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## **Global Forum on Competition**

### **INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES**

#### **Contribution from Spain**

-- Session III --

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*This contribution is submitted by Spain under Session III of the Global Forum on Competition to be held on 1-2 December 2016.*

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## INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

### -- Spain --

1. There has been some controversy about the CNMC's institutional design. Most relevant papers were written from a legal perspective and came from competition practitioners and academics. In general, these studies use cumulative heterogeneous criteria without a theoretical framework. Besides, these criteria were applied at the same time to the legal institutional design and to the implementation of the institution. It is not easy to produce a balanced global assessment.

2. Independence is always one of the fundamental criteria used in these assessment of the institutional design of competition and regulatory authorities, either standing alone or in the context of reaching a balance with accountability.

3. As is well known, accountability and independence are two sides of the same coin, and full independence should not be aspired to for legitimacy reasons. Thus it would always be preferable to present things in a way that does not relegate accountability to appear as a mere aspect of independence, to be considered at the end of the analysis. The key point is that independent authorities should be accountable to the parliament and courts and not –in a binding way– to the government.

4. According to the criterion of independence, the quality of the institutional design of the CNMC as reflected in the legislation (de jure independence) is basically sound. Broadly speaking, the new model of the Authority ensures in principle greater independence and greater accountability to the Parliament and to society:

- The CNMC is a legally independent and structurally separate regulatory body from the ministries. This should be a good design to prevent political capture.
- The board is a collegial body and the plurality of members should help resist capture and pressures.
- The President and the members of the board are proposed by the Minister of Economy and vetted by a parliamentary committee to ensure their independence and ability. Any candidates that are considered unfit can be vetoed by an absolute majority vote of the committee. This is the first instance in Spain of this kind of parliamentary control over governmental appointments.
- The top management of the institution is appointed by the board independently of the government.
- The President and the members of the board are appointed for fixed staggered non-renewable terms of six years. The terms of the appointments are longer than the term of the government.
- There are clearly defined grounds for the early dismissal of the President or the members of the board, such as disciplinary sanctions, infringement of confidentiality issues or conflicts of interest.

- The board formulates long and short-term strategic plans according to their independent priority-setting without any reference to the government. Strategic steering can only come –and in the broadest sense– from hearings before parliamentary committees.
  - The board’s decisions can only be overturned by the courts.
  - There is no governmental supervision, neither can the government issue directives or even make non-binding recommendations to the board. Asking for or receiving instructions from the government is strictly forbidden.
  - There is a significant increase in transparency in the CNMC vis-à-vis the preceding authorities, which is an important mechanism to ensure accountability and at the same time makes it more difficult for the authority to be captured. The CNMC is obliged by law to publish all its decisions as well as all information relevant to its activities.
5. De facto independence of a competition authority:
- Although long-standing authorities usually have more de facto independence, it is also possible to derive some degree of independence from its own track record. The CNMC’s successful enforcement record has enhanced its reputation and strengthened its de facto independence. But it is also true that the CNMC has often had to establish its credibility in opposition to big interest groups and to the government.
  - Some of the staff problems have been alleviated through non-monetary incentives that help compensate for the remuneration gap with the private sector and other problems. In our case, these incentives include a special awareness of performing a public service and a better work-life balance.
  - De facto independence is probably increased for the tasks of regulatory supervision that the CNMC also has (energy, telecommunications, transport, post) when they are incorporated into the same authority that is in charge of competition enforcement. The reason is that competition policy is not related to a particular ministry, but regulatory authorities usually are more related to the relevant ministries and might be more readily susceptible to formal or informal steering. Being part of a bigger institution would be as helpful for the independence of the regulatory side of the CNMC’s mandate as it is for the resistance to capture by regulated industries.