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**Working Party No. 2 on Competition and Regulation**

**Competition Enforcement and Regulatory Alternatives – Note by Spain**

7 June 2021

This document reproduces a written contribution from Spain submitted for Item 1 of the 71<sup>st</sup> OECD Working Party 2 meeting on 7 June 2021.

More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm>

Please contact Ms Federica MAIORANO if you have any questions about this document  
[Email: [Federica.MAIORANO@oecd.org](mailto:Federica.MAIORANO@oecd.org)].

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## *Spain*

1. This contribution by the Spain's National Commission for Markets and Competition<sup>1</sup> (CNMC) addresses the subject of the roundtable on the "Competition Enforcement and Regulatory Alternatives", to be held in the June 2021 meeting of the Working Party No.2 on Competition and Regulation (WP2).

2. It is structured as follows. The first section addresses the institutional design of the CNMC addresses the interaction between competition and regulation. The second section deals with competition enforcement in regulated sectors. The third section analyses the interplay between competition advocacy and regulation. The fourth section describes new issues and debates that have arisen due to developments in digital markets. The fifth and last section concludes with the main takeaways.

### 1. Institutional design of the CNMC

3. The CNMC combines sectoral regulation and supervision (of telecommunications and media, energy, transport and postal services) with the horizontal application of competition policy (both advocacy and enforcement). This model may exhibit several advantages.

- The synergies between regulation and competition can be better exploited<sup>2</sup>. Some authors say that these synergies come at the expense of losing specialization but that is a matter of model design. The CNMC tries to address this issue in two ways<sup>3</sup>:
  - Sectoral regulators and competition advocacy and enforcement remain different divisions to preserve the staff's specialization. But, at the same time, the internal coordination allows mutual learning. Sectoral divisions incorporate competition assessment and culture to appropriately design regulations. While competition departments learn to better analyse efficiencies in these sectors.
  - The Board of CNMC is also composed of two different Chambers for competition and regulation, to preserve Board Members' specialization. At the same time, each Chamber must submit a report to the other Chamber when dealing with a subject that can have relevance in both areas (cross reports). And the Board meets in Plenary sessions to discuss significant issues (from the point

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<sup>1</sup> This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents. Part of the knowledge used to prepare this submission relies on the analysis carried out in the [CNMC's market study on online advertising](#) which had not yet been approved when preparing this contribution (although it was planned to be published shortly and therefore it could have been released at the date of publication of this contribution). Therefore, views expressed in this contribution related to digital issues are preliminary and do not necessarily reflect CNMC's official views.

<sup>2</sup> CNMC (2019), Contribution to the OECD Roundtable on Independent sector regulators and competition. (p. 5-6)

[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)30/en/pdf)

<sup>3</sup> CNMC (2014), Contribution to the OECD Roundtable on Changes in Institutional Design of Competition Authorities. (p. 5-6)

[http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD\(2014\)103&docLanguage=en](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD(2014)103&docLanguage=en)

of view of both competition and regulation). These safeguards are relevant regarding not only synergies but also consistency (as we shall see below).

- The consistency of some decisions is enhanced<sup>4</sup>. Some authors say that an integrated institution faces conflicting objectives but this would rather be an advantage. When separated, Competition Agencies and Sectoral Regulators can reach different conclusions, leading not only to a legitimacy clash (both types of institutions are independent and technically prepared to carry out a valid assessment of an economic issue) but also to legal uncertainties. Meanwhile, reaching a single decision (integrating regulatory and competition concerns) gives market operators some certainty in a sector where investment and innovation need clear and predictable signals. In this regard, the reduction of regulatory bodies can increase the coherence of policy decisions (apart from other tangential issues such as operational savings).
- The ability to respond to current challenges is strengthened<sup>5</sup>. More than two decades after the start of the liberalization, regulated activities are featured by more competition after years of market entry. Therefore, competition issues (analysis of conducts, mergers...) gain relevance in these sectors.
- Regulatory capture can be reduced even further<sup>6</sup>. Even if sector regulators are politically independent they remain vulnerable to private lobbies. Horizontal institutions minimize that risk of alignment with specific sectoral interests.

4. The experience of these last years has shown that synergies are indeed possible and we have benefited from the advantages of a single agency. It is feasible to find common concerns and points of view in all regulated markets, even if the sectors are totally different. Third-party access to essential facilities, for example, may be one of the keys for the liberalization process in network sectors, and the passenger railway transport (currently in liberalization) can benefit from the experience of the energy or telecom sector. This is the reason why several working groups focusing on the digital economy, sustainability, railway and energy and innovation have been recently set up within the CNMC.

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<sup>4</sup> CNMC (2019), Contribution to the OECD Roundtable on Independent sector regulators and competition. (p. 6)

[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)30/en/pdf)

CNMC (2014), Contribution to the OECD Roundtable on Changes in Institutional Design of Competition Authorities. (p. 4)

[http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD\(2014\)103&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD(2014)103&doclanguage=en)

<sup>5</sup> CNMC (2014), Contribution to the OECD Roundtable on Changes in Institutional Design of Competition Authorities. (p. 4)

[http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD\(2014\)103&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD(2014)103&doclanguage=en)

<sup>6</sup> CNMC (2019), Contribution to the OECD Roundtable on Independent sector regulators and competition. (p. 6)

[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)30/en/pdf)

CNMC (2014), Contribution to the OECD Roundtable on Changes in Institutional Design of Competition Authorities. (p. 4)

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## 2. Competition enforcement in regulated sectors

5. The institutional design of the CNMC, as a unique organism, greatly facilitates the competition enforcement in regulated sectors. Before the creation of the CNMC, the legislation foresaw mandatory meetings and reports between the regulators and the competition authority. However, if existing synergies are successfully achieved, the integrated model can be more effective than simple coordination between regulators.

6. In addition to consistency of decisions, the integrated model can bring synergies for competition enforcement in the form of improved access to information, better regulation and enhanced ex officio detection of anticompetitive behaviors in regulated sectors.

7. Some recent and illustrative examples about the advantages of the integrated model will be described below for each of the sectors regulated by the CNMC. The coordination among the Competition Directorate and the rest of the sectoral Directorates is currently intense and fruitful and all of us take advantage from the experience and knowledge of the other areas.

8. On one hand, the Competition Directorate and the Telecom&Audiovisual Directorate are working together to align their respective test methodologies in the telecommunication sector. On the other hand, infringement cases carried out against the state-owned postal company -Correos- by both the Competition Directorate and the Transport & Postal Directorate are being carefully coordinated to ensure consistency. Moreover, some complaints received by the Energy Directorate have allowed the Competition Directorate to open formal investigations.

### 2.1. Telecommunications and media

9. Telefónica is an ex-incumbent operator subject to ex-ante regulation on the electronic communications sector. The CNMC, in its role as National Regulatory Agency imposed on Telefónica a number of remedies on the wholesale broadband markets at a fixed location, given its significant market power in those cases where competition law remedies are not sufficient to address the problem to date. Although no cost orientation was imposed on prices for regulated wholesale fixed broadband (FBB) services, they are subject to an *ex-ante* economic replicability test (ERT) for FBB flagship products and bundles (on the basis of the Commission Recommendation 2013/466/EU).

10. On the other hand, as a result of the 100% control by Telefónica in 2015 of DTS<sup>7</sup> (an operator offering pay-TV services on its satellite platform DTH), the CNMC (in its role as NCA) cleared the merger based on commitments offered by Telefónica (for five years, extended three more years) given Telefónica's strengthened position in the pay-TV and audiovisual content acquisition markets and the potential leverage onto fixed and mobile communications markets. Telefónica's commitments included the publication of a wholesale offer with premium channels, whose wholesale prices must allow replicability of Telefónica's retail offers (most important retail offers with premium pay-TV channels are bundled with electronic communications services and FBB). The verification of this commitment relays basically on an ex post replicability test which must be based on European Commission and NCAs precedents on margin squeeze analysis.

11. Although the replicability methodology under the commitments is based on similar principles to those of the ex ante ERT, in some aspects both differ (e.g., test for each individual product in the commitments versus test for flagship aggregated products at ERT;

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<sup>7</sup> Distribuidora de Televisión Digital S.A. (DTS).

client average customer life; treatment of commercial promotions; or application of downstream costs with common costs). In this context, retail product bundles including pay-TV premium channels, FBB and other communications services, need to pass first the ex ante ERT, while the commitments' replicability test is necessarily ex post. Therefore, passing the ERT does not ensure passing the ex post test under the commitments.

12. Given that the CNMC embraces under its umbrella both the National Regulatory Authority and the National Competition Authority, the CNMC created a specific working group with the objective of aligning in the best way possible both test methodologies in order to ensure consistency and legal certainty.

## 2.2. Transport

13. The railway sector provides another good example of the benefits of integrating regulatory supervision and competition policy under the same public authority. As it is well known, domestic passenger rail transport is being liberalized across the EU. In this regard, the close cooperation between the regulatory and competition arms of the CNMC has allowed a complementary approach to address the challenges brought by this liberalization process in Spain (for instance, as regards [\*the system planned by the Spanish railway network manager, ADIF, for operators in order to bid for capacity in a long-term basis\*](#)).

14. In addition, once the market is liberalized, both regulation and competition policy will work together in order to provide adequate answers to the market problems that will no doubt arise and this joint work will be mutually enriched with the experience and knowledge of each other, as it has happened in the past with the liberalization of freight railway transport (for instance, in competition case [\*S/DC/0511/14 RENFE OPERADORA\*](#)).

## 2.3. Postal services

15. The Spanish postal sector has been under intense scrutiny since its gradual liberalization starting in 1998. Specifically, the CNMC has dealt with several price-based abuse cases in the postal sector for the bulk mail segment since 2005, related to the prices in the retail market, as well as the wholesale access to the postal network managed by the Spanish incumbent operator (Correos), which is the state-owned company in charge of providing the Universal Service Obligation (USO) for the next 15 years (until 2025) in Spain.

16. The first of those cases dates from 2005 and finished with a commitments decision (the so called conventional termination agreement) between Correos and the former Spanish Competition Authority (CNC)<sup>8</sup>. It was deemed that Correos was applying excessive discounts that led to prices below costs and, at the same time, these losses were cross-subsidised by using the USO Fund. Nevertheless, the CNC ended reversed this conventional termination agreement in 2012 (Case VATC 2458/03 ASEMPRE/CORREOS<sup>9</sup>) with effects from 2010 because competition conditions had changed significantly since its adoption in 2005.

17. This case did have an influence on the regulation of the postal sector, and the CNMC is following this lead when reviewing prices set by Correos, seeking to mitigate any harm on competition in the liberalized postal segment.

18. Moreover, on 22 April 2013, the CNC Council adopted a decision finding that Correos abused its dominant position in the wholesale market for access services to the

<sup>8</sup> Case 2458 SOCIEDAD ANONIMA ESTATAL CORREOS Y TELEGRAFOS (CORREOS)

<sup>9</sup> <https://www.cnmc.es/expedientes/vatc245803>

public postal network and in the retail services market for administrative notifications<sup>10</sup>. In particular, the CNC Council deemed unjustified Correos' refusal to continue to provide wholesale access services to the public postal network for administrative notifications on the conditions laid down by Article 59.2 of Act 30/1992 (Regulations on Public Administrations and Common Administrative Procedure). The CNC Council found that Correos had thereby infringed Article 2 of the Spanish Competition Act 15/2007 of 3 July 2007 and Article 102 TFEU. This case was confirmed by the Spanish Supreme Court by its judgement of 24th April 2018, where the Supreme Court stated that Correos, as a provider of the universal postal service, must admit the possibility of other operators accessing the notification service.

19. Later, on 21 January 2014, the CNMC found that Correos had abused of its dominant position on the wholesale market for postal services (access to the public postal network managed by Correos) by offering to its big clients (large senders) significantly higher discounts than those offered to alternative operators who use the USO for equivalent services (Case S/0373/11). Yet, this decision was revoked on 1 July 2015 by the judgement of the Spanish National Court (and after confirmed by the Spanish Supreme Court on 5 February 2018).

20. In these two cases, the Spanish Competition Authority found several problems related to the access of third parties to the wholesale postal network, whose entry must be ensured under conditions of fair competition. And these enforcement cases have had an impact on the regulatory analysis carried out later on when assessing the wholesale postal network access and approving the access contract to Correos postal network, or when assessing access conflicts raised by other postal operators.

21. Finally, regulatory supervision of postal prices has shed light on a recent and ongoing enforcement case against Correos (S/0041/19) which started at the end of 2019. Allegedly, Correos has granted excessive discounts to large senders and this has had an exclusionary effect on competitors in the bulk mail retail market.

## 2.4. Energy

22. In 2020, the CNMC opened a sanctioning proceeding against Enel Green Power, for an alleged breach of the Competition Law, involving abuses of its dominant position in the market to get access to the electricity grid at certain nodes, with effects on the related electricity generation market. The Competition Directorate opened such an investigation after having analysed several disputes concerning the access to the electricity grid which were carried out by the Energy Directorate. In this specific case, besides the regulatory decision regarding the dispute on the access to the grid, the ongoing investigation from the competition angle in looking into whether Enel has taken advantage of its role as the single handler of the requests to have access to the grid on behalf of the grid manager, to benefit some companies from its same business group.

23. Moreover, the CNMC has recently opened sanctioning proceedings against Audax Renovables, an energy supplier, for an alleged breach of the Spanish Competition Law on unfair practices. The Energy Directorate received several complaints against the company from consumers who had been switched to this supplier without their explicit consent, as required by the sectoral regulation. Thanks to all the information provided by the Energy Directorate, the Competition Directorate launched a probe against Audax for unfair and confusing commercial practices in these markets since 2018 to date, distorting the free competition in the gas and electricity retail market.

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<sup>10</sup> Case S/0341/11: CORREOS : <https://www.cnmc.es/node/343799>

## 2.5. Monitoring

24. The collaboration among Directorates is essential not only during the investigations, but also in order to ensure an accurate monitoring of compliance with the competition decisions, both in merger control and in antitrust procedures.

25. In 2013, the merger consisting in the creation of a joint venture by the oil companies Disa and Shell, for the supply of aviation fuel in the Canary Islands, was cleared subject to remedies<sup>11</sup>. These remedies were aimed at guaranteeing the third-party access to the fuel maritime transport among islands, since it was not foreseen in the sectoral regulation. In 2016, the remedies were extended<sup>12</sup> since the competition in the market had not changed. In order to monitor the evolution of the market and the compliance with the remedies, the Energy Directorate delivered quarterly reports to the Competition Directorate. In March 2021, a formal investigation against Disa has been opened for a potential breach of the commitments related with transparency (on one side, the publication of tariffs and the investment plans in the website and, on the other, the report to the CNMC of the requests and refusals of access)<sup>13</sup>.

26. In the same vein, during the monitoring phase of the antitrust decision sanctioning the vertical agreements among three fuel companies Repsol, CEPSA and BP, the information submitted from the Energy Directorate to the Competition Directorate about the current oil prices in the market has been decisive to determinate the degree of persistence of the practice and to identify some errors in the information transmitted by the fuel stations to the energy Ministry about the contractual relationship between wholesale fuel distributors and retailers. Hence, sharing information within the different units of the CNMC allows for effective enforcement and monitoring of our decisions.

## 3. Competition advocacy and regulation

### 3.1. General framework

27. Competition is usually, in the absence of market failures, the best mechanism to ensure maximum efficiency and consumer/general welfare<sup>14</sup>. At the same time, regulation can also pursue legitimate goals, such as the correction of the abovementioned market failures or other reasons of general interest. However, regulation can be subject to two types of flaws<sup>15</sup>:

- Regulatory failure: well intentioned laws may have unintended consequences because of mistakes in ex ante analysis or in design and implementation. The source of this issue might be imperfect/asymmetric information. The authority passing the regulation may lack sufficient knowledge/expertise for an optimal analysis/design/implementation.

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<sup>11</sup> Case C/0468/12: DISA/SHELL/SAE/JV : <https://www.cnmc.es/expedientes/c046812>

<sup>12</sup> <https://www.cnmc.es/expedientes/vc046812>

<sup>13</sup> <https://www.cnmc.es/prensa/expediente-sancionador-disa-corporacion-petrolifera-cnmc-20210302>

<sup>14</sup> CNMC (2021), *Los beneficios de la competencia para los consumidores* (p. 8-19) <https://www.cnmc.es/guia-competencia-para-consumidores>

<sup>15</sup> CMA (2020), *Regulation and Competition A Review of the Evidence* (¶ 3.6-3.13) <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>

- Regulatory capture: the regulation is not motivated by general welfare considerations but by private interests, such as the political cycle or the influence of lobbies.

28. Under this setting, the interaction between policy-makers and independent bodies in charge of evaluation is especially important<sup>16</sup>, hence the rationale for advocacy by Competition Agencies. Policy interventions must respect the principles of “better regulation”, notably necessity (justified by market failures or other reasons of general interest), proportionality (not generating more harm than the one to be addressed) and minimum distortion (ensuring that the least distortive measure is chosen among all possibilities leading to the same outcome). Other best practices<sup>17</sup> to preserve “good regulation” include ensuring that it is “clear, comprehensible and accessible”, since not only the quantity of regulations but also their complexity (e.g. in terms of ambiguity or degree of interconnections with other laws<sup>18</sup>) can affect the outcome.

29. In order to evaluate those principles (especially proportionality and minimum distortion), Competition Agencies can use the OECD Competition Assessment Toolkit<sup>19</sup> in their advocacy role to assess whether a measure limits:

- The number or range of suppliers.
- The ability of suppliers to compete.
- The incentive of suppliers to compete.
- The choices and information available to customers.

30. In their regulatory reports assessing specific measures, Competition Agencies tend to be reactive, i.e. they appraise laws in the pipeline or that have just been passed. Therefore, their realistic role is to minimize distortions in regulations that face trade-offs between competition and other goals.

31. However, advocacy must remain ambitious and proactive. Competition Agencies can try to increase the procompetitive role of new legislation, i.e. by giving priority to those areas where competition and regulation are complementary and where there are not trade-offs but synergies (*win-win policies*). In some areas, the successful pursuit of goals other than competition can actually be achieved by regulatory reforms that foster competition in different ways:

- By increasing the number or range of suppliers. The entry and expansion of new firms and business models is a fundamental driver of competition and innovation. And it can help to achieve other relevant policy goals. For instance, by removing unnecessary or disproportionate barriers to entry, new business models with a higher degree of economic and energy efficiency can flourish, improving environmental sustainability<sup>20</sup>. Another example can be found regarding health

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<sup>16</sup> CMA (2020), *Regulation and Competition A Review of the Evidence* (¶ 1.14-1.15) <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>

<sup>17</sup> OECD (2005), *The OECD Reference Checklist for Regulatory Decision-Making*. <https://www.oecd.org/gov/regulatory-policy/35220214.pdf>

<sup>18</sup> de Lucio & Mora-Sanguinetti (2021): *New dimensions of regulatory complexity and their economic cost. An analysis using text mining*. Bank of Spain Working Paper 2107 <https://ideas.repec.org/p/bde/wpaper/2107.html>

<sup>19</sup> OECD (2019), *Competition Assessment Toolkit: Volume 1, Principles*. [www.oecd.org/competition/toolkit](http://www.oecd.org/competition/toolkit)

<sup>20</sup> CNMC (2021), *Los beneficios de la competencia para los consumidores* (p. 8-19) <https://www.cnmc.es/guia-competencia-para-consumidores>

objectives, where simplifying administrative procedures affecting critical medical equipment is a procompetitive way of attaining a more efficient and agile delivery of these products<sup>21</sup> (especially relevant in emergency situations such as a pandemic). Barriers to entry and expansion are relevant in data-intensive digital services, such as Fintech activities<sup>22</sup> and online advertising<sup>23</sup>, so interoperability and portability regulation can sometimes be procompetitive too.

- By increasing the ability and incentives of suppliers to compete. Again, environmental goals are a good example where competition is part of the solution. Introducing market-based regulation (such as a *Coasian* cap and trade of emission rights or a *Pigouvian* tax) leaves agents room to comply with the regulation according to their relative comparative advantage, laying the groundwork for innovation, differentiation and competition in business strategies, generating both static and dynamic efficiency. That is why market-based incentives tend to be preferable to Command-And-Control (CAC) regulations which impose choices on firms<sup>24</sup>.
- By increasing the choices and information available to customers. In some markets, agents are affected by imperfect/asymmetric information, leading them to suboptimal decisions that may not reward most efficient firms. Therefore, empowering customers with more information can improve their protection and also foster competition on the merits and allocative and dynamic efficiency<sup>25</sup> (since agents would tend to take more-informed decisions). For instance, information asymmetry is very relevant in many areas of financial markets. That is why part of the rationale for open banking policies is to empower consumers with more information on their financial situation, so that they can switch more easily to alternative providers<sup>26</sup>. Another sector where consumers also face information asymmetry is higher education: making more and better information available to students could lead them to take better decisions, generating also appropriate

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<sup>21</sup> OECD (2020), *Removing administrative barriers, improving regulatory delivery*. [www.oecd.org/coronavirus/policy-responses/removing-administrative-barriers-improving-regulatory-delivery-6704c8a1/](http://www.oecd.org/coronavirus/policy-responses/removing-administrative-barriers-improving-regulatory-delivery-6704c8a1/)

<sup>22</sup> CNMC (2018), *Market Study on the impact on competition of technological innovation in the financial sector (FINTECH)* E/CNMC/001/18 (p. 49-51) <https://www.cnmc.es/expedientes/ecnmc00118>

<sup>23</sup> CNMC (2020), Contribution to the OECD Roundtable on Competition in digital advertising markets. (p. 9) [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)6/en/pdf)

<sup>24</sup> CNMC (2020), Contribution to the European Commission consultation on competition policy supporting the green deal (p. 9) <https://www.cnmc.es/en/node/385533>

Santos *et al* (2010), *Part I: Externalities and economic policies in road transport*. Research in Transportation Economics, 28 (1), 2-45 (p. 39) <https://www.sciencedirect.com/science/article/abs/pii/S0739885909000584>

<sup>25</sup> Some authors obtain that, when the initial level of regulation is low and economic uncertainty is high, regulation can have a better impact. A potential explanation of this is the role of regulation to reduce legal uncertainty in the cases (by addressing these information issues).

Ash *et al* (2021), *More Laws, More Growth? Evidence from U.S. States*. CEPR Discussion Paper 15629 (p.4) [https://cepr.org/active/publications/discussion\\_papers/dp.php?dpno=15629](https://cepr.org/active/publications/discussion_papers/dp.php?dpno=15629)

<sup>26</sup> CNMC (2018), *Market Study on the impact on competition of technological innovation in the financial sector (FINTECH)* E/CNMC/001/18 (p. 44) <https://www.cnmc.es/expedientes/ecnmc00118>

incentives for universities<sup>27</sup>. And one area where more transparency is also being explored is digital advertising<sup>28</sup>, e.g. by providing advertisers and publishers more information (about their online campaigns and inventory) in order for them to take optimal decisions (in terms of bids, selection of intermediaries...).

32. In order to be proactive (and ensure that governments and regulators introduce the competition assessment when considering or drafting new legislation), Competition Agencies must deploy their toolkit ambitiously. Apart from traditional tools (such as regulatory reports or market studies), targeted actions for specific groups are needed. For instance, guides and training<sup>29</sup> can be useful for the public sector in the area of good regulation<sup>30</sup> and also in the area of public procurement<sup>31</sup>. And the ambitious and innovative use of communication tools is also important.

33. So far, we have just covered the general framework of the interplay between general regulation and competition. We are going to check whether these ideas remain valid in activities monitored by independent sector regulators.

### 3.2. Competition advocacy and independent sector regulators

34. The creation of independent authorities for specific sectors (such as telecommunications, energy, transport and postal services) aims at addressing the two above-mentioned flaws of regulation:

- A dedicated entity can learn and specialize on the sector, reducing information asymmetries and the risk of regulatory failure.
- An independent entity is not motivated by private interests or political considerations, reducing the risk of regulatory capture.

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<sup>27</sup> CNMC (2019), Contribution to the OECD Roundtable on Publicly funded education markets. (p. 2, 5-6)

[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)7/en/pdf)

OFT (2015), An effective regulatory framework for higher education: A policy paper (p.5, 37-40)  
[https://assets.publishing.service.gov.uk/media/550bf3c740f0b61404000001/Policy\\_paper\\_on\\_higher\\_education.pdf](https://assets.publishing.service.gov.uk/media/550bf3c740f0b61404000001/Policy_paper_on_higher_education.pdf)

<sup>28</sup> CNMC (2020), Contribution to the OECD Roundtable on Competition in digital advertising markets. (p. 10-11).

[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)6/en/pdf)

See also the European Commission's Proposal on a Digital Markets Act (Articles 5.g and 6.g)

<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN>

<sup>29</sup> Training can be done in open or in specific actions for certain stakeholders. For instance, the CNMC has a programme of training of public employees involved in public procurement.

See CNMC (2020). Memoria de actividades 2019 (p. 70)

<https://www.cnmc.es/file/190805/download>

<sup>30</sup> CNC (2008), Recommendations to public authorities for more efficient and pro-competitive market regulation

<https://www.cnmc.es/expedientes/g-2008-01>

CNC (2009), Guide for the elaboration of competition reports

<https://www.cnmc.es/expedientes/g-2008-02>

<sup>31</sup> CNC (2020), Guide to public procurement and competition. Phase I. Planning

<https://www.cnmc.es/expedientes/g-2019-02>

CNC (2011), Guide on public procurement and competition

<https://www.cnmc.es/expedientes/g-2009-02>

35. Nonetheless, competition advocacy is still much needed in regulated activities, since regulators can have multiple goals (ensuring optimal investment, protecting consumers...) other than competition. Some of these sectors are affected by endogenous or technological barriers to entry (such as scale, scope, learning and network economies) and switching costs. Regulation can also distort competition due to price regulation (minimum prices are introduced to remunerate investment and maximum prices are used to protect consumers in a context of monopoly/oligopoly) or due to access regulation.

36. Actually, a competition assessment of regulation is especially important in complex or changing markets<sup>32</sup> and activities under the scope of sectoral regulators (telecommunications, energy, transport and postal services) fit into this description. And the idea of a closer interplay between regulators and bodies in charge of regulatory impact assessment, such as Competition Agencies with an advocacy role, gains relevance<sup>33</sup>. A formal mechanism of coordination (e.g. a memorandum of understanding) between independent sector regulators and Competition Agencies could be established for that purpose.

37. A step forward could be an integrated model such as the one of the Spanish CNMC. The advantages and potential of combining competition and regulation under a single institution have been described above (in section 2), applying both to competition enforcement and advocacy.

38. To sum up, competition advocacy is of utmost importance in regulated sectors. That is why an integrated approach to competition and regulation gains merits. But the institutional design is not decisive. A culture of competition and good regulation across regulators is much more relevant.

39. The interplay between competition and regulation is becoming more relevant following the advent of digitization, as we analyse below.

#### 4. New challenges arisen due to digital markets

40. As we have said above, the interaction between competition and regulation is especially important in complex or changing markets<sup>34</sup> and digital markets are a paradigmatic example of these trends. New issues are arising regarding both horizontal regulation (e.g. consumer privacy and data protection) and the forthcoming specific regulation of digital markets.

##### 4.1. Horizontal regulation affecting competition in digital markets

41. Some forms of horizontal legislation can impact competition in digital markets. Chief among them is the regulation of privacy and data protection, which affects all economic activities but digital markets more especially.

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<sup>32</sup> CMA (2020), *Regulation and Competition A Review of the Evidence* (¶ 1.7)

<https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>

<sup>33</sup> CMA (2020), *Regulation and Competition A Review of the Evidence* (¶ 1.14-1.15)

<https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>

<sup>34</sup> CMA (2020), *Regulation and Competition A Review of the Evidence* (¶ 1.7, 1.14-1.15)

<https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>

42. Data are a variable of competitive advantage in digital services, since they are key to personalize content or advertising. Scale, scope, learning and network economies in digital business models imply that data can become a barrier to entry<sup>35</sup>.

43. Hence, successful digital business models are very intensive in data accumulation, so data are also a variable of competition. Firms can compete offering varying amounts of data collection (privacy) and consumer welfare will be affected by how much data is collected (or by how much privacy/attention is required).

44. Privacy is a legitimate policy goal whose regulation and protection should be attained as efficiently as possible and at the minimum harm to competition. In this regard, it is important to recall that regulations can have unintended effects on competition, also in this area of privacy and data protection<sup>36</sup>. Apart from the fact (common to many regulations) that compliance costs tend to be larger for smaller firms and new entrants, the specific regulation of consumer consent in data collection may be favoring big digital platforms<sup>37</sup>, which get that consent more straightforwardly. This buttresses their competitive advantage in accumulating 1<sup>st</sup> party data.

45. That is why competition is so important in digital markets. Digital markets exhibit barriers to entry (scale, scope, learning and network economies) and switching costs. Therefore, the dynamic and fast-moving nature of these activities means that markets can tip towards very few players if regulation is not appropriate and competition is insufficient.

46. Therefore, the advocacy role of competition authorities is crucial in this regard. In some cases, there will be trade-offs and competition agencies will have to ensure that the legislation is consistent with principles of necessity, proportionality and minimum distortion for a given objective of privacy (as a legitimate goal). But competition agencies are not in the position to assess which level of privacy is optimal.

47. But in other cases there will be *win-win* situations. For instance, an adequate level of competition can ensure that consumers have actually wider choice. This can allow

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<sup>35</sup> CNMC (2020), Contribution to the OECD Roundtable on Competition in digital advertising markets. (p. 7-9)

[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)6/en/pdf)

<sup>36</sup> CNMC (2020), Contribution to the OECD Roundtable on Competition in digital advertising markets. (p. 13-14)

[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)6/en/pdf)

CNMC (2020), Contribution to the OECD Roundtable on Consumer data rights and competition. (p. 11)

[https://one.oecd.org/document/DAF/COMP/WD\(2020\)38/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)38/en/pdf)

<sup>37</sup> Data protection regulation can affect competition through other ways. It is increasing concentration in data markets and undermining efficiency and innovation by restricting integration of independent databases which may lead small agents to take advantage of synergies and scope economies to challenge the position of dominant players. It may also lead to data-driven mergers since databases within the same firm can be combined without restrictions.

Gal, M.S., & Aviv, O. (2020): “The Competitive Effects of the GDPR” *Journal of Competition Law & Economics*, Volume 16, Issue 3, September 2020, Pages 349–391, <https://doi.org/10.1093/joclec/nhaa012>

Geradin et al (2020). “GDPR Myopia: How a Well-Intended Regulation ended up Favoring Google in Ad Tech” TILEC Discussion Paper No. 2020-012

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3598130](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598130)

Batikas, M, S Bechtold, T Kretschmer and C Peukert (2020), "European privacy law and global markets far data", CEPR Discussion Paper DP14475

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3560282](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3560282)

Johnson et al (2020): “Privacy & Market Concentration: Intended & Unintended Consequences of the GDPR” Available at SSRN: <https://ssrn.com/abstract=3477686>

alternative business models to flourish. Instead of a *take-it-or-leave-it* solution (where consumers have no option but to allow exhaustive data collection if they want to enjoy some digital services), a menu of alternatives (regarding price, privacy, attention...) could be available through different providers. In this case, more competition can mean more privacy.

48. And, actually, other way of avoiding the problems of horizontal regulation (such as the fact that a *one-size-fits-all* approach takes a bigger toll on small players) is the modulation of obligations in order to affect firms with a higher degree of market power through forms of sectoral regulation. We are going to see how this approach is likely to develop in digital markets.

## 4.2. Specific regulation of digital markets

49. The issue of market power in digital services is leading many jurisdictions to consider specific regulation<sup>38</sup>. The CNMC has contributed to the debate in the last months<sup>39</sup>, stating the relevance of the interplay between competition and regulation in dynamic and fast-changing markets, like the digital ones. Specifically, some issues must be stressed:

- The consistency between competition and regulation is of utmost importance. Therefore, the main aim should be to minimize the risk of overlaps to reduce uncertainty. Clarity in the drafting of the regulation must be safeguarded although at the same time some flexibility is needed to ensure that the framework is future-proof (capable of responding to current challenges while also adapting to possible future challenges)
- The regime must tackle specific gaps of the current system, where competition policy is perhaps not suitable. Consequently, it has to target preponderant players with significant market power. Although a case by case analysis is still warranted. Remedies, if needed, have to be proportionate to each market situation, considering also efficiencies.
- Competition policy will remain relevant in digital markets. New regulatory schemes will not deal with all players/conducts/contexts/concerns. Therefore, competition policy, with its ability to balance competitive harms and efficiencies and its flexible and ambitious toolkit, will continue being a valid instrument.

50. To sum up, competition policy and a prospective sectoral regulation will coexist in digital markets. Their synergies and complementarities must be exploited to ensure an optimal outcome.

## 5. Conclusions

51. The interaction of competition policy (both enforcement and advocacy) with horizontal and sectoral regulation is of utmost relevance. An integrated institutional model

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<sup>38</sup> See, in the case of the European Union, the European Commission's Proposal on a Digital Markets Act

<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN>

<sup>39</sup> CNMC (2020), Position paper for the public consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT)

<https://www.cnmc.es/en/node/385524>

such as the one of the CNMC in Spain (combining competition policy with competences in sectoral regulation and supervision) can be optimal to exploit synergies and ensure the consistency of policy responses.

52. Digitization has posed new challenges, both from the perspective of horizontal regulation (such as consumer and data protection issues) and sectoral regulation (with some initiatives around the globe considering the need for specific regulation for digital markets). These challenges are multi-faceted, so an integrated institution like the CNMC (combining competition advocacy and enforcement with regulation in connected sectors such as telecommunications and media) is well-equipped to cope with the complexity and dynamism of digital markets.