

Important Changes to the Antitrust Institutional Structure in Spain

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On 5 June 2013, the Spanish Congress approved the creation of a new Spanish competition authority: the National Commission on Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*, "NCCM"). The NCCM will merge the current competition authority (the NCC) and the six regulators governing energy, telecoms, audio-visual, postal, rail and airport services. It is likely to be operational in October 2013.

This reform represents revolutionary change to the Spanish antitrust institutional structure in Spain which business should take careful note of.

The new institutional structure

The most important change brought about by the new NCCM is that it will merge into one single institution the current competition authority (the NCC) and the six regulators currently in charge of supervising some of the most strategic economic sectors. The sectors involved are energy, telecoms, audio-visual, postal, rail and airport services. To date, the *ex-ante* supervision of compliance with the existing regulatory framework of these strategic sectors has been carried out by independent regulators, as is common in other EU Member States.

Regarding the internal structure of the new NCCM, the Act establishes a division of the instruction body into four Investigatory Directorates (IDs): one Competition ID (in charge of monitoring compliance with competition rules and initiating sanctioning proceedings), in addition to three other IDs with jurisdiction over specific regulated sectors, namely Energy, Telecoms/Audiovisual and Transport/Postal services.

The four IDs will be in charge of handling the instruction of the administrative files, which will then be sent to be resolved by the Council, the decision-making body of the NCCM.

The Council will have 10 members, to be appointed for six non-extendable years. Although initially selected and proposed by the Government, the appointment of the members of the Council must be expressly confirmed by Congress, which will have the power to veto specific candidates by an absolute majority.

The Council will be divided into two chambers, each composed by five members. One of the chambers will deal with antitrust issues (the Competition chamber), while the other will decide on the regulatory issues managed by the three remaining sector-focused IDs (the Regulation Chamber).

The Council will be chaired by the President and the Vice-President (each of whom will also preside over one of the two Chambers), to be appointed internally by and among its members. A Secretary will also be appointed and will participate in Council meetings with voice but without vote, providing advice to the Council when necessary.

New distribution of functions and competencies

The tasks and functions attributed to the new institution can be divided into five groups:

- (i) Supervision and control of the markets

The NCCM will inherit the supervisory and market control activities currently developed by the NCC and the merged regulators. From a competition law perspective, the new institution will assume, together with the investigatory powers described below, the merger control jurisdiction as well as the activity of general supervision of economic markets. It will also retain the capacity to propose measures to the Government aimed at introducing/boosting competition in specific markets.

- (ii) Resolution of conflicts

The NCCM has been entrusted with the task (currently fulfilled by the merged regulators) of resolving any conflict arising between operators in their respective industries, either deriving from the application of legislation or their respective commercial activities.

- (iii) Investigation and resolution of sanctioning proceedings

The investigation and resolution of sanctioning proceedings, previously dealt with by the NCC, will be fully assumed by the NCCM. Similarly, those investigatory and sanctioning powers that regulators have enjoyed to date will also be absorbed by the new institution. It is important to note that the wide powers of investigation granted by the antitrust legislation to the former NCC (including the possibility of launching onsite inspections, "dawn raids") have been extended to all the activity of the NCCM. This means that they will be applicable, in the future, to the investigation of purely regulatory files.

- (iv) Advisory activity

The NCCM will act as an advisory body to the Government and the Spanish Parliament concerning issues affecting regulated industries subject to the new NCCM jurisdiction, as well as on competition law matters.

One of the tasks already attributed to the NCC (and now to the NCCM) is advising commercial courts on the quantification of damages compensation awarded in private actions derived from antitrust infringements. Although, to date, it has not been fully developed (notably due to the scarcity of such private actions in Spain), this task will no doubt develop in the near future as private enforcement is promoted.

- (v) Transparency and publicity activities

Finally, importance has been also given in the NCCM to the implementation of different measures aimed at introducing more transparency and publicity to its activities. In line with previous recent Government initiatives addressed to promoting transparency in public institutions, the NCCM will have to publish *inter alia* an annual report and regular action plans as well as the decisions reached as a result of sanctioning proceedings.

This increased transparency has also brought certain controversy, since the NCCM will have to disclose information about all the meetings held (for whatever reason) with market operators. Although increased transparency is always welcome, we understand that this particular measure will likely act as a strong deterrent for some companies when consulting with the NCCM since the mere disclosure of these contacts with the antitrust authority can be a very sensitive issue (particularly for listed companies).

Task reallocation between the NCCM and the Administration

One of the most controversial aspects of the reform has no doubt been the re-assumption by the Central Administration of a number of functions and activities which, to date, had been carried out by the merging independent regulators.

The draft of the Act, which was initially presented by the Government, sought to relieve regulators from a very significant proportion of their administrative activities that were to be transferred to the corresponding Ministries (basically those of Industry, Public Works and Economy). In fact, that initial draft included an allocation closing mechanism whereby any functions that were not directly and expressly attributed to the NCCM by the Act (and there were many) would automatically be re-assumed by the Administration.

The initial allocation of regulatory tasks was so unbalanced in favor of the Administration, that from a regulatory standpoint, the new NCCM was almost an "empty shell". The withdrawal of functions in the initial plans of the Government was particularly important in the case of the former regulators of energy (CNE) and telecoms (CMT).

Due to intense criticism surrounding these initial plans, which included direct warnings from the European Commission, the Government has now changed its plans, reduced considerably the reallocation of tasks, and changed the sense of the allocation mechanism. Currently, those functions, which are not directly attributed to the Administration in the Act, will be automatically assigned to the NCCM.

When will the NCCM be fully operational?

The next step in the implementing procedure will be the approval of the Organic Statute which will regulate the internal functioning of the NCCM. Once this is approved, the Ministry of Economy will proceed to select the members of the Council and propose them to the Congress, which will then have a one-month period to evaluate them and vote their acceptance.

Once the new members of the Council are approved and officially appointed, the Council will select and appoint the senior management of the four IDs of the future NCCM. In parallel, the Council will discuss and approve an Internal Regulation and coordinate the hiring of the staff and the obtaining of the material resources needed to start the activity at the new regulator.

The Act establishes a maximum of four months to implement the new structure of the NCCM. Therefore, the new NCCM should be operational by 5 October 2013, although the consequences of not meeting this strict deadline for the Government are not clear.

Conclusion

These institutional changes represent radical reform to the antitrust landscape in Spain. It is yet to be seen whether the new structure will increase efficiency and/or reduce the costs of the application of antitrust and regulatory legislation, but the implementation calendar will no doubt provoke delays in the handling of antitrust files in Spain. Whilst this may have a limited impact on cartel cases (which are usually subject to long review periods), the new reform could lead to delays in the merger control review process.