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Institutional Reforms to Integrate Regulation and Competition Policy: Economic Analysis, International Perspectives, and the Case of the CNMC in Spain[1]

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Abstract

We review the related academic literature and the international evidence on the institutions of regulation and competition policy, to analyze the creation in 2013 of the new macro regulator in Spain, the CNMC. The institutional reform merged the competition policy authority with virtually all sector regulators with the exception of the financial regulator. The aim of the paper is to assess the extent to which the Spanish reform follows international best practices as well as how it fits within the analysis found in the academic literature. Although there is not a universally superior approach, neither in practice nor in theory, important shortcomings remain with the model that was finally adopted in Spain. Some institutional diversity would facilitate an optimal level of regulatory independence and governmental coordination for each sector, and ultimately achieving better results in terms of consumer welfare.

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1. Introduction

Several international jurisdictions have been active in recent times in reforming the institutional structure of competition policy and regulatory authorities. A possible explanation for the surge in this particular type of reforms is that governments may have thought that action on this front is one of the few remaining tools at the national level to free the growth potential of the economy. Fiscal stimulus in general must be very carefully administered and industrial policies involving direct subsidies are on the decline. Furthermore, and prior to the financial crisis in the case of the European Union, progress in competition policy (Cini and McGowan, 2009) and the emerging notion of 'services of general (economic) interest' (Clifton *et al.,* 2005, and Clifton, 2014) have been consubstantial with the political and economic integration in the region, and may also have inspired some of the reforms.

The purpose of this article is twofold. First, we examine the most relevant academic literature and policy recommendations regarding institutional reforms in regulation and competition policy. Second, and against this background, we analyze the creation of the National Commission for Competition and Markets (CNMC) in 2013 in Spain (Law 3/2013) building on the work of Trillas (2013) and Xifré (2014). As mentioned above, and as acknowledged by the Spanish Government, a major rationale for undertaking this reform is that it would be highly effective to overcome the economic and financial crisis, and reignite growth. For this very same reason, and more broadly to assess the contribution of the reform to the public interest, it is important to assess whether the broad direction and specifics of the Spanish reform are appropriate and aligned with academic research and internationally accepted practices.

We first review the most relevant academic literature and the main policy insights from past experience in reforming the institutions of regulation and competition policy (Section 2). In this section, we explicitly analyze how in general the reform of regulatory institutions fits into the broader debate about public intervention in network industries (see for example, Armstrong and Sappington, 2006, and Florio, 2013). The main message that emerges from this section is that while there are not universally optimal institutional arrangements,

several particular practices characterize the most successful reforms. On the theoretical front, there is a wider dispersion of perspectives but still some basic ideas are generally accepted, including the fact that agencies' independence, accountability, and enforcing power are of the essence but very difficult to attain in practice for a variety of reasons.

We next focus on the particular reform that the Spanish Government implemented by creating the CNMC in 2013 (Section 3). We first briefly review the state of affairs in competition policy and regulatory institutions prior to 2013, and then examine the CNMC reform process and content. We assess the reform by means of a detailed discussion and comparison with both the analysis of the theoretical literature and the internationally accepted practices.

In Section 4, we conclude by summarizing our main concerns about the Spanish CNMC reform. In contrast with the model of maximal integration adopted in Spain, the case for a certain degree of institutional diversity appears to be jusitified because, although some consolidation and coordination may be beneficial, diversity creates the conditions for accountability and sound decisions for consumers in markets that are complex, subject to the pressure of interest groups, and uncertain.

2. The Framework for Reform

2.1 The economic analysis of the institutional architecture of regulation and competition policy

The relevant literature on the economic analysis of the institutional architecture of regulation and competition policy, and especially on the role and structure of agencies, includes considerations of 1) regulatory independence, 2) incentive theory, and 3) the relationship between ex ante and ex post intervention (see Trillas, 2013, and Delgado and Mariscal, 2014). The issues of potential regulatory capture and policy delegation play a relevant role in each of these branches of the literature. Our concern here is how they give insight into the degree of integration between regulation and competition policy agencies. Existing research addresses other related topics about the structure of

agencies, such as whether there should be a clear individual or a collegiate body as head of an agency or the properties of term limits, but we do not address these issues here.

The recommendation of regulatory independence is part of the paradigm of reform of network industries that has prevailed in Europe and in other regions of the world over the last twenty years, as analyzed by Florio (2013), who locates the origin of the reforms in the United Kingdom in the early 1990s. This paradigm also included privatization, liberalization, and vertical separation, although these reform vectors were applied to varying degrees in different jurisdictions. The relationships among these dimensions are not always straightforward, as explained in the case of the airport sector by Bel and Fageda (2013). Regulatory independence is justified by several reasons (as explained in Trillas, 2010), including the need to establish expertise in complex industries. The main rationale, however, relates to the need for capital investments. When there are specific long-lived investments, regulation faces a commitment problem, because the body in charge of regulation may be tempted to *de facto* expropriate investments once these are sunk. This problem may be alleviated by a variety of means (including public ownership and detailed legislation, as described by Newbery, 2000), but also through oversight by a regulatory agency that is relatively pro-investment and independent from electorally concerned governments (in a way similar to central bank independence).

Interestingly, the reformers in the UK did not expect to create a permanent system of regulation (see Stern, 2003), as they were influenced by the Austrian School view that markets, and not regulation, as the best mechanism to promote efficiency. Independent regulatory agencies to control market power have also existed for more than a century in the US since the creation of the Interstate Commerce Commission in 1887. Today, there are two federal US anti-trust agencies, one that is part of the executive and therefore not independent, the Antitrust Division of the Justice Department, and the other that is formally independent, the Federal Trade Commission. In addition, there are sector-specific federal regulatory agencies (namely the Federal Energy Regulatory Commission (FERC) for energy and the Federal Communications

Commission (FCC) for telecommunications) and state regulatory commissions with multi-sector authority, as well as opportunities for private litigation. But international institutions, such as the World Bank or the European Commission (EC), promoted regulatory agencies mirroring the UK model instead of the US model perhaps fearing the political complexity (including appointment processes) that characterized the latter.

Although independence may alleviate the commitment problem and help build expertise, there is an optimal degree of independence. As explained in Trillas (2010 and 2013) regulatory independence also has drawbacks. These include potential lack of coordination with the rest of government, expert biases (such as overconfidence and others), or potential for capture (as seen in the revolving door phenomenon of specialized regulators). The optimal degree of independence depends on administrative costs, the supply of expertise, and subtle issues of demand growth and technology (such as depreciation and asset specificity), and is thus contingent on sector, country, and time. The energy sector, for example, faces more coordination requirements than the telecommunications sector because of environmental and distributional concerns. It can be argued as well that independence does not solve, but rather relocates, the commitment problem. Regulatory independence transfers the commitment problem to the government or the legislative majority, which then needs to commit to preserving regulatory independence. Some countries have found this particularly difficult, raising the issue of the importance of taking into account not only the legal aspects of regulatory independence, but also the *de facto* or practice issues. These difficulties, and others described by Florio (2013) and in the reviews by Estache and Wren-Lewis (2009) and Armstrong and Sappington (2006), illustrate the nuances of applying the reform paradigm. The main lesson we extract from this branch of the literature is that independence may be useful but it is difficult to implement and its optimal degree varies across sectors. As seen below, there are concerns that the Spanish reforms imposed a homogeneous level of independence for different sectors, reduced the overall level of regulatory independence, and by unilaterally changing legislation, *de facto* reneged on regulatory independence by taking advantage of the

legislative change to remove from office the regulators appointed by the previous political majority.

According to incentive theory (see Trillas, 2013, and references therein), when the same agents perform more than one task, their incentives to deliver effort are stronger or weaker (as optimally set by their principals) depending on the degree of substitutability or complementarity of the tasks. Agents should face weaker incentives when tasks are substitutes and stronger when they are complements. When tasks are substitutes, but one of them is easier to measure than the other, there is the risk that the agent concentrates the effort on the most visible task, which is not necessarily the most relevant in terms of welfare. This problem is aggravated if we introduce behavioral considerations such as the availability bias, by which agents focus their attention on immediate issues that come to a given person's mind. When tasks are complementary, however, strong incentives in one dimension also favor other dimensions. This suggests that those regulatory tasks that have synergies, due for example to technological convergence, should be bundled together, but not those for which these synergies are absent, or those that show larger effort costs when they are performed together. A clear case for synergies can be made in the telecommunications, computing, and Internet sectors, where the concepts developed to deal with the open-access controversies justify a common approach both in regulation and in competition policy, as argued by Farrell and Weiser (2003). However, some competition among agencies (see Gavil and First, 2014) to find new solutions may be needed when there is uncertainty. The optimal mix of regulatory coordination or competition thus depends on the degree of complementarity, substitutability, and uncertainty.

Combining independence and incentive issues, the accountability of independent agencies can be seen as more difficult when the number of tasks of the regulator expands, as it has arguably happened with financial regulation and with energy regulation in the recent past.

The academic literature has more specifically addressed the relationship between ex-ante regulation and ex-post anti-trust (or competition policy). This is

an especially relevant issue in network industries that face liberalization processes. These industries combine natural monopoly segments that require regulation, and potentially competitive segments that are the focus of competition policy (see Newbery, 2000). There is little doubt that these two policy instruments should be coordinated. In some countries, such as the UK, specialized regulatory agencies and antitrust agencies coexist, but have concurrent competition policy powers. The concern for market power interacts with other public concerns, such as other market failures (like externalities or asymmetric information) or equity concerns. Ex-ante regulation typically addresses this combination of issues (for example, through universal service policies), and usually includes a dynamic concern for sunk investments. Sunk assets are still important with deregulation, although in a proportion that depends on the specific technology. Bottlenecks remain in some segments and there is consensus that they require ex-ante regulatory attention. Due to the concern for investment in regulated segments, in the interaction between regulation and competition there is a trade-off between static and dynamic efficiency. For example, in the short run allocative efficiency may call for low prices and intense competition, but long run concerns about incentives for innovation and investment may call for higher prices and milder competition, at least temporarily. Whether a single agency (combining antitrust and regulation) or a diversity of agencies will better deal with this trade-off depends on the pressures that they will face to pay attention to the different issues. Most jurisdictions have preferred to preserve at least some institutional diversity.

Public intervention to address market failures, especially if it is in the form of ex-ante stable and specific regulation, opens the door to special interests.[2] Capture issues have been discussed in the literature in terms of their impact on horizontal institutional structure (the number of agencies), but no clear message emerges from the theory. Some authors, such as González (2006), recognize that the more general is the regulator in terms of the industries it oversees, the lower the possibility that it will be captured by a single firm or industry. In an integrated agency, the top executives need not be sector specialists and

[2] The door may not necessarily be crossed, see Carpenter and Moss, eds. (2014).

therefore their career will not be tied to a specific industry. A multi-sector agency with much power and impact will be more publicly visible and therefore more exposed to scrutiny of interested audiences such as consumer groups, business associations, parliament, media, etc. Greater public scrutiny improves accountability, but this must be accompanied by good commitment devices to avoid the derivation of public visibility into populism. Any decision not well founded, or influenced by capture, is more liable to be discovered. The larger institutional weight might also allow the agency to better resist interference or pressure from political power. In addition, one can imagine a context in which a company needs complementary permits or authorizations, if they are issued by separate agencies, where corruption could be more damaging than if they are delivered by a single agency. This is because agencies acting individually do not internalize the damage, or increased costs, that their actions impose on other agencies (as in the double marginalization problem in Industrial Organization). Finally, with a diversity of agencies there is the risk of "forum shopping," that is, firms trying with different regulators until they find one that is convinced of acting in their interests.

It is also possible, however, to question this result, by introducing the problem of asymmetry of information between agencies and between them and the regulated firm (see Laffont, 2001). The power conferred by information to the regulatory agency opens the possibility of being captured via bribery by the firm. If a multi-sector agency regulates a company that participates in several markets under its supervision, then the risk of capture may be higher than with several agencies because of subtle issues related to the firm's willingness to pay to hide information. If there is only one regulatory agency, it will always know the maximum willingness to pay by the firm to hide information, and capture is always a possibility. If there are multiple agencies involved in the regulatory process, where each of them is in charge of reducing the asymmetry of information in a particular parameter, the maximum willingness to pay of the regulated firm will depend on the information available to each individual agency. The separation creates a coordination problem and an informational externality affecting the incentive of each agency to disclose information (to political principals), weakening the bargaining power of those institutions

relative to the regulated firm and making capture less likely. One agency also favors collusion with lobbies because with fewer colluding agents, the transaction costs of lobbying are lower, and the gains of keeping the collusive agreement are higher (less players to share the payoff) relative to the gains of breaking it. Additionally, with a two-tier vertical regulatory structure (government plus regulatory agency), if a powerful firm has a strategy of lobbying government (for example, through the appointment of former politicians to the board of directors, a phenomenon that is well documented in Spain as well as in many other countries), the firm may prefer that there are few and weak regulatory agencies that spoil this privileged access. Therefore, overall the relationship between agency structure and capture is in general theoretically ambiguous.[3]

Beyond capture concerns and more broadly, it is impossible to understand the evolution of the institutions of regulation and competition policy without understanding the political underlying forces behind these structures (see Moe, 2013, and Marinello et al., 2015). Authors influenced by the New Institutional Economics, such as Spiller and Tommasi (2007), argue that what matters is the basic structure of political incentives, and that individual regulators or regulatory agencies are responsive to these underlying forces, such that small changes in agency boundaries may not be consequential.

In practice, governments and legislative majorities find it difficult to commit to optimal structures. Regulatory agencies are fragile institutions because of the influence of political forces and interest groups, and their structure and powers are the outcome of a political game. The degree of regulatory independence and the horizontal (number of agencies) and vertical (allocation of responsibilities at federal or state level) agency structures are far from stable in most jurisdictions. These structures change with technology and market demand, and with the outcome of games played among governments,

[3] See also Estache and Wren-Lewis (2011), Dal Bó (2006) and Mishra (2006) for other institutional determinants of capture or corruption.

legislatures and the relevant interest groups, as will be illustrated with the Spanish case below.

2.2 General policy principles for the reform of competition policy authorities

The theoretical background of the previous section uses mostly positive economics to provide a framework to analyze institutional choices. International organizations and practitioners take a more normative approach and generally agree that any effective competition policy should be characterized by a number of features, with the two main principles to be balanced being on the one hand accountability, and on the other independence from the government and the regulated industry (UNCTAD, 2008).

Independence from political interference and from business influences as promoted by international organizations is required in order to ensure that an agency's decisions are not politicized, discriminatory, or implemented on the basis of the narrow goals of interest groups. At the same time, independent institutions of competition policy are expected to be subject to government oversight and a well-defined system of checks and balances.

The principle of accountability requires that all relevant stakeholders affected by competition decisions (the business community, consumers and public administrations) must know who is responsible for a decision, and the reasoning behind it. This principle extends also to the requisite that affected parties must be able to provide input through well-established, publicly-known, and open consultation processes.

The particular way in which these two general principles are applied in each region and circumstance obviously differ but, following UNCTAD (2011), there are some internationally accepted practices that can be considered as robust guidelines for reform.

Several formal safeguards have been employed internationally to ensure the independence of the competition policy institutions, such as legally protecting

the competition authority remit; appointing the director-general and the board members for a fixed period and prohibiting their arbitrary removal; providing the agency with a reliable and adequate source of funding; or exempting the competition agency from civil service salary limits in order to attract and retain the best qualified staff.

In order to foster accountability, some of the actions taken internationally include publishing the law and statutes of the competition policy agency; requiring a formal review of its performance by independent auditors or oversight committees of the legislature; or mandating that the competition authority publishes its reasoned decisions.

Apart from the requisites on independence and accountability, competition or antitrust agencies also need to have an adequate level of enforcement powers, as pointed out by Armstrong and Sappington (2006). In particular, the competition agencies are expected to be able to investigate effectively so that they can gather information in a timely manner and impose sanctions for non-compliance. Along these lines, the international network of competition authorities (ICN) stresses that the quality of a competition agency's enforcement depends on its ability to conduct effective investigations (International Competition Network, 2013). They recommend that competition authorities are granted legal authority to obtain all relevant information, through appropriate investigative tools, and in turn that the necessary institutional mechanisms and resources are in place to ensure that available evidence is given adequate consideration.

From the standpoint of purely formal institutions, the number of competition authorities that are independent from ministerial control is increasing. According to the more recent figures of the UNCTAD (2011), competition authorities have been established in 112 countries and more than half of these authorities are separate from their respective ministries.

2.3 Recent developments in the reform of EU and national competition authorities

2.3.1 The experience in the EU

The experience of the Directorate-General for Competition in the European Commission (EC) is of particular interest when considering reforms of the competition systems in EU countries. According to Lowe (in Vives, ed. 2009), some of the main institutional and operative reforms adopted in the past by the DG Competition include the creation of a Chief Competition Economist function in 2003; the implementation of a matrix structure by integrating Merger Units with Antitrust Units; and setting priorities and allocating resources on project-based terms to somehow overcome organizational rigidities.

In addition, the EC has a long trajectory of extending its own remit on competition matters by appealing to the notions of 'service of general economic interest' (SGEI) and 'service of general interest' (SGI). The Commission has made clear that these concepts form a central pillar in the process of EU institution building (see Clifton *et al.,* 2005, and Clifton, 2014, for a detailed discussion of the role these concepts have played in the EU). The EC's dual economic and political approach has paved the way for two developments that are very relevant to designing the architecture of competition authorities in the EU.

First, the SGEI/SGI discourse has allowed the EC to become active in directly fostering competition within countries across an increasing number of industries. A notable example of this process, which Clifton (2014) coins as the EC moving from "Eurospeak" to "Euroaction", happened in the telecommunication industry after the 1985 British Telecom case. In essence, the Court of Justice of the European Union (CJEU) ruled that certain services that had been provided by BT as a monopolist up until that moment should from then on be opened up to competition; the EC used this to expand liberalization to all telecommunications services.

Second, in a more indirect but equally powerful manner, the appeal to SGEI and SGI provided the conceptual support for merging consumer protection and

regulation within public agencies. This follows the spirit of New Public Management (NPM), which prescribes among other things that public services and institutions should be more accountable to their direct users and taxpayers. An immediate corollary is that guaranteeing consumer rights based on standards for service delivery becomes a central function of the public sector. In practice this mission has been frequently assigned to the competition policy and/or regulation authorities.

2.3.2 National Competition Authorities

Apart from the DG Competition, competition policy is also enforced by EU Member States, who have their own national competition agencies (NCA). This is justified mainly on the principle of subsidiarity, which is one of the central working principles in the EU. The principle states that the operations and services that can be ably performed by a lower-level public body (i.e., closer to final user) should not be transferred to a higher-level actor. Of course there are limits to this principle in cases in which the issue exceeds the borders of one Member State or other special circumstances concur.

From an institutional and organizational perspective, the legal structure and functioning of the individual NCA in the EU countries can be classified by two criteria, following Cseres (2010):

- the number of competences allocated to the NCA, and
- whether the NCA controls the two main competition policy functions (investigation and decision making) or whether these functions are separated into a dual system with two bodies or institutions.

In terms of competences assigned to the NCA, there are three main legal-institutional models across the EU. The first and more restrictive model implies that the sole responsibility of the NCA is the enforcement of the competition law (as in Belgium, Spain before 2013, and Romania). Under the second model, some form of sector regulation (e.g. energy, telecommunications) is also part of the competencies assigned to the NCA (as in Denmark, Austria and Spain after

2013). Finally, the third type of agency combines the enforcement of competition law with some specific parts of consumer law, such as rules against deceptive or misleading advertising (as in Italy, Poland and the Netherlands after 2013).

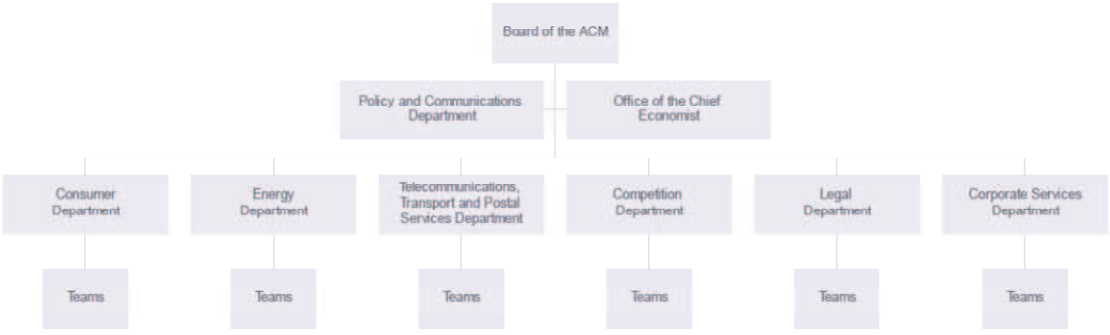
Different rationales might explain why the functions of consumer protection and regulation are merged in the agencies of certain countries. A very promising explanation, relying on behavioral economics, is that consumers do not always behave as fully rational agents who maximize their utility. Instead, it may be the case that, when purchasing a good or service, they are affected by a series of biases: inertia, risk aversion, status quo bias, choice overload, etc. (see Clifton *et al.* 2014 for a detailed explanation). On this basis, public institutions might be entitled to take certain actions (to protect the most vulnerable consumers) that limit the freedom of private operators, provided that no significant costs are inflicted to the non-vulnerable class of consumers.

In practice this principle, which some authors refer to as “paternalism” (Thaler and Sunstein, 2003, and Camerer *et al.,* 2003), would require, for instance, that service providers present their bills in simple and transparent terms, easily understandable to every consumer (example taken from Clifton et al., 2014) or to streamline the procedures for post-sale and quality-service claims. Given the nature of these interventions, which require extensive knowledge of the product or service market, regulators are optimally placed to undertake them.

However, as pointed out by Viscusi and Gayer (2015), regulators themselves and their institutional environment may be affected by behavioral biases, such as failure to optimize, overconfidence on their own expertise, or intrinsic preferences. The public may have a concern not only for the outcome of policies and reforms, but also for the fairness of processes that make them possible. The design of institutional architecture should minimize the negative impact of those biases that make it more difficult to pursue consumer welfare and make the most of those that might actually promote it, such as a public sector ethos as an intrinsic preference. Intuitively, we would expect that a monopolistic agency would make it easier for negative biases to prevail and remain unchecked.

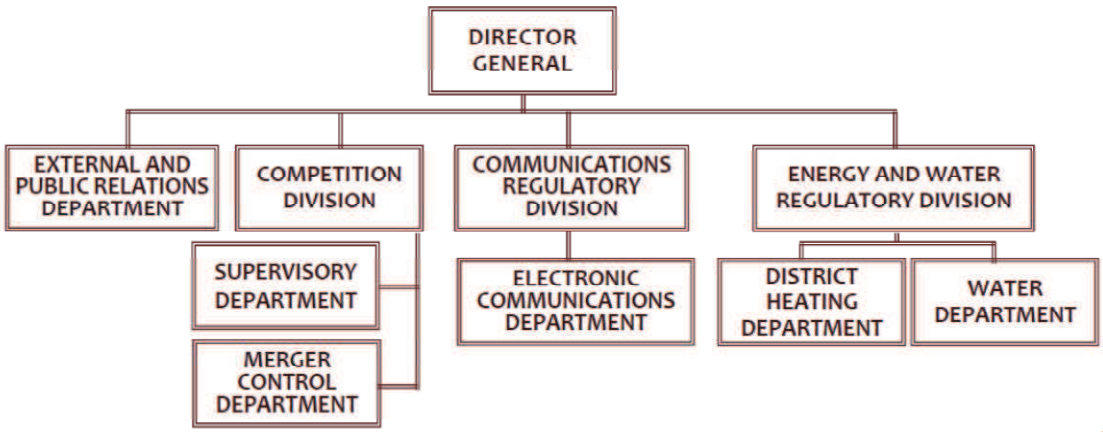
Of special interest are the recent institutional transitions in the Netherlands and in the UK. In the Netherlands, in April 2013 the new Authority for Consumers and Markets (ACM) was created as the result of the merger between the former Netherlands Competition Authority (NMa), the independent Post and Telecommunication Authority (OPTA) and the Consumer Authority. It includes the functions of regulation of the energy markets (see figure 1). This degree of quasi absolute integration is new in EU countries and it is only comparable with that of the Estonian Competition Authority (see figure 2).

Figure 1. The organization of the Dutch Authority for Consumers and Markets, 2013



Source. Dutch Authority for Consumers and Markets.

Figure 2. The organization of the Estonian Competition Authority, 2013



Source. Estonian Competition Authority

The recent experience of the UK is also relevant. The Competition and Markets Authority (CMA) was legally established on 1 October 2013 and it acquired full powers on 1 April 2014. The new body merged the Competition Commission (CC) with the competition and certain consumer functions of the Office of Fair Trading (OFT). The consumer protection principle is of the essence for the new authority, this understood as "empower[ing] consumers to exercise informed choice, using both competition and consumer powers to help markets work well" (CMA, 2014).

However, in contrast to the Netherlands, the UK competition authority and sector regulatory bodies are separate entities, with the latter having competition policy powers in their respective sectors. This separation between the regulation and competition agencies has been a long-standing institutional design feature of the UK competition policy framework.

In terms of the internal structure of the NCA, most Member States have a system where one single administrative authority both investigates and decides over the cases, although the units are internally independent. In the past years, some member states, like Spain (2007), France (2008-2009), and Estonia (2009), have migrated from dual to single systems in competition policy. On the

other hand, Belgium and Luxembourg currently still opt for a dual administrative system, while in Ireland and Austria, investigations are carried out by the respective competition authorities and decision-making powers have been transferred to courts.

Table 1 summarizes these two criteria for the classification of NCA of the UE27 with their current structure, marking the recent changes in Spain, the Netherlands and the UK.

Table 1 Classification of the National Competition Authorities in the EU

	Scope Functions attributed to the NCA			**System** Institutional integration of investigation and decision-making	
	Competition only	Competition + regulated sectors	Competition + consumer protection	Two agencies	One agency
Austria		X		X	
Belgium	X			X	
Bulgaria		X			X
Cyprus	X				X
Czech Republic		X			X
Denmark		X			X
Estonia		X	X		X
Finland	X				X
France			X		X
Germany	X				X
Greece	X				X
Hungary		X	X		X
Ireland			X	X	
Italy			X		X
Latvia		X	X		X
Lithuania			X		X
Luxembourg	X			X	
Malta			X		X
Netherlands	* ----→	X (ACM, after 2013)	X (ACM, after 2013)		X
Poland		X			X
Portugal	X				X
Romania	X				X
Slovakia	X				X
Slovenia	X				X
Spain	* (CNC, before 2013) ----→	X (CNMC, after 2013)			X
Sweden		X			X
United Kingdom	* ----→		X (CMA, after 2014)		X

Source. Authors' preparation based on Cseres (2010).

3. Institutional Reform in Spain

3.1 Overview of regulatory and competition policy institutions in Spain before 2013

3.1.1 The Regulatory Institutions

Until 2011, there were four sectoral regulatory authorities in Spain (excluding financial regulation): the National Commission for Energy (CNE), the Commission for the Telecommunications Market (CMT), the Committee for Railway Regulation (CRF), and the National Commission for the Postal Service (CNSP).

The first two were relatively strong institutions, as can be assessed from their budget and staff (see table 2), with a proven record in regulatory policy and a well-defined set of competences. However, the Spanish Government had kept for itself important legal competences in these two areas, including the ability to fix prices in the electricity market or the general management of digital spectrum in telecommunications.

Table 2 Budget and Staff of the Regulatory Bodies in Spain, 2013

Regulatory body	Staff	Budget (million euro)
CNE (Energy)	214	26.4
CMT (Telecommunication)	145	18.4
CNSP (Postal Mail)	23	1.8
CRF (Railway)	2	0.2
Total	384	46.8

Source. Report on Legal Impact, CNMC Creation Act

Since 2010, in addition to these institutions, legal mandates have created three new regulatory authorities in the sectors of transportation, gambling, and the audio-visual industry. However, rather than forming standing-alone entities,

these oversight functions were instead taken up by administrative units within the new CNMC (discussed below).

3.1.2 The Competition Policy Institutions

Spain created genuine competition policy institutions only as a result of the integration process into the European Economic Community (EEC), although the first competition law was formally passed in 1963 (see CNC 2012a for further historical references). The process of reform crystallized in a new Competition Law passed in 1989, which relied on two standing administrative bodies: the Service for the Defense of Competition (SDC) and the Court for the Defense of Competition (TDC). The SDC was a Directorate-General within the Ministry of Economy and Finance, initially performing information-gathering functions and later on taking on competition promotion functions. The TDC took on a more judicial nature but equally dependent on the Ministry. The limitations of this institutional arrangement became increasingly evident over time, in the form of lack of synergies, duplication of procedures, and weak transparency.

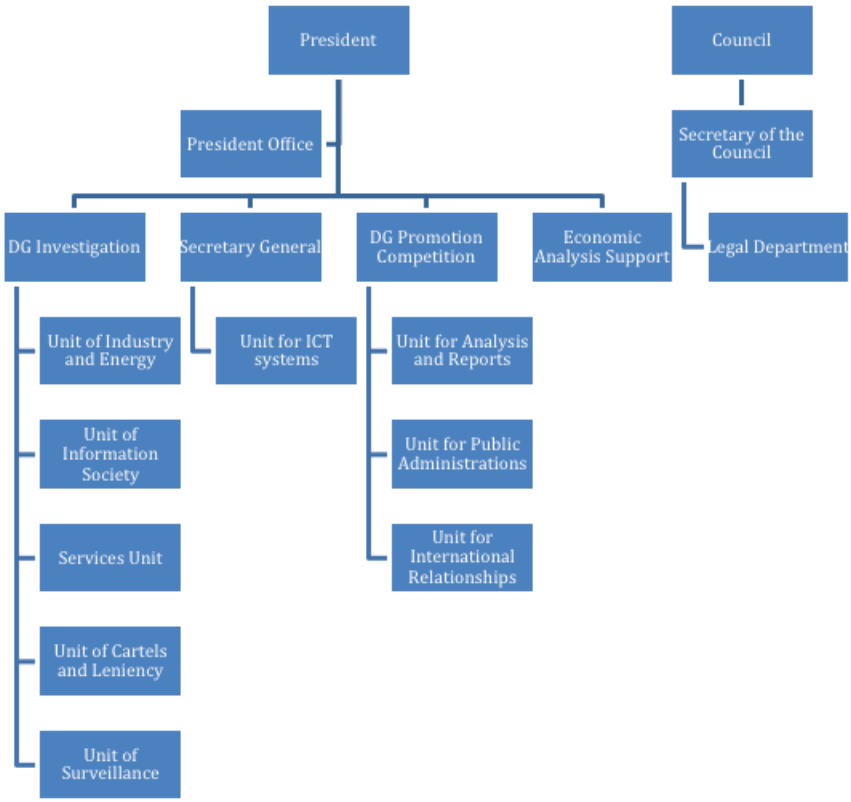
The Spanish Constitutional Court acknowledged that the Spanish regions had legal competition policy competences that were not properly acknowledged in the 1989 Law. This, in parallel to major developments in the EU competition policy arena arising from Regulation 1/2003, paved the way for a substantial reform of the institutional and legal frameworks in Spain.

With regard to legal and institutional reform, an open process of consultation with stakeholders started in 2005. The process integrated inputs from many parties: the incumbent competition institutions, the political parties, the trade unions and the business community as well as academics. The process achieved an important milestone with the preparation of a White Paper on the issue and successfully reached its goal when the Spanish Parliament passed the new Competition Law (Law 15/2007) with close to political unanimity.

The new Law not only upgraded the legal framework but also created a new institution, the National Competition Commission (CNC) which integrated the two previous competition institutions, the TDC and the SDC. A President was

appointed by the Government to coordinate the CNC, assisted by three major operative units: the Directorate-General for Investigation, whose function was mainly information gathering and the preparation of dossiers; the Council, composed by six members, including the President, with the role of decision-making over the dossiers; and the Directorate-General for Promotion, which was commissioned the task of analyzing the competition climate in Spain and preparing reports. The CNC was also supported by a General Secretariat and with an economic advisory section, which after a period of time became a Chief Economist department and later remained as a support unit to the DG of Promotion (see figure 3).

Figure 3. The organization of the CNC in 2013



Source. CNC.

In 2010, the Spanish Parliament passed the Law 2/2011 that introduced the requirement of a hearing in the Spanish Parliament for the president of the CNC, as well as for the presidents of the other regulatory bodies, before confirming their appointment. This law also established that these boards would be made up of seven members, including the president.

In terms of staffing, the CNC reached a maximum of 203 workers in 2009 and was subsequently downsized to 181 employees in 2013. Regarding the composition of the staff, consistently more than 90% of the employees have been civil servants over time. In terms of available resources, the CNC budget corresponding to 2013 was 12.5 million euro. In relative terms to the five larger EU economies, the CNC budget per staff member, roughly 68,500 euros, was the lowest (see table 3). With respect to the budget as a proportion of the GDP, the CNC was placed in the middle-low range with approximately 12,200 euros of budget per billion of GDP, much closer to the minimum corresponding to Germany (9,300) than to the maximum corresponding to the U.K. (54,200 euros).

Table 3. Staff and Budget of the NCA in the five larger EU economies, 2012/13

	Germany	France	U.K.	Italy	Spain
NCA Staff	320	188	657	262	184
NCA Budget (million euro)	25.0	20.4	104.6	53.0	12.6
Country 2012 GDP (billion euro)	2,666.4	2,032.3	1,929.6	1,567.0	1,029.0
NCA budget per billion of GDP, euro	9,375.9	10,037.9	54,209.2	33,822.4	12,244.9
NCA budget per staff member, euro	78,125.0	108,510.6	159,210.0	202,290.1	68,478.3

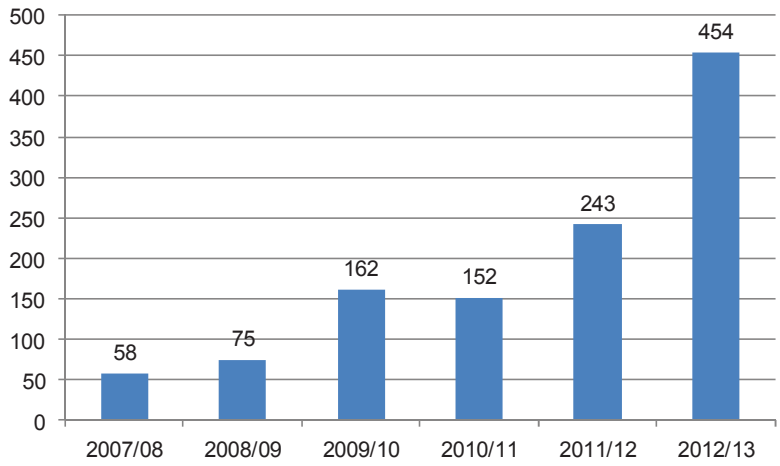
Source. NCA Annual Reports.

Of course, these comparisons should be made with caution. One of the reasons is that while in most countries, the competition authority is unique and centralized, in Spain the legal responsibilities for promoting and investigating competition-related issues do not correspond exclusively to the CNC but also to the regional competition authorities. Indeed, there has been a gradual creation of regional competition authorities. By 2013, there were ten such authorities

corresponding to the regions of Andalusia, Aragon, Basque Country, Castile and León, Catalonia, Extremadura, Galicia, Canary Islands, Murcia, and Valencia. The budget and staff of these regional competition authorities should be combined with that of CNC to have a more complete comparison of the situation in the five larger EU countries. However, the necessary information is not publicly available for all regional authorities. Marcos (2011), Campos and Jiménez (2004 and 2008), Espitia (2006), and Nadal and Roca (2003) analyze this decentralization process. Nadal and Roca (2003) argue that the regional authorities in Spain may reduce by 60% the number of cases addressed at the central level. They also argue that these institutions are more ambitious in scope than their counterparts in the German länder. The available studies largely conclude that the improvement in welfare due to better information must be balanced against the likely increase of capture by local interests (see also Montolio and Trillas, 2013, and Trillas, 2011, and references therein, for the advantages and disadvantages of decentralizing regulation). This is likely the reason why these authorities do not have a substantial role in merger policy.

Concerning enforcement output, the CNC has increased the financial penalties imposed on firms operating in Spain by a factor of 8 during its seven-year period (see figure 4).

Figure 4. Financial penalties imposed by the CNC for improper business behaviour (million euro)



Source. CNC.Report of Activities, 2012/13.

The CNC stood as the main competition policy authority in Spain up to 2013, with an exclusive mandate at the national level on competition issues, including those in the regulated sectors. This has created some conflicts, as the CNC and the sector regulators have occasionally approached competition issues, mainly in energy and telecommunications, with different criteria (see Trillas, 2013 for a more detailed account of these conflicts).

In October 2013, the new National Commission for Markets and Competition (CNMC) replaced the CNC and became fully operative by integrating the CNC functions together with the functions of other regulatory bodies.

3.2 The CNMC Reform

3.2.1 The Process of the Reform

We asserted above that institutional structure changes with technology and demand and with the outcome of political games played by governments, legislatures, and relevant interest groups. In January 2012, the Spanish Government that resulted from a political change in the general election of November 2011 set up a ministerial taskforce with the mission of reforming the institutional framework of competition policy and regulatory architecture in Spain. The initial draft of the reform was controversial because it mirrored the conclusions of a consulting report commissioned by the telecommunications incumbent, Telefónica (see Trillas, 2013). The Government was committed to implementing this reform in the second semester of 2012 as one of the economic policy measures included in the National Reform Program (NRP) submitted to the EC in 2012 (Government of Spain 2012), as part of the program of structural reforms adopted after the financial and euro crisis that began in 2008. This deadline was not met and the Government included the reform commitment once again in the 2013 NRP (Government of Spain 2013).

In contrast to the process that led to the creation of the CNC in 2007, the reform process that started in 2012 was strictly controlled by the central Government ministries with very scarce external input, at least in terms of a formal and

transparent procedure. When a draft law was ready in mid-May 2012, the EC, concerned about the devolution of powers to ministries, released a report arguing that "the current draft Law that creates the CNMC does not guarantee that it will carry out its regulatory activity in an effective and independent way" (European Commission, 2012). The Spanish Government introduced changes in the Law but the final approved version still included legal provisions that devolved regulatory powers to the ministries, as discussed below. The EC was also concerned that the creation of the new merged authority would require appointing new board members, which *de facto* implied reneging on the commitment to respect the terms of the sitting board members of the previous agencies. Regardless of the legal characteristics of the new agency, the institutional change would be an example of limited independence *de facto* because of this action. Future investors might be concerned that the regulatory institutions in Spain are fragile and may not survive political change, making policy prediction difficult and investment returns uncertain.

In 2012, the CNC (the previous competition policy authority) also released an assessment report (National Competition Commission, 2012b) on the draft version of the reform. The report warned against the same limitations mentioned by the EC (particularly the risk of devolution of powers to the ministries) and it also raised fresh concerns about issues that, according to the CNC, were not satisfactorily addressed in the draft law. The main concerns were the risk of losing specialized expertise in regulatory and competition supervision as a result of the institutional reorganization, and the possibility that the financing of the CNMC would not be sufficiently secure and protected from political interference.[4] The regulatory authorities in the energy and telecommunication sectors also released fairly critical assessments of the reform (National Commission of Energy 2012, Telecommunications Markets Commission 2012) along the same lines.

Finally, the Law that created the CNMC (Law 3/2013) was approved by Parliament, with a weaker political majority than the 2007 reform, and entered

[4] In July 2015, when this manuscript was being revised, the Spanish Supreme Court of Justice (TS) raised concerns about the validity of the CNMC model precisely along these lines by addressing an opinion request to the Court of Justice of the European Union (CJEU).

into force on June 4, 2013. The Government had prepared a gradual implementation plan to ease the institutional transition. In August, a Royal Decree (657/2013) approved the statute of the functioning of the CNMC; in September, the ten Council (or Board) members were elected, the CNMC was legally established in October as a full-standing public agency and in November the Director-Generals were appointed. As a separate piece of legislation, but with important regulation implications, the Telecommunication Act was passed in April 2014.

3.2.2 An assessment of the rationale for the reform

According to the Spanish Government (preamble of Law 3/2013), the CNMC reform sought to fulfill three main principles:

- respect for the rule of law and institutional reliability,
- ability to reap the benefits of economies of scale, and
- adaptation of the regulatory bodies to technological change.

Concerning the first principle, the main idea put forward by the Government to justify the organizational change was that the overlap of regulatory bodies with concurrent legal responsibilities about the same economic activity or industry may damage desirable economic policy values like predictability and the fulfilling of the rule of law. To alleviate this problem, the integration would presumably bring coherence and clarity in the enforcement of regulation and competition policy. However, regulatory and competition policy functions are inherently different and therefore it may be desirable to publicly discuss the tension between these two approaches for the sake of greater accountability and ultimately greater consumer welfare in the long run (see Trillas, 2013).

In terms of the economies of scale derived from the integration, the Government estimated that the creation of the CNMC would result in total savings of 28 million euros. However, two-thirds of this amount is not a reduction in current spending but instead imputed as the consequence of not setting up the regulatory bodies whose creation was mandated by law (in gambling, audio-visual industry, and airports). Beyond the potential reduction in administrative

costs, the government's plans are silent about other potential costs and benefits of the reform.

Finally, it is hard to see how the institutional reorganization of the CNMC makes the Spanish regulatory policy more able to cope with technological change (for an analysis of the positive role of institutional diversity in antitrust in the information society, see Gavil and First, 2014, on the Microsoft cases).

3.2.3 The Content of the Reform

3.2.3.1 Institutional dimension

The CNMC was created to perform two main functions:

- defense and promotion of competition in any market,
- regulatory functions in the sectors and activities where antitrust policy is not enough to ensure market efficiency, of which absence of market power is only an aspect.

The first function broadly corresponds with the functions of the former CNC, while the second represents the continuation of the tasks undertaken by the former regulatory agencies.

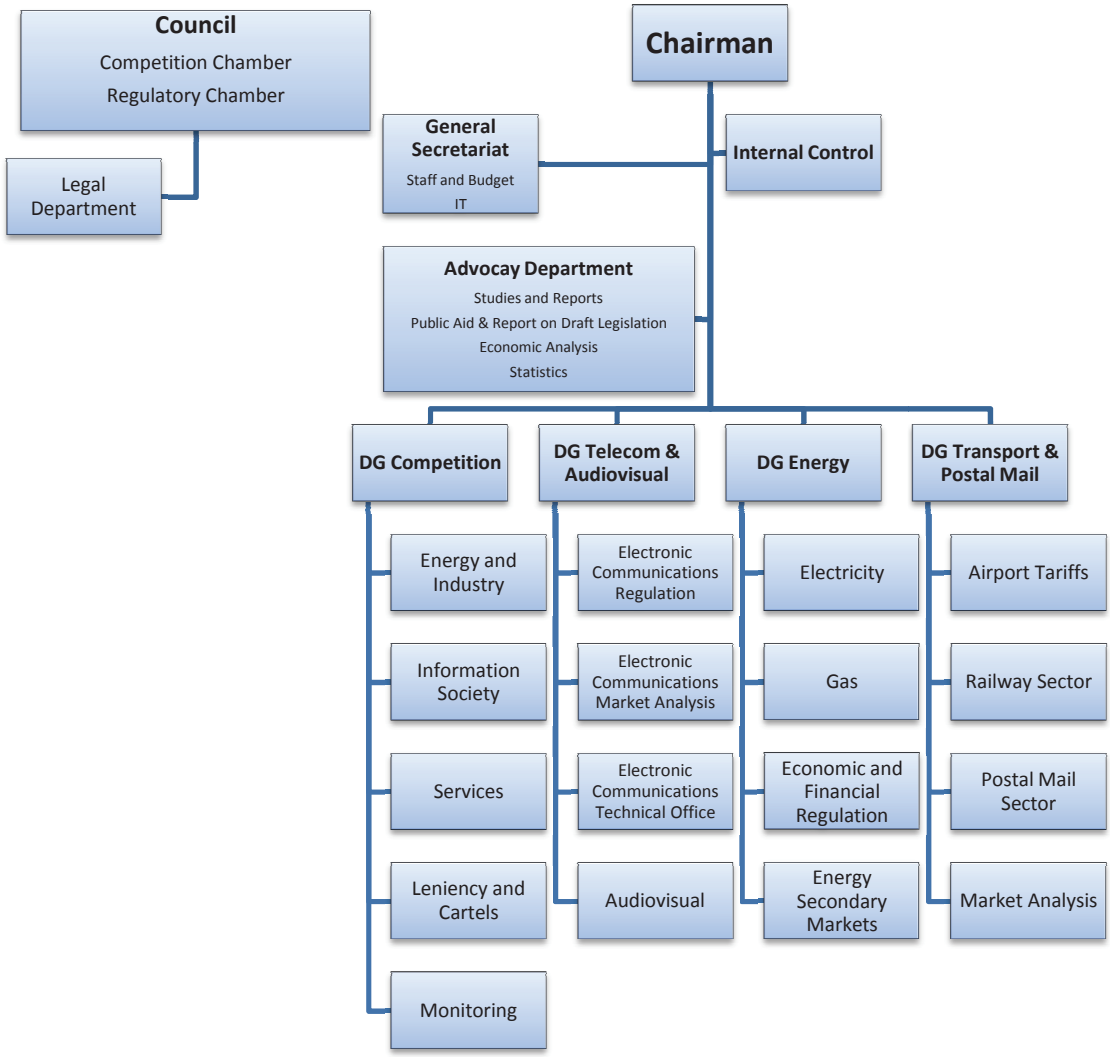
In terms of structure, the CNMC is governed the Council and the President. The Council, or Board, is a collegiate body with executive power and it is made up of ten members, including the President, whose function includes representation and coordination. Council members are appointed by the Government with the Parliament having a veto right. Each member is appointed for a non-renewable term of six years with staggered turnover appointments every two years.

The Council has two levels: it operates as a Plenary, and in two different Sections or Chambers, each of which is in charge of one of the two main functions: regulation and competition. Council agreements are adopted by majority, with the President having an additional tie-breaking vote. Subsequent legislation that determined the functioning of the CNMC (Royal Decree 657/2013) left the organization of those Sections very open, allowing the Plenary full autonomy to determine specifics. The law imposes only mild

restrictions: no Council member can be a permanent member of one Section and the composition of the Council is to be renewed only gradually.

In operative terms, there have been some changes in the structure of the CNMC since its creation. When this paper goes to press, there are four Directorates-General in charge of documenting and preparing the cases that will be submitted to the Council for deliberation and decision-making: Competition; Telecommunications and Media; Energy; and Transports and Postal Mail. Each of those contains Deputy Directorates-General that deal with specialized issues. In addition to these information-gathering DGs, two other directive units provide general services, the General Secretariat General and the Internal Control Department. Another Directorate-General, the Advocacy Department, is responsible for the promotion of competition and it is in charge of producing reports and analysis (see figure 5).

Figure 5. The organization of the CNMC in 2016



Source. CNMC.

The CNMC Plenary Council appoints the Director Generals who, in principle, should be civil servants, making non-civil servants the exception (arts. 25, 26.3 and 31.5 of the Law 3/2013). The appointment will be made according to general Spanish procedures for appointing Director Generals in the public administration.

3.2.3.2 Legal dimension

The Law that creates the CNMC has also devolved administrative and investigation competences to the Spanish Ministry of Industry in two policy areas, the audiovisual and the energy sectors (see Table 4 for the details)

Table 4. Legal competences attributed to the Spanish Ministry of Industry by the Law 3/2013 that creates the CNMC

Audiovisual sector Additional disposition no. 7 in Law 3/2013.	**Energy sector** Additional disposition no. 8 in Law 3/2013.
• To receive the kick-off activity notifications from audiovisual operators • To administer the national operators registry • To decide about any matter related to the audiovisual licenses and permits such as their granting, cancellation, duration, etc. • To verify the law concerning the limitations on the acquisition of shares by operators	*Electricity sector* • To oversee the correct technical well-functioning and economic operation conditions of the electricity production premises • To open investigations for breaching the prescribed technical or economic operation terms • Consumer protection • To make the clearing of the transportation and distribution network costs *Hydrocarbon sector* • To oversee the correct technical well-functioning and economic operation conditions of the electricity production premises • To open investigations for breaching the prescribed technical or economic operation terms • To make the clearing of the transportation and distribution network costs • Consumer protection • To run the system for the certification of biofuels • To oversee the activity of the Office for Switching of Service Providers • The competences on liquid hydrocarbon fuels so far attributed to the CNE

Source. Law 3/2013 on the Creation of the CNMC.

The new Law also allocated to the Ministry of Industry powers on merger control for the energy sector that were previously held by the sector regulator, CNE. The configuration of competition policy in the Spanish energy sector had been a controversial issue in recent times (see Federico and Vives, 2008 for a detailed account and Trillas, 2013, for a more recent comprehensive review of the regulated sectors in Spain). According to Trillas (2013), the independence of Spanish energy regulator in particular had been challenged, in part, as a byproduct of the corporate control battle triggered by the energy liberalization process taking place in Europe since 2000.

All large Spanish energy firms had participated in this takeover wave: either as buyers, targets or both. In this highly-sensitive issue, the Spanish Government retained for itself the last word on merger control for the energy sector until the middle-2000s. However, with the justification of seeking greater independence for merging decisions on the electricity sector, the more substantial powers on merger control were later transferred to the CNE ("Function 14"). The legal change introduced by the CNMC law now devolves the merger-control power to the Spanish Ministry of Industry.

In addition, the Spanish Government passed in April 2014 a new Telecommunication Law (Law 9/2014) that strikes a balance in terms of the regulatory powers allocated to the CNMC and the Government. The starting point, according to the now-replaced telecommunications Spanish regulator (CMT), was that the Spanish regulatory body in telecommunication had the fewest number of competences across the EU (see table 5 for a comparison with the other four largest EU economies).

Table 5. Legal competences of the telecommunications national regulatory bodies (selected countries)

	Germany BNETZA	France ARCEP	UK OFCOM	Italy AGCOM	Spain CMNC
Market regulation	X	X	X	X	X
Network security			X	X	
Spectrum management	X	X	X	X	
Consumer protection	X	X	X	X	
Other (e-commerce,...)	X			X	

Source. National Regulatory Bodies.

The new telecommunications law established that the CNMC would have legal competences in ex-ante regulation, conflict resolution between operators, and the possibility of mandating functional separation as acknowledged both by the EU regulation and the Law 3/2013 itself. Moreover, according to the telecommunication law, all telecommunication-audiovisual legal competences, current and forthcoming, not explicitly assigned to the Spanish ministry, would belong to CNMC.

3.2.4. Overall Assessment

For various reasons, several EU countries (and others as well; see the case of Mexico in Delgado and Mariscal, 2014), have recently reformed their regulatory and/or competition policy institutional frameworks. The debate is open about to what extent these reforms will help these agencies better deal with the pressures of lobbyists and political interests, or whether the reforms themselves are a byproduct of them. This is the case also in Spain. As a general assessment, we consider to what extent absolute integration, the structure of the agency, and the devolution of powers to ministries, may contribute to some concept of general interest (taking the academic literature and international practice as a reference) or are just a product of interest battles that contribute little to social welfare.

The first consideration, from an international comparative perspective, is that this model of 'absolute integration' adopted by the Spanish Government is relatively rare in the EU, with only the Netherlands and Estonia (both smaller countries than Spain) having a comparable integrated setup. Although regulation and competition policy interact in liberalizing industries, the experience of most developed countries suggests that there is still much to be gained in terms of incentives and accountability from keeping different agencies in regulation and competition policy. Savings in administrative costs could be achieved by merging the regulators of converging industries (such as telecommunications and broadcasting) requiring complementary effort inputs

The rationales for integration appear to be different in the cases of Spain and the Netherlands. In Spain, the reform was chiefly justified by the potential to reap benefits of scale economies and bring about stronger “institutional reliability”. Only time will tell whether the CNMC will achieve these desirable goals. In the case of the Dutch Authority for Consumers and Markets, the entire strategic shift gravitated around consumer welfare as a central concern. This is instrumented practically by creating a full-fledged Consumer Department and by setting a web service, the ConsuWije, that advises consumers about their rights. In the same vein, the recent reform of the Competition and Markets Commission in the UK has been tilted explicitly towards greater consumer protection. Economic analysis provides sound reasons to support these consumer-oriented shifts in the remit of the regulators (see Clifton *et al.* 2014).

By contrast, the new Spanish CNMC appears not to be as active in reaching out to consumers and responding to their concerns. To be fair, in Spain the Constitution allocates legal competences for consumer protection to the regional governments. Therefore, any meaningful move in the direction of more effective and direct consumer protection in Spain requires the involvement of the Central Government and the regional governments.

A second consideration, acknowledging *a priori* that it is very hard to establish a superior institutional model, is that reforms can be tested against some internationally accepted practices that are consistent with academic research. To start with, the transatlantic experience of both the US and the EU suggests that well-performing competition authorities feature rigorous economic analysis in a prominent role. Second, the most advanced competition authorities rely on ambitious investigative tools that have “sharp teeth” and that deliver useful information in the information-gathering phase and for the preparation of case documentation. The high weight that civil servants have in the new agency in Spain brings into question its ability to recruit experts that can deliver such standards. Third, there is consensus that the accountability and assessment of the regulatory and competition authorities are necessary to effectively deliver business confidence and build up credibility. In this respect, the CNMC has an Internal Audit Unit that seems more directed to establishing a proper internal management control system (by controlling operations and budget) than to

performing a comprehensive and regular external impact analysis of its activities.

Another issue raised by the CNMC reform is the devolution of legal competences from the regulators (either the individual, sector-specific existing before the reform or the new CNMC itself) to the Ministry, therefore weakening regulator independence. This economic and political operation was conducted in two stages. In the first stage, on occasion of the passing of the Law 3/2013 that created the CNMC, some administrative and control powers were transferred by the Government from the regulators to the Ministry of Industry in the audiovisual and energy sector. In the same Law, the Government recovered control over merger operations in the electricity sector, which has been a very sensitive issue in Spain. In the second stage, by means of new telecommunications law (Law 9/2014) the Government somehow struck a balance between the regulatory powers kept for itself and those granted to the CNMC. Although the Government keeps a great deal of regulatory discretion in the telecommunications and audiovisual sector, the CNMC is granted with all legal competences not explicitly assigned to the Ministry.

Finally, the actual degree of independence and accountability with which the authority works is (as argued above) of great importance, independent of the particular institutional design. In this respect, the Law that creates the CNMC is somehow ambiguous.

The mechanism for renewing the CNMC Council (or Board) members (staggering turnover and non-renewable appointment terms of six years for the ten council members) is sound in that it follows internationally accepted practices and recommendations, and is comparable to those of most competition and regulatory authorities. However, the Government retains the right to appoint the Council members, who in turn have absolute discretion in appointing the Director Generals. In the same spirit, in contrast to internationally accepted practices, the CNMC is not granted a reliable and politically-insulated source of stable funding.

These forms of control by the executive are questionable. In a system that fits better with accepted practice and academic recommendations, regulation

should first, at least for some tasks, receive the input of *de facto* independent agents. Second, the CNMC Council members and Director Generals should be appointed by means of a truly open process, based on merit, and effectively open to the institution's outsiders. Ultimately, the resulting level of regulatory independence is lower than in the previous set-up, and homogeneous for sectors that probably require, as argued above, different optimal levels of institutional independence. Relatedly, by unilaterally changing legislation and taking advantage of the change to remove the regulators appointed by the previous majority, the new government *de facto* reneged on the existing level of independence.

Although the Spanish government justified integration as a central part of the structural reforms that were needed to make the Spanish economy more competitive and productive, there is no evidence of the contribution of merged agencies to productivity or competitiveness. Although these considerations may have been relevant, other motivations for reform may have to do with the role of incumbent firms and interest groups seeking to advance their agendas in industries that generate rents and that have historically been highly politicized.

4. Conclusion

In this paper, we have raised concerns about the step taken by the Spanish government to integrate the competition policy and regulatory agencies into a single authority. Regulatory agencies are influenced in their evolution by the pressures of interest groups and political principals. This has indeed been the case in the Spanish reform.

Consolidation can be justified in industries where there is technological convergence; coordination between regulation and competition policy also makes sense when liberalizing industries. But this does not justify the extreme position of integrating almost all regulation and competition policy in a single agency, especially when the integration is not designed with consumer welfare as the main objective. This extreme position is not justified either by reasons of productivity or competitiveness, as the relationship between the institutions of regulation and competition policy (microeconomic tools) with stabilization or macroeconomic growth objectives is not well established. This does not mean

that efficient network industries and competition are not important in the long run, but there is little reason to believe that the institutional details of policy have macro implications.

In contrast with the model of maximal integration adopted in Spain, the case for a certain degree of institutional diversity appears to be justified because, although some consolidation and coordination may be beneficial, diversity creates the conditions for accountability and sound decisions for consumers in markets that are complex, subject to the pressure of interest groups, and uncertain.

Good board members and officials may over time overcome the institutional deficiencies that we have noted with regard to this reform. But the reform itself reveals interesting issues about the difficulties of regulatory independence in practice. If fairness in the process of reform is as important as the outcome (as argued in the behavioral literature), then the institutions of regulation and competition policy have not become more robust as a result of integration, because these institutions remain vulnerable to the changing opinions of the public, stakeholders, and potential new political majorities, who have not been involved in the reform process.

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