore, evidence of legislator and competition authority will to promote these mechanisms. All opinions and reports received were evaluated and taken into account in the modification of the regulations of Spanish competition law, remembering that one of the main functions of the reform was to adapt our regulations to EU Law.

Nevertheless, there are also mechanisms institutionalized by this Law such as, for example, the “requests for information” that the *CNC* may address to companies of any sector (or to consumers, users, customers, etc.), either within the framework of generic investigations about the situation of a specific market or within the more individualized framework of merger control or restrictive practices sanctions (in each case with a different degree of constraint). This is, to a greater or lesser extent, coercive for its target audience, although there is also a provision for voluntary modes where different market actors can contact the *CNC*: these are the “*formal complaints*” in the domain of anticompetitive practices, basically made by competitors or affected clients of offender firms, and the recently established “*leniency program*” in which any member from any cartel may reveal the existence of the organization, remaining - when the established conditions are fulfilled- exempt from any fine

It should also be highlighted that there is also contact between the *CNC* and the Council of Consumers and Users (*Consejo de Consumidores y Usuarios, CCU*) and other consumer and user associations. Due to the fact that the *CNC* is a transversal Authority which must intervene in very diverse sectors, it is not so viable to create a kind of “Advisory council” similar to that of the *CNE*, where the different consumers of these markets participate. Contact with consumers and users is maintained through the obligation of taking them into account in the processing of the cases: the Competition Protection Act obliges the *CNC* to send the details of the operation to the *CCU* (this must be done when, after investigation and detection of suspected infringement of competition rules, the case goes on to a second phase and a new phase begins with an adversarial process). The *CNC* voluntarily sends as well the details to the Consumers and Users Organization (*CUO*). Sometimes, the *CCU* shows interest and provides an opinion, but other times it is possible that it has no substantial information on the subject or it just does not consider that the issue poses a special competition problem. All of these Councils and Organizations of Consumers and Users have, of course, the possibility of reporting any suspected infraction they detect in the market<sup>1</sup>.

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<sup>1</sup> In fact, that is the way the SOS CUÉTARA proceeding begun, where it was sanctioned together with eight big distribution suppliers for negotiating the retail price of two brands of oil (28-6-07).

Informal contact is also common within this domain, basically those based on invitations to courses, seminars and training sessions. Both consumers and users must have the best possible information and training in Competition Law so they know how to use it to the consumer's benefit.

In addition to the provisions made under this Act, the *CNC* Information Service receives frequent calls and even e-mails (here, not only is information requested but also a great number of specialists offer to provide the *CNC* with information and explanations on all kinds of issues of interest). Meetings called "informal contacts" are also popular. Here, companies or people who are going to notify an operation, report an infringement or who simply have doubts about if they can or must make a decision or take some action, may obtain information on how they should proceed, may be guided in the preparation of the documentation and be advised on any aspect of the issue.

This direct contact with market actors is deeply appreciated by the *CNC*. The *CNC* benefits from the real experience of those for whom the competition rules are designed (either to punish or to protect them). This is crucial to maintaining rules and applying them adequately to real situations. It is also important that these rules be adapted to the dynamism of financial sectors and to anticompetitive practices which are increasingly more complex and sophisticated.