Integrating Regulatory and Antitrust Powers: Does It Work? Case Studies from Spain and Mexico

BY JUAN DELGADO & ELISA MARISCAL[1]

There are a wide variety of possible structures for regulatory regimes in countries. This article focuses on the analysis of multi-purpose regulators that combine regulatory and antitrust powers, such as the Mexican IFT and Cofece, as well as the Spanish CNMC. We focus on institutional design, review the existing literature on the pros and cons of single-purpose vs. multi-purpose regulators, and use the new Spanish and the Mexican institutional settings to contrast how such pros and cons are designed to operate on paper and how they do so in real life. Our goal is to look for evidence, at the very initial stage of the reforms in both these countries, of whether these countries are moving closer to a rule of law equilibrium.

I. INTRODUCTION

As evidenced by the recent wave of regulated agencies' restructuring across the world, both developed and developing countries have key concerns regarding establishing agencies that will credibly regulate sectors plagued by market failures and/or that will arbiter competition in markets that ought to function freely. The goal of these reforms reflects a growing concern with building a legal order that is effective, as well as laying the groundwork to provide incentives for citizenry to behave in a lawful manner. In other words, establishing an effective "rule of law."

HOWEVER, IN OTHER NATIONS, THERE EXIST MULTI-PURPOSE INSTITUTIONS COVERING ALL IMAGINABLE COMBINATIONS

With this objective in mind, some nations have created both single-purpose regulators and separate antitrust authorities, whose sole responsibilities, respectively, are to regulate specific sectors and to enforce antitrust rules. However, in other nations, there exist multi-purpose institutions covering all imaginable combinations. As pointed out by Kovacic & Hyman,[2] the most common arrangement is to combine antitrust with consumer protection statutes and/or public procurement laws, but other combinations exist. These include institutions regulating various industries, such as the German Bundesnetzagentur (which regulates energy, telecommunications, post, and railways); institutions applying both antitrust law and industry regulation as is the case of the Mexican Instituto Federal de Telecomunicaciones (Federal Telecommunications Institute ("IFT"), which has regulated and enforced antitrust law in the telecoms sector industry since September 2013); the recently created Spanish Comisión Nacional de los Mercados y la Competencia (Markets and Competition Commission ("CNMC") which merged six industry regulators plus the antitrust agency); and the Dutch Authority for Consumers and Markets ("ACM") (which merged the Competition Authority, NMa, the Consumer Protection Authority, and the Post and Telecommunications Authority ("OPTA")).

This article focuses on the analysis of multi-purpose regulators that combine regulatory and antitrust powers, such as the Mexican IFT, the Spanish CNMC, and the Dutch ACM. We will further argue that

WE WILL FURTHER ARGUE THAT THE MEXICAN FEDERAL ECONOMIC COMPETITION COMMISSION HAS ALSO BECOME A MULTI-PURPOSE REGULATOR AS IT NOW INCLUDES BOTH EX POST AND EX ANTE REGULATORY POWERS

the Mexican Federal Economic Competition Commission (Comisión Federal de Competencia Económica ("Cofece")) has also become a multi-purpose regulator as it now includes both ex post and ex ante regulatory powers—the latter in the form of identification of barriers to competition and compelling access to essential inputs, both of which can result in divestiture.

The article focuses on institutional design and does not analyze other factors affecting regulatory outcomes such as framework and enforcement.[3] It reviews the existing literature on the pros and cons of single-purpose vs. multi-purpose regulators and uses the new Spanish and the Mexican institutional settings to illustrate how such pros and cons are designed to operate in paper and how they do so in real life. In other words, we look for evidence, at the very initial stage of the reforms in both these countries, whether these countries are moving closer to a rule of law equilibrium.[4]

A. The Spanish Reform

In Spain, the government proposed in 2012 the merger of six sector-specific regulators (energy, telecoms, media, postal, air transport, and railways) and the antitrust enforcer into a single regulator, the CNMC. The proposal was officially motivated by recent episodes of conflict between regulatory and antitrust interventions in the telecoms sector as well as the need to reduce the size and cost of the public administration under current strict government budget constraints.

The decision, however, was heavily criticized for not being the result of rigorous analysis on the needs and failures of the existing scheme, putting at risk the experience and achievements of regulatory and antitrust policies realized during more than a decade.[5] There were questions on whether the structure of the new macro-regulator guaranteed a materialization of the potential benefits of the merger.[6]

The CNMC, now responsible for the regulation of the different industries and for horizontal enforcement of antitrust law in all industries, started operations in the last quarter of 2013. CNMC is structured around three sector-specific investigation directorates (energy; telecoms, audiovisual and broadcasting; and transport and postal) and an antitrust directorate. There are two resolution chambers: the regulatory chamber, which deals with sector-specific regulation; and the antitrust chamber, which enforces antitrust law. Both chambers meet at plenary sessions to resolve potential conflicts and to deal with general topics. The investigation and resolution phases are formally separated.

The institutional reform did not, however, entail major legal changes regarding substantive issues—both antitrust law and sector-specific legislation remain basically unchanged.

THERE WERE QUESTIONS ON WHETHER THE STRUCTURE OF THE NEW MACRO-REGULATOR GUARANTEED A MATERIALIZATION OF THE POTENTIAL BENEFITS OF THE MERGER

B. The Mexican Reform

In Mexico, after more than a decade of trying and failing to enact asymmetric regulation in the telecoms industry, the new government of President Peña Nieto set out in its "Pacto por México," a new route to effectively implement telecommunications reform. The reform included changes to the competition agency, which had been deeply involved in telecommunications litigation over the last decade. This pact led to a Constitutional reform (June 2013), which granted new powers to a re-founded autonomous antitrust agency and created a new telecoms and broadcasting regulator with powers to enforce competition rules in both the telecommunications and broadcasting sectors, thus becoming a multi-purpose regulator. While a similar proposition has been discussed for other regulated sectors (most notably energy), so far those changes have not been enacted.

In essence, this reform implied an important divestiture of the existing antitrust regulator's powers, which had been notably focused on telecommunications and were absent in other important regulated and non-regulated sectors[7]. While it sought to streamline judicial processes in telecommunications, it may have opened the door for a more complicated interaction among regulators; not just in the telecommunications sector over the near future, but also with other sector-specific regulators, as antitrust and regulatory enforcement powers come into question with new changes to various laws.

For example, a new development in the completely re-written secondary laws dealing with competition policy—which come into effect on July 7, 2014—entrust Cofece, the new agency, with *ex post* and *ex ante* powers. While the law maintains Cofece's powers to enforce remedies for anticompetitive conduct and perform merger reviews, it curtails its ability to do so in telecommunications and broadcasting. Cofece still has the ability to undertake studies into competition conditions in other regulated sectors that may trigger price controls and asymmetric regulation, but it adds the possibility for Cofece to sanction directly—without requiring coordination with other sector regulators and in some cases even requiring divestiture—those markets where it considers that there are high "barriers to competition" and where economic agents or undertakings have control of "essential inputs".

IN ESSENCE, THIS REFORM IMPLIED AN IMPORTANT DIVESTITURE OF THE EXISTING ANTITRUST REGULATOR'S POWERS, WHICH HAD BEEN NOTABLY FOCUSED ON TELECOMMUNICATIONS AND WERE ABSENT IN OTHER IMPORTANT REGULATED AND NON-REGULATED SECTORS

The constitutional reforms of 2013 changed the management of both agencies, establishing a complicated system to name the now 7-person board (vs. 5 previous commissioners) through a merit-based process. The process, however, is unnecessarily rigid, effectively barring more experienced private-sector candidates from ever participating in the plenum of either agency and eliminating the possibility of any kind of revolving door policy between government and private sector. We discuss this and some of the other challenges that lie ahead for both regulators in the next section.

II. INTEGRATING ANTITRUST AND REGULATORY POWERS: A NORMATIVE ANALYSIS

A. Synergies vs. Conflict

Following Kovacic & Hyman,[8] multi-purpose agencies can realize policy synergies (in addition to other administrative synergies) and lower costs associated with coordinating policy between separate institutions with related functions. They emphasize that such synergies will only arise if the functions to be combined are true policy complements. Under this view, it might make sense to merge institutions that look at similar issues (such as network industry regulators) or at the same issue from different angles (such as antitrust and regulation in a specific sector). If policies are not complementary, synergies will not develop. Also, the integration of several functions under one roof might contribute to policy coherence by turning a conflict between institutions into an internal conflict, but still not necessarily provide any synergy.

A JOINT MANDATE TO REGULATE AND COMPETE MAY ALSO AFFECT THE FORCE WITH WHICH THESE TWO OBJECTIVES ARE PURSUED AND IMPLEMENTED IN PRACTICE

Excessive diversity among policy objectives or sectors might lead to lack of specialization, especially when the resolution body within the institution is unique, as is the case for the Spanish regulatory chamber (all sectors) or for the Mexican IFT board (*ex ante* and *ex post* regulation). For example, even if the economic principles of network industries regulation are similar, and there might be synergies in coordinating their application, there are also sector specificities that require sector expertise. A multi-purpose regulator might be able to exploit potential synergies but still lack the expertise to address sector specific issues.

Realizing synergies requires an appropriate internal organization that guarantees a coherent outcome. The sum of different operating units dealing with different topics under the same roof does not necessarily guarantee the realization of potential synergies. As reported by Hyman & Kovacic,[9] rivalry between operating units can be beneficial "if it results in synergies that serve the larger aims of the agency" but can also be destructive "if it manifests itself in credit-claiming or other measures designed to enhance the visibility of the operating unit as an end in itself." The internal organization and the institutional culture are crucial in determining the outcome.

THE INTEGRATION OF SEVERAL FUNCTIONS UNDER ONE ROOF MIGHT CONTRIBUTE TO POLICY COHERENCE BY TURNING A CONFLICT BETWEEN INSTITUTIONS INTO AN INTERNAL CONFLICT, BUT STILL NOT NECESSARILY PROVIDE ANY SYNERGY

The creation of multi-purpose regulators dealing with both sector regulation and antitrust enforcement can also generate conflicts.[10] The mandate of sector-specific regulators is generally broader and includes additional objectives other than the promotion of competition. For example, the telecoms regulator might encourage infrastructure sharing for environmental or public health reasons, and this might turn into a conflict with competition policy. Therefore, the assessment and the outcome of specific cases might differ substantially.

A joint mandate to regulate and compete may also affect the force with which these two objectives are pursued and implemented in practice. For example, one important task of any antitrust authority is competition advocacy—it may be the case that advocacy plays a secondary role (or no role at all) compared to regulatory objectives in a given sector. Who then advocates competition when the two mandates of a multi-purpose regulator conflict?

A STRONG MULTI-PURPOSE REGULATOR WILL BE ABLE TO BETTER INFLUENCE DECISION-MAKERS AND GET ITS PROPOSALS THROUGH THE POLITICAL PROCESS

The integration of institutions can also increase administrative efficiency.[11] Administrative procedures can be simplified and duplication of administrative departments (accounting, human resources, IT) can be avoided. This is generally a second-order benefit and should by no means be a driver for integration. Integration should not be motivated by the possibility of reducing fixed administrative costs (a one-time cost benefit), but should rather be motivated by a policy efficiency and an increased effectiveness that can be passed on to the constituency the institution serves (similar to the analysis of efficiencies under merger review).

B. Advocacy

WITH SINGLE-PURPOSE REGULATORS, POLICY-MAKERS WILL GET "PURE" COMPETITION AND REGULATORY RECOMMENDATIONS AND ANY CONFLICT WILL HAVE TO BE RESOLVED OPENLY

The advocacy functions of regulatory and competition authorities refer to those activities beyond law-enforcement such as industry studies and reports, comments and recommendations on new laws and regulations, and public awareness activities that aim to contribute to the authorities' goals. Most antitrust and regulatory agencies have powers to take advocacy initiatives in the form of recommendations or guidance that are not necessarily binding for the regulated entities, the government, or other agents.

The creation of multi-purpose regulators has two potential effects on advocacy activities: On the one hand, an integrated institution might be more powerful and influential but, on the other, the diversity of the agenda of a multi-purpose regulator might dilute and weaken its positions.

A strong multi-purpose regulator will be able to better influence decision-makers and get its proposals through the political process. Also, being able to use a multi-perspective approach could allow regulators to elaborate a more comprehensive and effective strategy on sector-specific issues.

A multi-purpose regulator should have access to deeper expertise in regulated sectors, which often possess complex and unique competition problems. When specific-sector regulators and competition authorities are separated, "(c)ompetition authorities often lack the sector-specific expertise the regulators do have" and "(a)s a consequence, they may easily get caught in a scrimmage of technical arguments with great risk to lose the fight."[12] Therefore, sector-specific expertise could help to strengthen competition analysis in regulated sectors.

Being multi-purpose might, however, affect negatively the attainment of some specific objectives. Advocacy activities within multi-purpose, sector-specific regulators combine competition objectives with other objectives in their agenda, which could conflict with competition such as investment promotion, technological development, or rapid network deployment. This will require multi-purpose regulators to make trade-offs and choices, therefore reducing the strength of stand-alone arguments.

Regulation and competition advocacy require different priorities and objectives and therefore their recommendations will have different natures implying different approaches.[13] With single-purpose regulators, policy-makers will get "pure" competition and regulatory recommendations and any conflict will have to be resolved openly. However, in a multi-purpose regulator, the differences in approaches will be resolved internally, reducing the transparency of the discussion and hiding possible discrepancies between the competition and the regulatory approaches. This will imply, for example, that "pure" competition and "pure" regulation-specific advocacy arguments will be weakened vs. the case of a single-purpose regulator.[14]

IF THE INDEPENDENCE OF REGULATORS IS NOT FULLY GUARANTEED BY THE LEGAL FRAMEWORK, THE EXISTENCE OF FEWER MULTI-PURPOSE REGULATORS MIGHT FACILITATE GOVERNMENT CONTROL AND INFLUENCE ON REGULATORY DECISIONS

Any bias towards a more regulatory approach or a more competition-oriented approach will depend on the internal structure of advocacy units: If sector-specific units take the lead in sector-specific advocacy initiatives, competition arguments can be undermined. The balance of the final outcome will depend to a large extent on the internal allocation of responsibilities, and especially on whether the relationships between the competition and the regulation staff are cooperative or competitive.

Finally, these implications for the advocacy functions will just be present in regulated sectors. Advocacy in non-regulated industries will mostly focus on competition aspects, which can result in an unbalanced advocacy approach to regulated vs. non-regulated industries.

C. Independence vs. Accountability

Agency independence is essential for efficient application of competition law and regulation. An independent institution will avoid political interference that can affect the agencies' objectives and effectiveness. An independent agency will solve commitment problems that can exist when it has strong ties to the government.[15] Also, independence of competition authorities is linked to effective antitrust enforcement.[16]

Governments can try to influence regulatory and antitrust policy enforcement in order to benefit their own political agenda. If the independence of regulators is not fully guaranteed by the legal framework, the existence of fewer multi-purpose regulators might facilitate government control and influence on regulatory decisions. On the contrary, the existence of several regulators overlooking a specific issue—say a merger in the communications industry, which is analyzed by both the antitrust authority and the sector-specific regulator—might make the

implementation of the government agenda more difficult.

NEVERTHELESS, COHERENCE CONSIDERATIONS RARELY MAKE IT INTO THE LEGISLATIVE DISCUSSION

Responsibilities for a specific sector might be diluted if the sector is supervised by several regulators. Thus, the integration of competition and regulatory powers can solve the problem of assigning responsibilities and thus improve accountability.[17] Sector-specific regulators can always blame the competition authority for the deficient functioning of a market (and vice versa). On the other hand, a too broad agenda can make the assumption of responsibilities by top managers more difficult since they might not be able to get a deep knowledge in all subjects.

An independent agency contributes towards building a country's "rule of law" through its ability to enforce laws that are known and relatively settled, and which undergo revisions by a judiciary that is schooled in legal reasoning and is independent of political manipulation. In addition, an independent agency will more likely use its powers to enforce technical decisions and rules vs. short-term political goals or agendas. This contributes towards compliance with these laws, as people are more likely to comply with rules that are viewed as treating them "fairly".[18]

COHERENCE AND COORDINATION ISSUES AMONG REGULATORS ARE SOMETIMES RESOLVED THROUGH MERGERS OR SEPARATION OF POWERS

On the other hand, critics note that autonomous institutions tend to represent an autonomous bureaucracy and hence are beyond the reach of the general citizenry, as they are not beholden to the voting public. A solution to this valid critique is ensuring that these agencies function in a transparent manner and that they are accountable, making the risk of capture less serious. Increasing independence makes an institution's accountability more difficult. Independence from the political process is important, but independent regulators must have some form of mechanism in which they are accountable via, for example, the control of their budgets or through the disclosure and transparency of their activities.[19]

D. Coherence and Coordination: The Value of Primacy and Deference

When an agency is reformed to incorporate a combination of duties, one of the first questions that arises is whether its policy remains coherent or not. In other words, the considerations of complementarity in its new functions, which we discussed above, are crucial to its efficient functioning. Nevertheless, coherence considerations rarely make it into the legislative discussion. A consequence is that the consistency of new mandates within an agency will have to be resolved within the organization—not in an open and transparent manner, but as decisions are enacted. It is usually the outcome of an agency's decisions, and not its legal mandate, that will determine the final effects of the reorganization brought about by a legal change in regulators.[20]

A SOLUTION TO THIS VALID CRITIQUE IS ENSURING THAT THESE AGENCIES FUNCTION IN A TRANSPARENT MANNER AND THAT THEY ARE ACCOUNTABLE, MAKING THE RISK OF CAPTURE LESS SERIOUS

The issue of coherence in an agency facing a multiplicity of objectives or, if concurrence exists, when

an agency is required to coordinate with another will affect an agency's credibility with the parties it regulates. Taking the first issue into account, an organization with varied and conflicting mandates will lack credibility when it enacts certain policy objectives since other purposes written into laws and regulations can eventually become a priority and may or may not conflict with the agency's current actions. This problem exists whether the agency is multi-membered or managed by a single person.

A PROLIFERATION OF REGULATORY AGENCIES INCREASES THE RISK OF JURISDICTIONAL OVERLAPS AND THEREFORE OF CONFLICTS, PARTICULARLY WHEN PRIMACY OR DEFERENCE HAS NOT BEEN AGREED UPON OR ESTABLISHED

If we consider the second issue, the lack of coherence in the face of concurrency, agencies with concurrent mandates but differing objectives will have to solve the problem of coordination to ensure that their decisions lend certainty to the undertakings they regulate. Coordination will very likely result in a slower decision process as collaboration takes place. Coordination problems are sometimes solved internally, but they may play out in public or over long periods of time, leading to a lack of predictability in enforcement and policy application.

THUS AN AGENCY'S CREDIBILITY AND BRANDING IN TERMS OF THE WORK IT IS CAPABLE OF DOING ARE CRUCIAL TO SET EXPECTATIONS IN LINE WITH ITS PRIORITIES

Coherence and coordination issues among regulators are sometimes resolved through mergers or separation of powers. This affects the institutional design of regulatory bodies and their setup as single (specialized) or multiple enforcers of competition policy. A single antitrust enforcer has exclusive enforcement in these matters and so coherence problems are eliminated—but not necessarily coordination problems, as the enforcer's actions may hinge upon sectors regulated by a different agency.

In the case of multiple enforcers Kovacic & Hyman[21] note a plurality of models, going from the concurrence of agencies with similar mandates (the DOJ Antitrust Division and the FTC), different levels of government (federal and state), shared or concurrent responsibilities among regulators (FCC and DOJ), to the models we are addressing here: a multi-purpose, multi-sectorial agency with antitrust and regulatory powers over various regulated sectors (the case of Spain), or a specialized antitrust agency across all sectors but one where a sector regulator has multi-purpose objectives as it can regulate and apply antitrust law exclusively (the case of Mexico's Cofece and IFT).

In seeking to solve coherence and coordination problems through new institutional design, potential new problems need to be considered—such as cost (where will the money come from?), capture (is it easier or harder to capture a single purpose regulator that oversees multiple sectors but needs to coordinate in order to enforce the law or a multi-purpose regulator who may have conflicting objectives?), and political influence (who is benefitting from the new design and is this an equilibrium that truly improves the social outcome vis-à-vis the previous setup?).

For the problems laid out above, it should become clearer that intervening at the level of institutional design by creating or merging agencies is not necessarily a simple solution. A proliferation of regulatory agencies increases the risk of jurisdictional overlaps and therefore of conflicts, particularly when primacy or deference has not been agreed upon or established.

For example, Petit argues that the traditional distinction between *ex ante* enforcement (regulators) and *ex post* sanctions (competition agencies) is overly simplistic.[22] Sector regulation has incorporated the opening of markets and elimination of bottlenecks in its mandate, bringing it closer to competition law standards, while competition agencies, particularly in Europe, have increasingly taken on "quasi-regulatory enforcement policies." In contrast, merging all objectives into an "all powerful" agency may simply internalize a problem that was publicly evident before. The problems then change, giving rise to a lack of transparency in priority setting and resolution, a need for accountability as all power becomes concentrated into fewer actors, and a greater coherence problem as multiple mandates and priorities need to be reconciled.

THE RISK OF REGULATORY CAPTURE SEEMS THEREFORE TO BE REDUCED WHEN COMPETITION AND REGULATION ARE INTEGRATED UNDER A MULTI-PURPOSE INSTITUTION

E. Priority Setting

Priority setting might be diluted under a multi-purpose regulator. A too broad mandate can be translated into confusion about both objectives and the criteria needed to make a preliminary assessment of the seriousness and importance of some matters.[23] In addition, a broad mandate risks leaving a discussion of policy priorities in the hands of an agency based on its own set of internal restrictions, which may or may not coincide with the expectations set out by the legislative branch or the public in general. To put it bluntly, a broad mandate with no transparency requirements about the allotment of funds, setting of goals, etc. may lead to an agency working hard but underperforming relative to a performance bar expected by society. Thus an agency's credibility and branding in terms of the work it is capable of doing are crucial to set expectations in line with its priorities.

THE INTEGRATION OF COMPETITION AND REGULATORY POWERS MIGHT REDUCE FORUM-SHOPPING OPPORTUNITIES, IMPROVING AGENCIES' USE OF RESOURCES AND POLICY INSTRUMENTS

This is especially relevant when the objectives of different divisions of a multi-purpose regulator conflict. For example, in a regulator with joint powers for regulation and competition in the telecoms sector, the regulation division may give priority to rapid infrastructure deployment over the existence of competitive markets. In such a case, a multi-purpose agency would have to balance which combination of policy objectives better serves society. If the mechanism for setting priorities is not well defined and sufficiently transparent, the quality of the regulatory process might be affected and the outcome might not necessarily enhance social welfare.

The integration of different powers and responsibilities under one roof will require, at least initially, a lot of effort to integrate, coordinate, and maintain the overall internal coherence. There are risks that

an agency's priorities will be biased towards internal procedures rather than focused on policy objectives. Although such a risk is in principle temporary, it might become permanent if not properly addressed.

F. Regulatory Capture and Regulatory Arbitrage

According to Cseres, "concerns about agency capture may dictate to have agencies with broad jurisdictions to make them more likely to resist pressure from any one interest group."[24] Similarly, Kovacic & Hyman state that "[a] multiplicity of functions does provide a safeguard against capture. Owing to the breadth and diversity of its duties, a multi-purpose agency provides a more elusive target for any single industry group."[25] The risk of regulatory capture seems therefore to be reduced when competition and regulation are integrated under a multi-purpose institution. Also, a multi-purpose, multi-sector regulator will be exposed to a larger number of industries and therefore be able to use experience across sectors to adopt more informed and unbiased decisions in specific sectors, reducing not only conscious but also unconscious potential capture.

THE SPANISH GOVERNMENT PUT FORWARD SEVERAL REASONS FOR THIS INSTITUTIONAL REFORM

However, there are also views arguing that the integration of regulatory and competition powers could actually increase the influence of the industry on the regulator because "[s]plitting regulatory tasks and monitoring technologies among several non-benevolent regulators may reduce their discretion in engaging in socially wasteful activities."[26] This is the case when different institutions have shared powers over a specific sector; for example, in the case that the competition authority can review decisions by regulators.

Therefore, the overall effect of the integration of functions in one single regulator can reduce the risk of capture when regulators prior to the integrations were too small and there was not an effective control of decisions between agencies; but it could be negative when regulators were already large enough but competition authorities could review regulators' decisions.

Finally, the existence of discrepancies between regulators that have concurrent (vs. complementary) powers over one sector can result in regulatory arbitrage. Companies can look for those agencies whose decisions are more favorable to them through "forum shopping." The integration of competition and regulatory powers might reduce forum-shopping opportunities, improving agencies' use of resources and policy instruments.

III. THE CASES OF SPAIN AND MEXICO

A. Institutional Reform in Spain

1. Background

The new multi-purpose regulatory authority in Spain, the Comisión Nacional de los Mercados y la

THE STRUCTURE DOES NOT ALLOW ELUCIDATING HOW POTENTIAL SYNERGIES ACROSS DEPARTMENTS CAN ARISE, SO CREATING SYNERGIES WILL DEPEND ON HOW THE INSTITUTIONAL CULTURE DEVELOPS

Competencia ("CNMC") (in English, the Markets and Competition National Commission) started operations in October 2013.[27] The new CNMC integrated the former antitrust authority, Comisión Nacional de la Competencia ("CNC") and six sector-specific regulators responsible for telecommunications, audiovisual media, energy, railways, airports, and postal services[28] (of which two were projected but not yet created).[29]

The Spanish government put forward several reasons for this institutional reform. Chief among them were increasing the coherence between regulatory and antitrust decisions through better integration of *ex-ante* regulation and *ex-post* antitrust enforcement, reducing costs by increasing administrative efficiency, reducing the risk of regulatory capture, and integrating *ex-ante* and *ex-post* approaches. Other political motivations for the merger were widely discussed in the press at the time since one of the consequences of the integration was the dismissal of the previous members of the different boards and the appointment of new members by the new parliamentary majority.[30]

The creation of the macro-regulator involved a re-assignation of responsibilities, and some minor previous regulators' functions were assigned to the respective ministries.[31]

The new CNMC consists of a decision board, composed of ten members, and four Directorates (antitrust, energy, telecommunications and audiovisual, and transport and postal services). There are other horizontal units such as a legal service that reports to the board and a competition advocacy department that reports directly to the Chairman.

The board is divided in two chambers: the antitrust chamber, chaired by the Chairman, and the regulatory chamber, chaired by the Deputy Chairman. The antitrust chamber deals with antitrust infringements and mergers, and the regulatory chamber deals with *ex-ante* sector-specific regulation in all industries covered by the sector Directorates. There is a mechanism for exchanging opinions between chambers and discrepancies between chambers are resolved at plenary sessions of the two chambers.

The members of the board are proposed by the government for a six-year non-renewable term, and approved by the Parliament. The appointment criteria are completely opaque. The actual board members proposed by the government did not face any opposition in Parliament where the party supporting the government had an absolute majority.

For infringement proceedings, there is a functional separation between the board and the four directorates.[32] Directorates conduct investigations in infringement cases. Once the investigation phase is finalized, the Directorate makes a proposal to the Board, which analyzes it and adopts a decision (which does not necessarily follow the line of the proposal).

2. Assessment

• Synergies vs. Conflict

The new CNMC is organized into four Directorates that replicate the structure of the former independent regulators (antitrust, energy, telecoms plus the new audiovisual powers, and transport which includes the former railways and postal regulators plus the new airports regulator). The structure does not allow elucidating how potential synergies across departments can arise, so creating synergies will depend on how the institutional culture develops (i.e. whether there is collaboration or rivalry between departments).

IN EITHER CASE, "PURE" COMPETITION ARGUMENTS WILL BE UNDERMINED SINCE THE PROMOTION OF COMPETITION WILL NO LONGER BE THE SOLE GOAL OF THE INSTITUTION

Synergies might potentially arise at the Board level both within the regulatory chamber that will deal with the several industries and therefore can apply consistent regulatory principles, and across chambers since the consultation mechanism between chambers can realize synergies between regulation and antitrust enforcement.

However, there are obstacles to the realization of synergies:

• if there is no collaboration across departments, synergies at the board level might come too late in the procedure;

• the diverse agenda of the regulatory chamber can lead to a lack of specialization of board members and inability to exploit potential synergies; and

• the functioning of the cross-chambers consultation mechanism will depend on the rules established and on whether Board members adopt a conflict or a collaborative attitude. Games of power between chambers might make synergies more difficult to arise.

Finally, the Spanish government argued that the increased administrative efficiency derived from the removal of duplicated costs and the simplification of the structure of the regulator would produce important cost savings, an argument that is especially relevant under the current public budget constraint. The government predicted cost savings of EUR 28 million.[33] However, this is a side argument that does not justify per se the creation of a multi-purpose regulator, unless there are also important policy synergies.[34]

ACCOUNTABILITY IS, IN PRINCIPLE, EXPECTED TO IMPROVE, SINCE IN REGULATED SECTORS A SOLE INSTITUTION WILL BE RESPONSIBLE FOR THE SUPERVISION OF THE MARKETS AND THE ENFORCEMENT OF ANTITRUST LAW

- **Advocacy**

The fact that the CNMC is a bigger institution with broader responsibilities makes it potentially more influential over the legislative process. Also, combining sector-specific and competition expertise puts the institution in a better position to submit more informed opinions on sector-specific regulatory initiatives or to create more comprehensive market studies.

However, depending on how responsibilities are assigned internally, this combination could also introduce some bias. The new CNMC maintains a separate competition advocacy department, which already existed in the preceding antitrust agency. This department is in charge of elaborating market studies as well as participating in the legislative process through non-binding reports and recommendations. However, it is not clear from the CNMC structure and functions how advocacy responsibilities are assigned within the regulator, and whether advocacy initiatives in the regulated sectors will be led by sector-specific units or coordinated by the competition advocacy unit. In the former case, competition arguments might become of secondary importance in favor of other regulatory goals. In either case, "pure" competition arguments will be undermined since the promotion of competition will no longer be the sole goal of the institution. Also, if the advocacy reports in regulated sectors are approved by the regulatory chamber, the regulatory bias might be reinforced.[35]

BOTH TIMING AND POWERS DIFFER IN ANTITRUST AND REGULATORY INTERVENTIONS

The integration of regulatory and competition powers under the CNMC does not necessarily mean that discrepancies will disappear, but rather that they will be resolved internally. Possible internal conflicts might not be visible to policymakers and legislators who will receive a sole report. To avoid this, the advocacy reports should reflect any potential conflicts between regulation and competition advocacy and should not attempt to reconcile them.

Again, the outcome will very much depend on whether the directorates and chambers adopt a cooperative or a rivalry approach. A rivalry approach is not necessarily negative if it enriches the discussion and such discussion is reflected in a transparent manner in the final report. Under the current setting, it is difficult to anticipate which model will prevail.

- **Independence vs. Accountability**

The creation of the CNMC did not entail major changes in the system of appointment of board members, which are proposed by the government and heard by the Parliament. The current appointment system lacks transparency and is not necessarily based on the merits of the candidates. Under this setting, the smaller number of board members and the fact that they are politically appointed make the risk of government influence more likely.[36] Also, the excessively broad agenda of the regulatory chamber and the lack of expertise of some board members in both chambers make board members more exposed to government influence.

Accountability is, in principle, expected to improve, since in regulated sectors a sole institution will be responsible for the supervision of the markets and the enforcement of antitrust law.[37]

The new institution budget is set by the government, which reduces the independence of the agency but makes it more accountable.[38] [39] However, the large number of industries covered by the new agency and the small size of the chambers (five members each) make it difficult for board members to know the details of all the adopted decisions. For example, according to the Chairman of the CNMC, the board has adopted nearly 1,000 decisions during its first eight months of operation,[40] of which almost three-quarters corresponded to the regulatory chamber.

SUCH A BROAD STRATEGIC PLAN DOES NOT PROVIDE INDICATIONS OF HOW PRIORITIES WILL BE SET AND INTERNAL CONFLICTS WILL BE SOLVED

This implies that the five members of the regulatory chamber have adopted an average of 20 decisions per week in six industries.

The number of decisions is likely to increase in sectors such as railways and airports, which are at early stages of liberalization. The topics range from technical network issues to audiovisual contents and advertising regulation. It is therefore not credible that the members of the regulatory chamber will be able to take proper responsibility for such a volume of decisions covering such a broad set of issues.

- **Coherence and Coordination**

One of the reasons put forward by the Spanish government to justify the merger was to address some concerns regarding conflicting decisions of industry regulators and the antitrust agency.[41] Companies claimed that this led to high regulatory uncertainty. The CNMC can promote a more coherent application of competition principles in regulated sectors.

However, there are factors that could limit coordination:

1. Coordination depends not only on the institutional arrangements but also on the institutional culture. If the sector-specific divisions and the competition division do not develop a culture of cooperation, coherence will not be guaranteed.

2. The different natures of regulatory and competition administrative procedures make a formal coordination difficult. Both timing and powers differ in antitrust and regulatory interventions. While regulatory intervention is normally *ex ante* and does not aim to sanction, antitrust investigations are *ex post* and aim to sanction specific conducts. This difference is blurred but not totally eliminated under the current convergence of regulatory and antitrust principles.

DEPENDING ON THE LEVEL OF COORDINATION AND CONTROL ACROSS DIVISIONS AND ACROSS CHAMBERS, FORUM SHOPPING MIGHT OR MIGHT NOT BE REDUCED

3. It is also not clear how such coordination will be articulated at directorate and board levels. If coordination does not occur explicitly at directorate and at board levels, the integration might result in an internalization of potential conflicts leading to a lack of transparency in resolution. This problem might be aggravated by the multiple mandates of the regulator and the difficulty in reconciling priorities and objectives.

- **Priority Setting**

The CNMC has integrated supervisory powers over a large number of sectors, which could lead to a dilution of priority setting. In its first strategic plan[42] presented in May 2014, the CNMC set three broad goals that are not specific to a multi-purpose regulator: rigorous interventions, transparency and independence, and the realization of synergies. It then developed a list of actions, which are mostly related to the process (e.g. an integrated approach to problems, internal communication, efficient use of resources). Just a few actions refer to vague policy objectives such as the active prosecution of cartels.

THE NEWLY FORMED AUTHORITIES WERE GRANTED AUTONOMY—A COMPLETELY NOVEL FORM OF INSTITUTIONAL MAKEUP IN MEXICO UNTIL NOW

Such a broad strategic plan does not provide indications of how priorities will be set and internal conflicts will be solved but, on the contrary, it keeps a large degree of uncertainty regarding policy objectives, decision mechanisms, and internal allocation of human and financial resources of the new regulator.

Also, the fact that there is no organic integration of the antitrust and the regulatory departments means the setting of priorities at directorate level will not truly benefit from an integrated institutional setting. Only the Plenary of the Board is in a position to set comprehensive priorities covering regulation and antitrust but the separation of the investigation and the decision phases and the broad range of issues covered by the Board make the process of setting priorities a complex task.

- **Regulatory Capture and Regulatory Arbitrage**

To prevent regulatory capture was one of the drivers of the reform. This is certainly an issue for the smaller regulators (railway, postal, and the yet to be created, airports regulator), since they may lack enough resources to face monopolies or quasi-monopolies in their respective markets.[43] A large multi-sector regulator reduces in principle the risk of being captured.

There are two aspects that may contribute to maintain or increase the risk of regulatory capture: First, the structure of the new regulator keeps industry responsibilities under different directorates which are still subject to capture by big industry players. Second, the broad agenda of the regulatory chamber means that members of the chamber cannot be experts on all supervised sectors and therefore might be more receptive to arguments by large industry players. The risk of capture will therefore depend on the degree to which the

competition division can be heard, and the extent to which the interplay between chambers can limit the risk of capture of sector-specific divisions and of the regulatory chamber.[44]

Finally, it is not clear that "forum shopping" will be attenuated under the new structure since complaints will still follow different routes depending on whether they are submitted on the basis of sector regulation or competition law. Regulatory complaints will be dealt with by sector-specific units and decided by the regulatory chamber. Competition complaints will be investigated by the competition division and decided by the competition chamber. Depending on the level of coordination and control across divisions and across chambers, forum shopping might or might not be reduced.

ONE OF THE STATED OBJECTIVES WITH THE REFORM WAS TO ALLOW BETTER COOPERATION AND INFORMATION SHARING BETWEEN THE SECTOR REGULATORS AND THE AREA CHARGED WITH OVERSEEING ANTITRUST.

B. Institutional Reform in Mexico

1. Background

In its "exposition of motives" to the 2013 constitutional amendment, the Mexican government noted two key objectives that had a direct incidence on telecommunications and antitrust under the "Pact for Mexico," which all three major political parties signed at the beginning of President Peña Nieto's presidency in 2012:

> 1. "Extend the benefits of an economy formed through competitive markets." Within this agreement the government agreed to strengthen the Federal Competition Commission (CFC at the time, now "Cofece") and create specialized tribunals in competition and telecommunications.
>
> 2. "Guarantee equitable access to world-class telecommunication services." Meaning that a right of access to broadband would be recognized, and the sector regulator Comisión Federal de Telecomunicaciones (COFETEL at the time, now "IFT") would be granted autonomy. In addition, a telecommunications backbone would be developed and competition would be instilled in broadcasting, telephony, and data services.

After a very short discussion period from late February to early April of 2013, Congress voted to pass changes to various articles in the Constitution. These Constitutional reforms triggered the formation of new telecommunications and competition authorities in Mexico and came into effect on June 11, 2013.

THE NEW REGULATOR WILL HAVE TO "WALL OFF" THE INVESTIGATION AND MERGER REVIEW CASE TEAMS TO AVOID BEING ACCUSED OF ACTING AS A JUDGE, JURY, AND EXECUTIONER.

A rare characteristic of the constitutional reforms was the length and detail of the amendments. Constitutions are usually meant to be coordinating devices among heterogeneous actors that aid in the enforcement of the law, but are not meant to dictate behaviors or transform culture.[45] They provide a

framework with which to evaluate both transgressions to rules and the effectiveness of enforcement. In the case of the Mexican reforms, the stated aim of the legislators in drafting lengthy permanent and transitory articles was to avoid special interests from subsequently "watering down" any significant changes during the process of drafting the secondary legislation. Given how long the drafting of secondary legislation has taken, these concerns may not have been completely without grounds.[46]

The newly formed authorities were granted autonomy—a completely novel form of institutional makeup in Mexico until now, with the exception of the Central Bank, the Statistics Office, and the Electoral Commission. Autonomy does strengthen the mandate of these institutions but generates a number of practical difficulties and uncertainties, from the very basic: Who issues their codes of rulings? How are funds to be disbursed to them? Should legal adjustments be made to ensure they comply with the transparency and civil service responsibilities that the remaining federal public administration entities follow? To the more complex: How do two autonomous regulators interact with regulators that, while being technically autonomous, belong to the executive and may have a different standing with the judiciary? If they are completely autonomous, are they a fourth branch of government and, if so, are they even constitutional?

THE INCORPORATION OF EXPERIENCED COMPETITION ECONOMISTS AND LAWYERS IS AN IMPORTANT BOOST TO IFT, BUT IT HAS COME AT A COST TO COFECE

New commissioners were selected through an open, merit-based process and began their responsibilities in September 2013, basing their power on two old laws, Federal Telecommunications Act 1996 ("LFT") and Federal Economic Competition Law of 1993 ("LFCE")—both of these having been amended partially over time. Meanwhile as secondary legislation has not yet been passed, the two new institutions have not yet formally announced their internal restructure, as it is dependent on bylaws to secondary legislations that have not come into force. We will, nevertheless, describe in general terms the current institutional make up with the caveat that it is still undergoing changes as we draft this article.

IFT will likely have to face a difference in the interaction that exists between the substantive or technical areas and its plenum in a regulation vs. a competition context. While technical areas work with and report to the plenum on a regular basis while performing their various duties aimed at designing, supervising, and enforcing regulation, the nature of the interaction in an adversarial context, as is the case with antitrust, is completely different. The new regulator will have to "wall off" the investigation and merger review case teams to avoid being accused of acting as a judge, jury, and executioner.

This, of course, is not a problem in Cofece where technical areas have been accustomed to working at arms length with its plenum. In fact, reforms which very strictly separate the investigative from the trial phases of the case were aimed at increasing procedural fairness and further legitimizing Cofece's decisions. The Investigative Unit Head (Autoridad Investigadora ("AI")) has been raised to the level of the commissioners. The Plenum no longer relies on the AI to oversee the trial portion of a case, and a new Instruction Secretary position has been created to give continuity and report to Plenum. New powers on reviewing "barriers to competition"—currently being interpreted as the possibility of undertaking market studies—and determining

"essential inputs" will likely lead to a restructuring of competencies between various directorates: regulated markets, economic studies, and perhaps even unilateral conduct investigations, since "essential inputs" are also regarded as an abuse of dominance conduct.

2. Assessment

• Synergies vs. Conflict

The most significant change comes in IFT with a completely new unit (Unidad de Competencia Económica ("UCE") charged with overseeing antitrust investigations and modeled after Cofece's previous model. One of the stated objectives with the reform was to allow better cooperation and information sharing between the sector regulators and the area charged with overseeing antitrust. The reasoning for the merger was precisely to exploit these synergies.

The UCE is broken into three directorates: a merger review, an investigation and an adjudication area meant to keep separate the inquiry of anticompetitive allegations, and merger review during the trial portion of the legal procedure. Competition advocacy remains with the office of the head of the UCE who collaborates with the other units within IFT but at the same time functions as an independent division within IFT since it has to respect one of the key reforms introduced in the Constitution, which is the separation of investigative work from the decision-making process. Although this can be seen as applying to the plenum in deciding competition cases, it remains to be seen how regulatory analyses and decisions, which are *ex ante*, will not be "contaminated" with *ex post* resolutions applying on a case-by-case basis to individual economic agents—an issue of coherence which we take up later.

In the case of Cofece, a similar problem does not arise since its directorates of investigation have traditionally been separated from its market and economic studies directorates. The latter two will likely no longer report to the Investigation Area Head (the Executive Secretary) but to a new Instruction Secretary or similar office charged with following the trial phase of the cases and perhaps the advocacy obligations of Cofece. In terms of Cofece, no synergies are gained from the new makeup imposed by the Constitution, but a larger bureaucracy—with an incommensurate budget—will have to be created.

ANOTHER POINT OF CONCERN ARE THE STRICT GUIDELINES THAT CONGRESS HAS IMPOSED ON FUTURE AND MERITORIOUS CANDIDATES WHICH WILL LIKELY RESULT IN GOOD PUBLIC SERVANTS—BUT ONLY PUBLIC SERVANTS—HAVING THE POSSIBILITY TO BE APPOINTED AS COMMISSIONERS

As Hyman & Kovacic mention,[47] it is a common complaint among regulated entities that additional powers are rarely assigned new budgets that allow them to face these new responsibilities. In this case, Congress did increase budgets for both: IFT's threefold (350 percent increased from approximately U.S. $50 million to U.S. $230 million) and Cofece's 33 percent. Cofece's budget increase will hardly cover the fees for the new administration responsibilities and two additional commissioners' posts with their respective staffs.

In addition, Cofece was not allowed to introduce changes to the law that would enable it to obtain monies from late fees or from merger notifications. One immediately visible effect has been its inability to retain a large portion of its qualified staff as an important number of competition experts have left the old antitrust regulator for better salaries and positions with the new telecommunications regulator. The incorporation of experienced competition economists and lawyers is an important boost to IFT, but it has come at a cost to Cofece, which even before the reforms often suffered from a shortage of qualified economists and lawyers.

- **Advocacy**

Having joint regulatory and competition knowledge may better position IFT to lobby Congress for important regulatory changes. With both regulatory and competition knowledge it will be able to make more informed opinions but, as is the case of Spain, additional responsibilities while sometimes complementary may also be conflicting and lead to bias in decision-making. In contrast to the CNMC, the same plenum decides regulatory and competition cases so that two conflicting positions will very likely be resolved inside the organization and not be subject to external scrutiny and discussion. That is, unless the new regulator adheres to transparency criteria that present competition and regulatory arguments side by side.

IT WILL BE A CHALLENGE FOR IFT TO MANAGE AND PRIORITIZE ITS DIVERSE MANDATE

Given the size of the Competition Unit vis-à-vis the other units at IFT, there is a very real risk that regulatory-based considerations will trump competition ones and that advocacy will be weakened within the IFT. A concurrency of faculties in advocacy opinions in telecom with Cofece would be a welcome reform in the future.

- **Independence vs. Accountability**

The possibility for reelection as president of each agency after an initial four-year term, subject to Congressional decision, puts in jeopardy the independence with which the presidents of IFT and Cofece will act over his or her initial four-year terms.

Another point of concern are the strict guidelines that Congress has imposed on future and meritorious candidates which will likely result in good public servants—but only public servants—having the possibility to be appointed as commissioners. To avoid regulatory capture the law forbids any person who has worked or represented an economic agent subject to regulation or investigation during the three prior years to their appointment to become an eligible candidate for Commissioner. In addition, there is a bar against candidates serving in companies that were subject to regulation or investigation during the three subsequent years after

AVOIDING REGULATORY CAPTURE SHOULD NOT IMPOSE UNNECESSARY BURDENS ON THE AUTHORITY, BUT THE RIGIDITY WITH WHICH INVESTIGATIVE AND RESOLUTION PHASES HAVE BEEN SEPARATED RESULTS IN AN IMPORTANT AND LIKELY UNNECESSARY BURDEN ON THE AUTHORITIES

they served as commissioners. The likelihood that anyone but political appointees and civil servants will fulfill or agree to these conditions is low making independence suspect over time.

THE SUCCESS OF THE NEW INSTITUTIONAL SETTINGS BOTH IN SPAIN AND MEXICO IS YET TO BE PROVED

With the degree of scrutiny they are facing as completely new autonomous institutions—one that will likely continue—both regulators have so far been cautious and responsible about publishing their annual work plans and quarterly reports. The production of guidelines, foreseen in the secondary legislation, that will make transparent and provide certainty in their enforcement actions will be a crucial metric for how accountable they are in the future.

- **Coherence, Coordination, and Priority Setting**

A key driver for the constitutional amendment that granted competition powers to the telecommunications regulator was to improve the coordination that had been lacking even if improving between CFC and COFETEL. Nevertheless, there was no clear analysis of the reasons that had led to this poor coordination, created mostly by the CFC's determinations of a lack of effective competition conditions that were the trigger to impose asymmetric regulation. Consequently all competition powers were granted to IFT (mergers, investigations, advocacy), not just those relating to the imposition of regulation. As a result, the new telecommunications entity has a large and not necessarily complementary mandate reflected in its annual work plan for 2014, which includes: freedom of speech and universal access; competition, free market access, and eliminating restrictions to competition and innovation; ensuring quality, competitive prices, and security; regulating and supervising the use of spectrum, networks, and telecommunications and broadcasting services; and protecting rights of users and audiences.[48]

It will be a challenge for IFT to manage and prioritize its diverse mandate. This may be reflected in the judiciary, where economic agents have traditionally turned when defending conflicting rules or their enforcement. The newly minted specialized tribunals will have an important workload in ensuring that the new reforms do not deteriorate into excessive and unnecessary litigation, as was the case before.

Another important aspect to note is that although the merging of competition authority into the telecommunications regulator was seen as a "clean" way of resolving coordination problems, coordination will still be key between IFT and Cofece. Both have to enforce the same law in competition matters, and any similarities or discrepancies with which they do so may result in excessive litigation brought before the tribunals or the possibility of regulatory arbitrage, which we take up next.

- **Regulatory Capture and Regulatory Arbitrage**

Although there are certain undertakings that very clearly fall into the purview of the telecommunications regulator, there are others such as value-added services operators, which lie in a grey area. Much has been written about the behind the scenes disputes between U.S. regulators regarding their own

purviews,[49] but this is new to Mexico and will present not just an interesting coordination challenge between IFT and Cofece, but could open up a new avenue of litigation among economic agents falling into this grey area and seeking to arbitrage between them.

Avoiding regulatory capture should not impose unnecessary burdens on the authority, but the rigidity with which investigative and resolution phases have been separated results in an important and likely unnecessary burden on the authorities. In the case of competition, historically there were internal complaints of having very little interaction between the technical areas and plenum to the point where commissioners only heard one side of the argument (the external parties) and not the other (the directorates). We hope to take up this point in future research.

IV. CONCLUSIONS AND FUTURE RESEARCH

There are synergies and benefits to gathering regulatory and competition powers under one roof, but in order for these elements to be exploited special attention should be put on institutional and organizational design. Just merging several institutions into one larger one does not guarantee the realization of promised synergies and benefits.

The building of an institutional culture is also important. Like in any merger, there are aspects of institutional culture that are valuable in the separate entities and thus need to be preserved, while others have to be modified either for the joint entity or for individual departments or subsidiaries. In essence, the creation of a new culture is needed to change the way of working. There needs to be a clear strategy driven by top management and absorbed by the staff. As pointed by Lyons[50] for the U.K.'s CMA, the first thing the chairman and the board members of the new institutions will have to get right is a "common culture of genuinely independent collective decision making."

Within this process clear risks need to be recognized, such as the risk of running independent divisions with no clear unifying mandate (it need not be single, but it must be cohesive and priorities need to be clear). Externally, the government has to believe in the concept of an independent institution. As pointed out by Hadfield & Weingast, "this is not just a matter of building institutions; it requires the achievement of a shift in common knowledge systems of beliefs."[51]

A transitional period is essential to ensure that there is enough flexibility to adjust to change and ensure a smooth transfer of the strengths, knowledge, and experience from previous institutions into the new organization. When a transitional period is clearly announced it also signals to all parties—internal and external to the new agency—that the period of uncertainty is finite and reduces posturing and opportunistic behavior by economic agents as change is enacted and implemented.

The configuration of a small board with enormous responsibilities over a broad number of sectors and a complex system of interactions between chambers can act as a bottleneck to the functioning of the

institution. A more sensible option seems to opt either for the German model (with nine specialized ruling chambers) or for the Dutch model (with a minimalistic board with limited managerial responsibilities).

Increased responsibilities require even better appointment mechanisms that select the best candidates to occupy the decision posts. In both cases described here, the current mechanism does not guarantee a transparent selection of the best candidates going forward, and in some cases not necessarily based on their merits. If the quality of the board is important in a single-purpose regulator, it becomes crucial in a multi-purpose regulator where not only highly technical expertise is required, but also capacity to know and relate sectors, and to have a broader overview over the issues at stake is essential.

The ultimate aim of institutional design is to ensure an effective enforcement of the law. The success of the new institutional settings both in Spain and Mexico is yet to be proved. Some features of the new institutions were not fully motivated by the aim of improving regulation enforcement. This can lead to a non-materialization of the potential benefits. The fine-tuning of the institutional design, the details of the implementation, the internal procedural design, and the new culture of the institutions and governments will be crucial to exploit the complementarities of regulatory and antitrust policies. ▲

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[1] Juan Delgado is Director at Global Economics Group. He thanks Héctor Otero for his comments and suggestions and Jaime Pingarrón for his excellent research assistance. Elisa Mariscal is an adjunct professor of Economics & Law at CIDE and Director at Global Economics Group. She thanks Alexis Pirchio for his excellent research assistance.

[2] W.E. Kovacic & D. A. Hyman, *Competition Agency Design: What's on the Menu?*, Public Law and Legal Theory Paper no. 2012-135 and Legal Studies Research Paper No. 2012-135 (2012), hereafter "Kovacic & Hyman."

[3] *See* Coglianese for a review of the determinants of regulatory outcome, C. Coglianese, *Measuring Regulatory Performance: Evaluating the impact of Regulation and Regulatory Policy*, OECD. Expert Paper No. 1 (2012).

[4] G.K. Hadfield & B. R. Weingast, Microfoundations of the Rule of Law, Center for Law and Social Science Research Paper Series No. CLASS13-5, (November 7, 2013), hereafter "Hadfield & Weingast."

[5] Allendesalazar comments on the concerns related to the creation of the new regulator, R. Allendesalazar, *Una reforma arriesgada*, Gaceta jurídica de la Unión Europea y de la competencia, ISSN 1575-2054, Nº 31, págs. 5-10 (2013).

[6] In addition, the decision was accused of being politically motivated with the aim of replacing the regulators' boards appointed by the previous government. See F. Trillas, F. *The Institutional Architecture of Regulation and Competition: Spain's 2012 Reform*, IESE Working Paper WP-1067-E. April (2013), hereinafter "Trillas."

[7] At some point during 2008-12, for example, the CFC's general directorate of regulated sectors was almost fully devoted to analyzing dominance issues in telecommunications markets, while the unilateral conduct general directorate's portfolio was split 50 percent in telecommunications and broadcasting with the remaining portion assigned to all other sectors of the economy. This represents a highly skewed distribution of

human and financial resources considering that telecommunications made up only 2.73 percent of Mexico's GDP in 2008 (Source: World Bank).

[8] Kovacic & Hyman, *supra* note 2.

[9] D.A. Hyman &W. E. Kovacic, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?*, Illinois Program in Law, Behavior and Social Science Paper No. LE12-14 pp. 2012-70 (2013) hereafter "Hyman & Kovacic."

[10] Petit reports potential conflicts between antitrust and regulatory policies in the telecoms sector in Europe and the increasing overlap between competition agencies and NRAs at the European level. Competition and regulation interact in the regulatory framework on electronic communications adopted by the EC in 2002, which introduces competition law concepts and principles at the core of it. N. Petit, *The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion?*, in Regulation through agencies in the EU (Damien Geradin, Rodolphe Muñoz, & Nicholas Petit, eds. 2005) hereafter "Petit."

[11] M.J. Trevilcock & E. M. Iacobucci, *Designing Competition Law Institutions: Values, Structure and Mandate*, 41(3) Loyola Univ. Chicago L.J. 455 (Spring, 2010).

[12] International Competition Network, *Advocacy and Competition Policy Report*, ICN Conference, Italy (2012).

[13] *See*, for instance, K.W. Viscusi, J. E. Harrington, & J. M. Vernon, Economics of Regulation and Antitrust, 3rd Ed. (2000); D.W. Carlton & R. C. Picker, *Antitrust and Regulation*, NBER working paper series. Working Paper 12902 (2007); S.L. Dogan & M.A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 Texas L. Rev. 685 (2009); and M. Hellwig, *Competition Policy and Sector-Specific Regulation for Network Industries*, Max Planck Institute for Research on Collective Goods (2008) for discussions on the different roles and objectives of regulatory and antitrust policies.

[14] Multi-purpose regulators might have to balance between conflicting regulatory and competition goals limiting the role of policymakers and politicians. The fact that regulators and neither policy-makers nor politicians decide on the combination of policies might reduce, in principle, political interference. Acemoglu & Robinson conclude that this does not necessarily have to be welfare enhancing since pure technical advice might ignore political considerations that might also enhance welfare. They determine that welfare maximizing policy makers should not just work to solve market failures, but should take into account the later political ramifications of their decisions. Economic reforms implemented without an understanding of their political consequences rather than solely promoting economic efficiency can significantly reduce it. D. Acemoglu & J. A. Robinson, *Economics versus Politics: Pitfalls of Policy Advice*, NBER Working Paper Series. Working Paper No. 18921 (2013)

[15] B. Levy & P. Spiller, Regulations, institutions and commitment: comparative studies in telecommunications, (1996).

[16] Dutz & Vagliasindi and Borrell & Jimenez find that independence has a statistically significant positive effect on antitrust effectiveness—M. Dutz & M. Vagliasindi, *Competition Policy Implementation in Transition Economies: An Empirical Assessment*, 44(4-6) Eur. Econ Rev., 762-772 (May, 2000) and Jimenez Borrell & J. Jimenez, *The drivers of effectiveness in competition policy*, Documento de trabajo de FUNCAS, 2007/363. (2007).

[17] J. Black, *Calling Regulators to Account: Challenges, Capacities and Prospects*, LSE Legal Studies Working

Paper No. 15/2012 (2012).

[18] Hadfield & Weingast, *supra* note 4.

[19] Kovacic & Hyman, *supra* note 2.

[20] Hadfield & Weingast, *supra* note 4.

[21] Kovacic & Hyman, *supra* note 2.

[22] Petit, *supra* note 10.

[23] Hadfield & Weingast, *supra* note 4.

[24] K.J. Cseres, *Integrate or Separate. Institutional Design for the Enforcement of Competition Law and Consumer Law,* Amsterdam Law School Legal Studies Research Paper No. 2013-03 (2013).

[25] Kovacic & Hyman, *supra* note 2.

[26] T. E. Olsen & G. Torsvik, *The Ratchet Effect in Common Agency: Implications for Regulation and Privatization*, 9(1) J. L. ECON. & ORG.136-58, (April 1993).

[27] Ley 3/2013, of June 4th that creates the *Comisión Nacional de los Mercados y la Competencia*. *Available at* http://www.boe.es/boe/dias/2013/06/05/pdfs/BOE-A-2013-5940.pdf

[28] Energy (CNE, Comisión Nacional de la Energía), Telecomunicaciones (CMT, Comisión Nacional del Mercado de Telecomunicaciones), Railways (CRF, Comité de Regulación Ferroviaria), Postal (CNSP, Comisión Nacional del Sector Postal), Airports (CREA, Comisión de Regulación Económica Aeroportuaria) and Audiovisual (CEMA, Consejo Estatal de Medios Audiovisuales).

[29] CEMA and CREA.

[30] *See* Trillas, *supra* note 6.

[31] Those for which the law understood that the functional separation from government was not necessary (e.g. handling consumer claims.)

[32] The procedure is not that clear in the case of non-infringement procedures such as reports, studies, and opinions.

[33] From that amount, 3.6 million corresponded to the lower number of board members, 18.7 million to the non-creation of the two pending regulators, and 5.8 million to administrative efficiencies. *See Proyecto de Ley de Creación de la Comisión Nacional de los Mercados y la Competencia. Memoria del análisis de impacto normative*, (27 de septiembre de 2012).

[34] Important administrative synergies can arise, for example, from merging the Ministry of Environment and the Ministry of Defense. However, the lack of policy synergies makes irrelevant any potential administrative synergies.

[35] This might also lead to some asymmetry between advocacy initiatives in regulated and non-regulated industries, as advocacy activities in non-regulated sectors will be addressed by the competition advocacy unit from a competition perspective.

[36] The appointment of the new board has been preceded by the dismissal of the board members of the existing regulators before the end of their mandate, which has raised some concerns on the independence requirements set by European legislation. *See* Trillas, *supra* note 6.

[37] Leaving aside the shared responsibilities that some regions have on competition matters and also the EU competition and regulation competences.

[38] Under the previous model, some regulators such as the energy and the telecoms regulators were funded via industry levies. Such levies still exist but are now collected and distributed by the government.

[39] Autonomy has to be more than just financial. A. Estaché & David M. Mortimert, *Politics, Transaction Costs, and the Design of Regulatory Institutions*, Policy Research Working Papers (1999). It should also mean that the regulator should be able to recruit its own staff. The new regulator favors the recruitment of civil servants for top positions, which limits the recruitment autonomy and the expertise of the regulator. The autonomy of the regulator and the quality of the regulatory outcome are reinforced by allowing the incorporation of experienced economists, lawyers, and engineers from both the private and the public sectors.

[40] Hearing of the CNMC President on the Parliament. See, *Comparecencia del presidente de la CNMC en el Congreso de los Diputados*." (May 13, 2014).

[41] Perhaps the most remarkable example was the EC antitrust decision against Telefónica for the anticompetitive nature of broadband prices that had been previously approved by the national regulator. *See* COMP/38.784—Wanadoo España v Telefónica.

[42] *Plan Estratégico de la Comisión Nacional de los Mercados y la Competencia: Competencia, Supervisión de Mercados y Regulación Económica Eficiente* CNMC (7 de mayo de 2014).

[43] In Spain there is just one airport public operator (AENA), while there are large public dominant ex-monopolies in the railway industry (RENFE's market share is close to 85 percent on the freight market, while it is the only operator in the railway passenger transport market) and postal sectors (CORREOS' market share is around 90 percent on the traditional postal sector).

[44] There is a rotational system between chambers by which after a certain period of time board members switch chambers to reduce the possibility of capture. However, this will affect negatively board members specialization.

[45] Hadfield & Weingast, *supra* note 4.

[46] The Federal Law of Economic Competition was published May 23 in the Federal Daily Gazette and will be enacted 45 days after its publication (July 7, 2014). The Federal Telecommunications Law—a far more contentious piece of legislation—was discussed in the Senate first, where it was decided to postpone voting until an extraordinary period is called in June or July. It will then have to pass to the Chamber of Deputies and, if any changes are made, returned to the Senate for final confirmation. This situation obviously puts the new telecom regulator on shaky ground in its current decisions.

[47] Hyman & Kovacic, *supra* note 9.

[48] *Programa Annual de Trabajo 2014*, Instituto Federal de Telecomunicaciones.

[49] Hyman & Kovacic, *supra* note 9.

[50] B. Lyons, *Will the New U.K. Competition and Markets Authority Make Better Antitrust Decisions?*, 5(1) Cpi Antitrust Chron. (May, 2012).

[51] Hadfield & Weingast, *supra* note 4.