

# Towards a higher degree of independence of competition authorities: Lessons learned from Spain's institutional reform

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<sup>✉</sup> Dismissal; EU law; National competition authorities; Officeholders; Regulatory bodies; Spain; Utilities

## 1. Background: Merger of the Spanish regulatory authorities with the competition authority

Spain's former National Competition Commission (Comisión Nacional de la Competencia or CNC) was one of the most active competition authorities in the world, imposing fines of over €450 million during its last year of functioning (period between 1 September 2012 to 30 September 2013).<sup>1</sup> In October 2013, Spain's competition landscape was significantly transformed when the government's plan to reform the CNC went ahead. The reform consisted in creating a "super-regulator"—known as the National Commission for Markets and Competition (Comisión Nacional de los Mercados y de la Competencia or CNMC)—by combining the CNC with various national regulatory authorities (NRAs) in order to reduce expenses in times of austerity, increase synergies, economies of scale and ensure a consistent approach in the regulation of all network industries for the benefit of consumers.<sup>2</sup> The involved NRAs include the authorities responsible for telecommunications, energy, postal services, audiovisual media, airport services and railways.

The establishment of the CNMC also led to the appointment of new members in the decision-making board which is now divided into two chambers (the Competition Chamber and the Regulatory Chamber) of five members each. Of the five members of the Competition Chamber, only one was previously employed by the CNC. Furthermore, the media heavily criticised the appointment of the new members, as they were allegedly chosen for their political persuasion, rather than for their competition law expertise.

As part of the merger and the appointment of new members in the CNMC's decision-making board, two Royal Decrees were adopted in October 2013 in which the President of the Telecommunications Market Commission (Comisión del Mercado de las Telecomunicaciones or CMT), Mr Bernardo Lorenzo, and a board member of the CMT, Mr Xabier Ormaetxea (appointed to their respective positions on 10 March 2011), were removed from their posts prior to the end of their terms of office, which would normally have been six years.<sup>3</sup> A number of members of the boards of the other NRAs were also dismissed before the end of their terms of office. Notwithstanding this, only the two aforementioned individuals appealed their early dismissal to the national court. Both individuals challenged these Decrees before Spain's Supreme Court, claiming that their dismissal infringed art.3(3a) of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the Framework Directive).<sup>4</sup> This provision sets out that the head of an NRA or members of the board may be dismissed *only* if they no longer fulfil the required conditions that are laid down in advance in national law. Spain's Supreme Court stayed the proceedings and referred a number of questions for a preliminary ruling to the European Court of Justice (ECJ or the Court).

## 2. The reference for a preliminary ruling and the ECJ's judgment

In essence, the Supreme Court asked whether the creation of a multisectoral regulatory body, such as the CNMC, is compatible with the Framework Directive, and if so, whether Mr Lorenzo and Mr Ormaetxea could be removed from their posts prior to the end of their terms of office, without justification.

The Court ruled that in the context of an institutional reform such as the one at issue, a Member State may assign the tasks incumbent on NRAs under the

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<sup>1</sup> CNC's Annual Activity Report (Memoria de Actividades) 2012–2013, p.27, [https://www.ccmc.es/Portals/0/Ficheros/ccmc/normativa/MEMORIA%202012\\_2013.pdf](https://www.ccmc.es/Portals/0/Ficheros/ccmc/normativa/MEMORIA%202012_2013.pdf) [Accessed 5 January 2017].

<sup>2</sup> On 4 June 2013, the Spanish Parliament adopted Law 3/2013 creating the new authority in charge of both competition and regulatory matters. The new CNMC started work on 7 October 2013, four months after the enactment of the Law.

<sup>3</sup> Royal Decree 795/2013 removing Mr Bernardo Lorenzo from his post as President of the Telecommunications Market Commission, BOE No.247 of 15 October 2013, p.83736; Royal Decree 800/2013 removing Mr Xabier Ormaetxea from his post as Member of the Board of the Telecommunications Market Commission, BOE No.247 of 15 October 2013, p.83741.

<sup>4</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37.

Framework Directive to a multisectoral regulatory body, only if that body, in the performance of those tasks, meets the organisational and operational requirements to which those NRAs are subject. Those requirements include competence, independence, impartiality and transparency and that an effective right of appeal is available against its decisions to a body independent of the parties involved.<sup>5</sup>

As to the dismissals of Mr Lorenzo and Mr Ormaetxea, the Court found that these did not satisfy the requirements of art.3(3a) of the Framework Directive, as they came about for a reason other than the fact that the appellants no longer fulfilled the conditions required for the performance of their duties, which are laid down in advance in national law.<sup>6</sup> The dismissals were merely a result of the institutional reform and jeopardised the attainment of the objectives of strengthening the independence and impartiality of the NRAs.<sup>7</sup>

Finally, the Court confirmed the institutional autonomy of the Member States as regards the organisation and the (re-)structuring of their NRAs, as long as the objectives and obligations laid down by the Framework Directive are fully complied with.<sup>8</sup> An institutional reform like the one at stake is precluded by the Framework Directive in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of such members.<sup>9</sup>

Advocate General Bot noted, however, that the outcome might have been different if the Spanish government had implemented transitional arrangements, such as the ones initially envisaged, where the Presidents of the NRAs would have been allowed to sit for their full term and where the board members would have been replaced at the stage when the number of board members whose term was about to expire was below six.<sup>10</sup> This initial solution would, according to Advocate General Bot, have made it possible to comply with the requirement of independence as set out by the Framework Directive.

### 3. The ECN+ initiative: Empowering National Competition Authorities to be more effective enforcers

National Competition Authorities (NCAs) have become a key pillar of EU competition law enforcement.<sup>11</sup> While Regulation 1/2003 gave NCAs the competence to apply the EU competition law rules, it did not tackle the means and instruments by which NCAs apply those rules. In the Commission's Communication on "Ten Years of Antitrust Enforcement under Regulation 1/2003", the Commission identified three areas of action to create a truly common competition enforcement area in the EU, namely:

- further guarantee the independence of NCAs and make sure they have sufficient resources;
- ensure that NCAs have a complete investigative and decision-making toolbox; and
- ensure that NCAs have the power to impose effective fines and that well-designed leniency programmes are in place.<sup>12</sup>

To ensure the effective enforcement of EU competition law, NCAs should be independent when exercising their functions and have adequate resources. The Commission has defined independence as meaning that "the authority's decisions are free from external influence and based on the application and interpretation of the competition rules relying on legal and economic arguments".<sup>13</sup> Challenges in this regard still persist, in particular concerning the autonomy of NCAs vis-à-vis their respective governments and appointments and dismissals of NCA management and decision-makers,<sup>14</sup> as evidenced in the Spanish case. This is contrasted with related policy areas, such as the telecoms, energy and railways sectors, where secondary legislation explicitly provides for a number of requirements regarding independence, impartiality and transparency that are applicable to the competent NRAs. In this sense, EU competition law enforcement is lagging behind. Though most Member States have national laws in place that contain specific safeguards to ensure the independence of NCAs, at this time EU secondary legislation does not provide any explicit requirements to this end. The Commission is of the opinion that minimum

<sup>5</sup> *Ormaetxea Garai and Lorenzo Almendros v Administración del Estado* (C-424/15) EU:C:2016:780 at [36].

<sup>6</sup> *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:780 at [43].

<sup>7</sup> *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:780 at [47].

<sup>8</sup> *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:780 at [49].

<sup>9</sup> *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:780 at [52].

<sup>10</sup> Opinion of Advocate General Bot *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:503 at [52]–[54].

<sup>11</sup> In 2015, nearly eight out of 10 antitrust cases were investigated by NCAs, see <http://ec.europa.eu/competition/ecn/statistics.html> [Accessed 5 January 2017].

<sup>12</sup> Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453 final, 9.7.2014, point 46.

<sup>13</sup> Commission Staff Working Document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, SWD(2014) 231/2, point 12.

<sup>14</sup> See Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453 final, point 27.

guarantees are needed to ensure the independence of NCAs and their management or board members,<sup>15</sup> which is why it intends to propose a directive that covers, inter alia, this matter in 2017.<sup>16</sup>

In order to empower the NCAs to be more effective enforcers, the Commission launched a public consultation<sup>17</sup> inviting citizens and stakeholders to provide feedback on their experience/knowledge of issues that NCAs may face which have an impact on their ability to effectively enforce the EU competition rules and what action, if any, should be taken in this regard. The consultation led to 181 replies from a wide variety of stakeholders. Regarding the independence of NCAs, many respondents considered the following measures to be of most importance:

- guarantees ensuring that NCAs are endowed with adequate and stable human and financial resources;
- guarantees ensuring that NCAs' top management/board or decision-making body are not subject to instructions from any government; and
- guarantees ensuring that dismissals of members of the NCAs' top management/board or decision-making body can only take place on objective grounds.<sup>18</sup>

Most Member States have specific rules in place on the early dismissal of top management or members of the board of their NCA.<sup>19</sup> Common grounds include inability to perform their duties, conflicts of interest, disregarding professional secrecy, disciplinary sanctions, criminal convictions and personal reasons. However, a small minority of Member States do not have any rules on early dismissals, and in some Member States the head of the NCA can be dismissed without limitation.<sup>20</sup>

#### **4. Portfolios of NCAs: Combining competition law enforcement with other functions**

A minority of NCAs in the EU remain exclusively responsible for competition law enforcement. The majority of them have wider portfolios, covering, inter alia, consumer protection, public procurement and the supervision of liberalised sectors, such as energy, post,

telecommunications and railways. Certain NCAs have combined competition law enforcement and regulatory functions for a long time. Other NCAs have combined competition law enforcement and consumer protection into one single authority (e.g. Denmark, Finland, Malta and Ireland). In the UK, the Competition and Markets Authority also combines certain consumer functions with competition powers. In the Netherlands, the energy and transport regulatory functions were already integrated with the competition authority, and were further merged with the consumer authority as well as the regulator in charge of postal services and telecoms. Similar multisectoral regulatory bodies have also been set up in Estonia and more recently, as described above, in Spain.

As confirmed by the Court, the decision to merge NRAs with competition authorities belongs to the institutional autonomy of the Member States. Such decisions are usually motivated by synergies and efficiency gains. Member States retain a wide margin of discretion in this matter, as long as they abide by the requirements established by EU law. However, the Commission has made clear that an "amalgamation of competences should not lead to a weakening of competition enforcement or of the additional competences granted to the NCAs".<sup>21</sup>

The Court has already had the chance to rule on the independence of data protection authorities in *Commission v Hungary* where it noted that, while Member States are free to choose the appropriate institutional model and alter it, this should not affect the guarantee that the head of the authority can serve his or her full term, as the threat of a premature termination could lead the supervisory authority "to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence".<sup>22</sup> Advocate General Bot noted that even though data protection authorities and NRAs have different aims, there is no reason to apply a different solution to regulatory and data protection authorities.<sup>23</sup>

The question arises, however, whether the most stringent independence requirements would apply to the multisectoral regulatory body as a whole, or, whether each division would need to comply with its own set of specific requirements. In the Railway Directive, the EU legislator confirms that the integral authority should

<sup>15</sup> See Commission Staff Working Document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, SWD(2014) 231/2, point 40.

<sup>16</sup> See speeches of Competition Commissioner Margrethe Vestager on 10 October 2016 at the European Parliament, Committee on Economic and Monetary Affairs and on 23 November 2016 at the European Competition Day in Bratislava, [http://www.europarl.europa.eu/news/en/news-room/20161004IPR45279/committee-on-economic-and-monetary-affairs-10102016-\(pm\)](http://www.europarl.europa.eu/news/en/news-room/20161004IPR45279/committee-on-economic-and-monetary-affairs-10102016-(pm)) and [http://ec.europa.eu/commission/2014-2019/vestager/announcements/defending-competition-throughout-eu\\_en](http://ec.europa.eu/commission/2014-2019/vestager/announcements/defending-competition-throughout-eu_en), respectively [Accessed 5 January 2017].

<sup>17</sup> The public consultation took place between 4 November 2015 and 12 February 2016.

<sup>18</sup> Summary report of the replies to the Commission's Public Consultation on Empowering the national competition authorities to be more effective enforcers, p.6, [http://ec.europa.eu/competition/consultations/2015\\_effective\\_enforcers/Summary\\_report\\_of\\_replies.pdf](http://ec.europa.eu/competition/consultations/2015_effective_enforcers/Summary_report_of_replies.pdf) [Accessed 5 January 2017].

<sup>19</sup> See Commission Staff Working Document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, SWD(2014) 231/2, point 20.

<sup>20</sup> In Poland, for instance, the President of the Office of Competition and Consumer Protection can be dismissed by the Prime Minister without limitation, see art.29(4) of the Act of 16 February 2007 on Competition and Consumer Protection, Journal of Laws of 2007, number 50, item 331.

<sup>21</sup> See Commission Staff Working Document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, SWD(2014) 231/2, point 26.

<sup>22</sup> Judgment of 8 April 2014, *European Commission v Hungary* (C-288/12) EU:C:2014:237; [2014] 3 C.M.L.R. 42 at [54].

<sup>23</sup> See Opinion of Advocate General Bot *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:503 at [42].

comply with the sector specific independence requirements, including the division in charge of competition law enforcement.<sup>24</sup>

## 5. Conclusion: Back to a dedicated competition authority

The Court's judgment should not be misinterpreted in the sense that the merger of the NRAs with the NCA or the creation of the CNMC was in breach of EU law. Instead, the Court clarified that EU law precludes the early dismissal of the President and a board member of an NRA (i.e. before the expiry of their terms of office) in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of the authority. However, the judgment does come as a wake-up call to the recently formed government who may enforce it through (yet) another institutional reform of the multisectoral body.

The reform is envisaged in the investiture agreement signed at the end of August between the then acting government (which has now taken office) and one of Spain's leading political parties.<sup>25</sup> The agreement proposes the division of the CNMC into two independent entities:

- the Independent Markets Authority (Autoridad Independiente de los Mercados or AIReM) responsible for regulated sectors; and
- the Independent Authority for the Defence of Competition (Autoridad Independiente de Defensa de la Competencia or AIDeCo) in charge of competition law enforcement.

The Spanish government anticipates that this agreement will be formalised in a bill before the end of the first half of 2017. However, the Spanish Association for the Defence of Competition (Asociación Española para la Defensa de la Competencia or "AEDC") has stressed in a press release of 29 December 2016 that safeguarding the independence is an essential aspect of the reform and proposed to hold a public consultation in order to foster consensus between the Spanish Parliament and civil society.<sup>26</sup>

The mandatory re-appointment of both Mr Lorenzo and Mr Ormaetxea to the AIReM could be the Spanish Supreme Court's solution to the early dismissals. Alternatively, economic compensation for the individuals could be another possibility, although this would not remedy the breach of the independence requirement. Furthermore, a proposal to create an independent committee that would be able to evaluate and, if necessary, oppose the appointments of the Presidents of the country's regulators and competition authority, will soon be discussed at the Spanish Parliament. This committee would avoid politicising these institutions and guarantee their independence.

With the upcoming Directive and Spain's political will to reverse the merger, it seems that the CNMC will go down as a failed experiment in national competition law enforcement. This is further reinforced by the fact that, in September 2016, the Commission formally requested Spain to ensure the correct implementation and application of the Electricity Directive<sup>27</sup> and the Gas Directive<sup>28</sup> which include rules on strengthening the independence and the powers of NRAs.<sup>29</sup> With the creation of the CNMC, Spain reserved the power to set the electricity transmission and distribution tariffs to the government—a competence previously held by the National Energy Commission (Comisión Nacional de Energía or CNE). The Commission now requires that Spain transfers these competences back to the CNMC.

The ECJ's judgment thus comes at a crucial time, as it shows that in certain Member States concrete issues still persist in competition law enforcement and need to be tackled head on. The judgment puts a stronger focus on the Commission's intention to propose a Directive in 2017 empowering NCAs to be more effective enforcers. The Directive should harmonise the legislative landscape across the EU as to what minimum rules Member States should have in place concerning the guarantees of independence of NCAs, including rules concerning the dismissal of their senior management. Finally, the Directive would leave a sufficient degree of flexibility to reflect the institutional autonomy of Member States, confirming the Court's views, as well as encourage innovation between the different enforcement systems that currently exist in the EU.

<sup>24</sup> Article 55(2) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area [2012] OJ L343/32.

<sup>25</sup> Partido Popular and Ciudadanos, respectively.

<sup>26</sup> See <http://www.aedc.es/wp-content/uploads/2016/12/COMUNICADO-DE-PRENSA-AEDC-29122016-VF.pdf> [Accessed 17 January 2017].

<sup>27</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2011] OJ L211/55.

<sup>28</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94.

<sup>29</sup> See <http://ec.europa.eu/energy/en/internal-energy-market-commission-urges-spain-fully-comply-third-energy-package> [Accessed 5 January 2017].