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**Session II - Electricity Markets in Latin America: Regional Integration
and Competition Issues**

-- Contribution from Spain --

16-17 September 2014, Montevideo, Uruguay

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Session II - Electricity Markets in Latin America: Regional Integration and Competition Issues

THE CNMC: A MODEL FOR INTEGRATION BETWEEN THE COMPETITION AUTHORITY AND THE REGULATORY AUTHORITY FOR THE ENERGY SECTOR IN SPAIN

-- CONTRIBUTION FROM SPAIN --

1. Background

1. The Hydrocarbons Sector Law 34/1998 (*Ley del Sector de Hidrocarburos – LSH*) created the now defunct **National Energy Commission** (*Comisión Nacional de la Energía – CNE*) as the regulatory body responsible for overseeing the correct operation of the energy, electricity, natural gas, liquid fuels and bottled LPG sectors, including effective competition within them, for the benefit of the consumer.

2. Meanwhile, Article 12 of the Competition Protection Law 15/2007 (*Ley de defensa de la competencia – LDC*) established the also defunct **National Competition Commission** (*Comisión Nacional de Competencia – CNC*) as the body responsible for protecting guaranteeing and promoting effective competition in domestic markets.

3. Both bodies, the CNE and the CNC, have played a fundamental role in the liberalization of the gas and electricity markets and, in particular, in overseeing compliance with competition in the wholesale and retail markets in these sectors, each exercising the powers legally endowed to it: the CNE as technical regulatory body for the regulated energy sectors, like the electricity sector, and the CNC as the body responsible for antitrust controls in the wider economy, including the electricity sector.

4. Both the LSH and the LDC established coordination mechanisms as part of efforts to supervise the market and to monitor economic concentrations in the energy sector.

5. With regard to the energy sector, the former CNE was empowered to make regulatory proposals aimed at promoting competition in regulated sectors. Likewise, it could initiate or direct disciplinary procedures for breaches of industry regulations in the wholesale and retail electricity, although it was not empowered to sanction these breaches itself. Moreover, if as a result of monitoring the wholesale or retail

electricity market, the CNE identified behaviors that suggested failure to comply with the LDC, this report had to be handed to the CNC, in accordance with power 12 of the LSH and article 17.2. a) of the LDC regarding the obligation to inform the CNC of evidence of anticompetitive practices.

6. In addition, the CNE was the authority responsible for resolving conflicts both regarding access to the transport network and concerning economic and technical negotiation.

7. With regard to concentrations in the energy sector and in particular in the electricity sector, the CNE, as the specialized technical body with the best access to information about the market in question, delivered a statutory report to the former CNC as provided for in the Law on Sustainable Economy 2/2011. This was a mandatory report, the content of which was determinant though not binding. This Law also established that the CNE must refer to the competition authority any regulatory proposals that might affect competition, for consideration by the latter.

8. The promulgation of **Law 3/2013** in Spain has created a single body, the **National Commission for Markets and Competition** (*Comisión Nacional de los Mercados y la Competencia – CNMC*), a result of the merger of the supervisory bodies for the regulated sectors (National Energy Commission, National Telecommunications Commission, Railroad Regulation Committee and National Postal Commission), together with the competition authority, the former National Competition Commission (CNC). In setting out the motivation for this Law, the following reasons for the merger are adduced:

1. Taking advantage of economies of scale resulting from the similar supervisory roles, and the sharing of knowledge and experience.
2. The advantage of carrying out a comprehensive supervision of regulated sectors with networked industries and natural monopoly characteristics in at least part of the sector's activity.

9. To this should be added the fact that certain conducts are liable to be analyzed both from a competition perspective (Articles 1, 2 and 3 of the LDC) and from a sectoral perspective, and as such, the preliminary proceedings taken by both authorities could pose some a risk of overlapping, and of contradictory conclusions.

10. In this sense it is worth highlighting, for example, that the new regulation on the abuse of wholesale electricity and gas markets in Europe (Regulation 1127/2011 REMIT) typifies as abuse of market both the use of privileged information and price manipulation in these markets (conducts for which it is not necessary to establish a dominant position) and notes that the supervisory authority is ACER, in collaboration with national energy regulators, which are also the authorities that may punish non-compliance.

11. Another example is found in the retail market, in behaviors that reflect non-compliance with the rules allowing customers to change supplier, which either infringes Article 3 of the LDC if this leads to market distortion that affects the public interest, or represents simple sector infringement of lack of explicit consent or lack of compliance with availability of the documentation required by applicable energy regulations.

12. There is, as a result, a set of conducts whose analysis, given the characteristics of these sectors, requires, as well as the technical knowledge of each market, a joint analysis to enable identification both of the most appropriate legal basis and of the know-how required to analyze each conduct in the most efficient manner possible.

13. The creation of a single body, in principle, should make it possible to identify cases of anti-competitive behavior more easily, due to non-compliance with sector or competition law, thereby avoiding redundant or duplicate actions, and directing all relevant efforts to the effective elimination of this type of behavior in markets.

14. Below are described the developments in energy and competition resulting from the creation of the CNMC, the criteria for regulated and non-regulated cooperation are described, and a number of brief conclusions are drawn.

2. Energy and Competition in the CNMC

15. With the creation of the CNMC, a **Competition Department** was formed and endowed with all the investigatory powers set out in the LDC, as described in Article 5 of Law 3/2013, and which will continue to be exercised, maintaining the uniqueness, coherence and horizontal character of the competition protection regulations. An **Energy Department** was also formed, responsible for investigating cases relating to the supervision and control of the electricity and gas sectors, as provided for in Articles 7 and 12.1b) of Law 3/2013, and all those added in Ley 24/2013 relating to the electricity sector (previously the responsibility of the former OCSUM [Office for Supplier Change] relating to supervision of changes of supplier, sanctions applicable by the CNMC, monitoring for consumer protection and proposing measures on the basis of binding legal decisions).

16. With the new Law 3/2013, the Competition Department retains all the powers ascribed to it by the previous Law (the LDC), essentially referring to the investigation of punitive proceedings in relation to prohibited conducts and monitoring of economic concentrations.

17. Meanwhile, the functions of the Energy Department include supervising the separation of activities, and in particular separation between the operation and accounting of the regulated activities, in order to avoid crossed subsidization between these activities and those subject to the free market. It is also in charge of overseeing compliance with the regulations and procedures for switching suppliers, monitoring the suitability of prices and conditions of supply for end customers; guaranteeing transparency and competition in the electricity and natural gas sectors, including the wholesale price level; and ensuring gas and electricity companies meet their transparency obligations. Also in relation to these sectors, it is responsible for supervising the degree and effectiveness of market openness and competition in both the wholesale and retail markets, including complaints raised by electricity and natural gas consumers. Finally, the Department is in charge of the regulated auctions of forward contracts for electricity, determining the dominant and principal operators in the market each year, and all other functions relating to these operators in accordance with the provisions of RD-L 6/2000, dated June 23, concerning urgent measures for increasing competition in markets of goods and services.

18. Finally, the new Law (Article 21.2) creates two courts as part of the CNMC Board, as the settlement body: the **Competition Court** and the **Regulatory Supervision Court**. The courts hear those cases that are not expressly assigned to the plenary of the Board. The regulations set out those cases in which, in accordance with a case being heard in one of the courts, the other must be informed, by issuing a so-called **crossed report**.

3. Regulated Cooperation

19. As indicated, Law 3/2013 provides for coordination mechanisms between Courts in order to ensure coherence in the application of sector and competition regulations and to foster synergies in procedures that may affect both. To this end, Article 21 of Law 3/2013 defines a mechanism of “crossed” reports that each court must issue to the other in specific cases.

20. Specifically, it establishes that such reports must be issued in the following cases:

- By the Competition Court, for cases that affect the degree of openness, transparency, correct operation, or existence of effective competition in markets;
- By the Regulatory Supervision Court, for cases of competition protection relation to the regulated sectors.

Table 1. Crossed reports from the Energy Department

	Procedures investigated by the Competition Department
Regulatory Supervision Court Report	• Application of Law 15/2007 in relation to conducts that lead to hindrance, restriction or distortion of competition, together with Articles 101 and 102 TFUE in regulated sectors. • Cases of monitoring of market concentration in regulated sectors. • Studies and reports of competition promotion in regulated sectors.

Table 2. Crossed reports from the Competition Department in relation to energy

	Procedures investigated by the Energy Department
Competition Court Report	• Punitive proceedings • Transparency and competition in the electricity and natural gas sectors • Degree and effectiveness of market openness • Exclusion of discriminatory conducts • Principal and dominant operators • Certification of separation of activities • Third-party access to distribution and transport networks

21. Meanwhile, the organic statute of the CNMC (RD 657/2013, dated August 30, approving the organic statute of the CNMC) stipulates in Article 14.2 the specific cases in which a report must be requested, and in Article 12.2 those cases that will automatically be heard by the plenary formed by both courts, explicitly including those that “those in which a difference in opinion between the Competition Court and Regulatory Supervision Court arises” and “cases that given their impact on the competitive operation of the markets or supervised activities, are taken up by the Plenary by a majority of six votes and at the proposal of the President or three members of the Board.

22. However, neither the Law nor the statute describe how the report is requested or how it is prepared and processed, making it necessary to resort to informal mechanisms of cooperation between the Departments that ensure the internal functioning of the Commission, minimizing times and procedures. In this regard, it is worth noting that in comparison to the earlier mandatory reports that were sent between

regulatory and competition bodies, the crossed reports obviously do not suspend the maximum period for resolution of cases, to the benefit of the party in question.

4. Unregulated Cooperation

23. The demand for a comprehensive approach to regulation and competition in the procedures dealt with by the CNMC in regulated sectors cannot undermine the speed of these procedure and the necessary legal certainty of the agents involved. For this reason, as well as the cooperation set out in the regulations, intensive coordination is necessary within the new Commission that is necessarily based on informal cooperation between Departments and Sub-Departments.

24. In the year since the new Commission was created, there have been many occasions on which the need for such unregulated cooperation has made itself obvious, in order to maximize the synergies of the new body and minimize the time and number of internal procedures required to achieve it.

25. A clear example is found in the investigation of the market concentration case C-550/14 REPSOL/PETROCAT, which culminated in REPSOL taking over exclusive control of PETROCAT, subject to a series of commitments made by both parties. Although jurisdiction in investigating the case fell, according to the LDC, to the Competition Department, as did its resolution, in accordance with Law 3/2013, the impact on the operation of the liquid hydrocarbon sector made the contribution of the Energy Department to the analysis of the effects of the operation not only necessary but particularly beneficial, specifically with regard to the prices in the competitive environment where overlaps occurred between the services stations operated by the parties.

26. Similarly, in the electricity sector, attention may be drawn to the recent ruling by the CNMC's Competition Court of July 10, 2014, imposing a fine of 1.18 million euros on Endesa for abuse of its dominant position in the market of electrical installations reserved for distributors. In the course of this punitive process, which was dealt with by the Competition Department, it requested a substantial amount of information from the Energy Department relating to market quotas for electricity distribution, documents explaining the methodology used for calculating the remuneration for the investments made by electricity distributors, and annual reports on the calculation of the remuneration for the activity of electricity distributors, among others. Similarly, the Regulatory Supervision Court of the CNMC Board analyzed the proposed ruling put forward by the Competition Department and issued a favorable crossed report, in application of the abovementioned Article 21 of Law 3/2013.

27. To these may be added the numerous regulatory projects sent by the Energy Department to the Regulatory Supervision Court for approval that were previously analyzed by the Competition Department and subject to a crossed report by the Competition Department.

28. It is worth emphasizing that the crossed report, far from making categorical pronouncements on issues relating to the legal basis for the case, which it is the responsibility of the other Court to analyze and rule on, seeks to contribute information that can improve the analysis and rationale for the ruling issued, without prejudice to the exclusive jurisdictions of each Court and Department.

5. Conclusions

29. Almost a year after the creation of the CNMC, the new Commission has dealt with numerous procedures that simultaneously affect the sectoral and competition regulations, not only in the field of energy but also in those of telecommunications, the postal sector, railroads, airports and broadcasting. In this first year the implementation of the regulation cooperation has been reflected in numerous crossed reports between one court and the other, allowing rulings and resolutions concerning these regulated sectors to be strengthened.

30. The comprehensive approach sought by the reform has required thorough reflection on the procedures and processes—sometimes highly disparate—followed by the forerunner bodies to the CNMC, in order to bring the new procedures into line in terms of manner and time taken (in particular, the issuing of crossed reports or turning issues over to the Plenary of the Board).

31. To this must be added the increasing level of unregulated cooperation, which while it implies a major challenge to an institution with a staff of over 500 with very different backgrounds, is entirely necessary to achieve the aims set out in the reform of the institutional model: to contribute to the efficient operation of the markets, guaranteeing legal certainty and institutional trust among operators, and consumer protection.