

Spain's CNMC: The Story So Far

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It has been just over a year since Spain enacted a major reform of its regulatory agencies. On June 4, 2013 a law was passed to create the National Commission for Markets and Competition (*Comisión Nacional de Mercados y Competencia* or “CNMC”), a “super-regulator” that combines the functions of both the National Competition Commission (*Comisión Nacional de la Competencia*, or “CNC”) and those of the regulators responsible for telecoms, energy, postal services, audiovisual media, airport services and rail transport.

Spain was the first country to merge its major sector regulators not only with themselves but also with the competition authority (a similar reform in the Netherlands was stalled at the time, while in Germany the single sector regulator and the competition authority are still separate). The reform was also set in motion in record time: the new CNMC started work on Monday, October 7, only four months after the enactment of the law.

The ambitious, pioneering reform was, however, controversial. The stated aim was to reduce costs, and the initial figures certainly seemed to suggest that the new authority might suffer a resources crunch, with fewer employees forced to take on more tasks. Indeed, in addition to the existing sector regulation and competition enforcement roles, the new authority has taken on even more workload since, in an interesting parallel with the European Commission’s function as guardian of the common market, the CNMC has been charged with a leading role in the enforcement of a new “Law for the Unity of the Market.”

As a result, many in the Spanish antitrust community and elsewhere were concerned that the reform would lead to a reduction in the intensity of antitrust enforcement in Spain, in marked contrast to the “boom” that followed the creation of the National Competition Commission in 2007.

For its part, the CNMC has made clear that it fully intends to keep up the CNC’s vigorous enforcement of cartels and other serious infringements, and even subjected its plan of action to public comment on those terms.

It should also be noted that although the CNMC has a new Council and the Director of Investigation of the CNC has left the authority, there has nevertheless been a significant degree of continuity on the whole. The new Director (now the “Director of Competition”) was previously an advisor to the CNC and had been an official at preceding authorities of the CNC for well over a decade. Moreover, many of Sub-directors and a large number of case handlers and other staff of the former CNC also remain.

There has also been some evidence of the expected synergies. There has been some integration of staff from the sector regulators within the Directorate of Competition, and while the Directorate of Competition continues to request advisory reports from the various regulatory directorates in merger cases, it no longer suspends its own investigation while those reports are prepared, which often leads to quicker clearances.

Nevertheless, there has been a marked change in the rhetoric of senior antitrust officials. Whereas senior CNC officials frequently went on record stating that the “natural” outcome of investigations would be fines, with the exception of negotiated settlements, both the

President and the Director of Competition of the CNMC have declared publicly the importance attached to dialogue with companies in investigations, and have stated that, in their view, an investigation ending in fines could be considered a “failure” of the system.

More importantly, the Council appears to be deciding cases differently. While it is hard to discern a change in practice in relation to merger control (there have been no second phase or remedies cases yet), and there does not seem to have been any let-up in the number of conduct investigations being initiated or dawn raids being carried out, there has been a visible change in the number and amount of fines imposed for antitrust infractions.

Between October 2012 and October 2013, the CNC imposed total fines of €454 million (\$615.9 million). That was, by some distance, the CNC’s “record” year in terms of the amount of fines imposed. The average amount of fines imposed by the CNC between 2007 and 2013 was €190 million (\$257.7 million). In the period since 2009, when a fines notice similar to that of the European Commission was introduced, the average yearly “take” was €245 million (\$332.4 million). Similarly, 2012/2013 was also a record year in terms of the number of decisions imposing fines: 34 in total, compared to an average of 21 over the six years of the CNC.

In the eight months since October 2013, on the other hand, the CNMC’s output has been notably lower. It has only imposed fines in four cases (even accounting for the shorter period, a dramatic decrease on the CNC’s average yearly output of 21). Moreover, the total fines imposed have been just over €14.5 million (\$19.7 million). Again, even accounting for the shorter period of eight months, the CNC would, on average, have imposed fines of more than €163 million (\$221 million) in the same period: an apparent decrease of 90 percent.

The apparently lower level of fines may to an extent be a result of changes in the analytical approach. First, and although not explicitly recognized as such, the CNMC’s apparent moderation may have been influenced by a large number of appeal judgments by the Audiencia Nacional over the last twelve months which have reduced the fines imposed by the CNC. Specifically, a majority of judges in the Audiencia Nacional appear to have established a doctrine that the rule limiting fines to no more than 10 percent of turnover should be calculated not by reference to the total turnover of the company but to the “affected” turnover, or sales in the affected market. Those cases are understandably controversial (in some there are two dissenting judgments) and many of them are under appeal to the Supreme Court. But it may nevertheless be the case that the CNMC has moderated the amounts of fines pending those decisions or in order to avoid future confrontations with the Court.

Second, the Council appears to be more demanding in terms of the evidence needed to prove an antitrust infraction and more accepting of the legal arguments submitted by the parties. The Council has rejected as unproven at least one case in which the Directorate of Competition had concluded that there was a hardcore infringement deserving of fines. In other cases, the Council has overruled the Directorate of Competition on issues such as *non bis in idem* and *non-retroactivity*, and even more controversially, has decided at least one case on a basis that was not even alleged by the Directorate of Competition.

Finally, the Council appears not to be applying the CNC's 2009 fines notice, which had resulted in major increases in the levels of fines (although this could be a coincidence due to the relevant dates of the four cases decided to date).

It may be unfair to draw conclusions based on the decisions taken by the CNMC in the eight months so far. Even in Spain (which unlike most countries, establishes time limits for completion of antitrust investigations) the average length of cases is around two years, so the CNMC is still to some extent "inheriting" the work of its predecessor and may need some more time to adapt to its new circumstances. It may also be unfair to judge the authority on its record based purely on fines imposed when its senior management have spoken of a different approach. Nevertheless, it seems clear that for whatever reason the intensity of competition enforcement in Spain has been diminished and that much of the momentum established by the CNC has been lost.