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Working Party No. 2 on Competition and Regulation

Competition and Regulation in Professional Services – Note by Spain

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This document reproduces a written contribution from Spain submitted for Item 8 of the 77th meeting of Working Party 2 on 10 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/competition-and-regulation-in-professional-services.htm

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1. Introduction

1. The Working Party No. 2 on Competition and Regulation (WP2) has agreed to hold a roundtable on Competition and Regulation in Professional Services in June 2024. Three main topics would be under discussion: a) main policy developments and challenges; b) impact of regulation and c) competition advocacy.
2. Because of its belonging to the European Union, Spain transposed into national law the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. Even though it was a significant achievement, there is room for improvement, at least in national terms. Despite some general regulations passed on market unity or the proportionality test, there is still a lack of a general law on professional services.
3. While enforcement tools are essential for direct intervention, advocacy plays a subtler yet strategic role in shaping the regulatory environment. This aspect of competition policy, focusing on advising and guiding policymakers, is essential for Spanish competition authority as it plays a crucial role in setting a competitive market environment.
4. Since its creation in 2013, and even before its predecessor, the CNMC has considered professional services one of the key elements of its advocacy activity. This contribution collects some of the main considerations included in CNMC's advocacy actions in the last 10 years.
5. Following the structure proposed by the OECD's working document, a wide range of questions included in its Annex have been selected to be answered. In doing so, we have taken advantage of the relevant experience of the Spanish competition authority on this issue.

2. Policy developments and challenges

Please describe any changes in the regulation of professional services in your jurisdiction in the last 10 years. If there was a debate in response to proposed changes, what were the arguments and what was the outcome?

6. In the last ten years, both horizontal and sectoral regulations related to professional services have been adopted in Spain.
7. With regard to **horizontal regulations**, it is worth to mention: a) Law 20/2013 of 9 December 2013 on Market Unity Guarantee, which seeks to report and eliminate obstacles and public barriers to market unity across regions applying better regulation principles; b) Royal Decree 472/2021 of 29 June, transposing into Spanish law Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on the proportionality test before adopting new regulations on professions, which set the obligation to carry out a proportionality test before adopting any new regulation on regulated professions.
8. And very recently, a Royal Decree 435/2024 of 30 April amending Royal Decree 472/2021 of 29 June transposing into Spanish law Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on the proportionality test before adopting

new regulations on professions, establishes that professional associations should self-assess their proposals for codes of ethics and that, subsequently, the CNMC will report on the proposals (the report will be mandatory but non-binding).

9. Additionally, there was an attempt to pass a new law on professional services (Draft bill on professional services and professional associations, proposed in 2013 but never passed). The draft legislation included different relevant measures; in particular, what professions should be subject to compulsory membership in an Association.

10. On the other hand, **specific regulations** have been modified as well in recent years. Here are a few examples, without being exhaustive.

11. In the area of Legal or Economic professions, the following reforms should be highlighted: a) Law 15/2021 setting amendments to the Law 34/2006 of 30 October 2006 on access to the professions of lawyer and solicitor. The reform confirms the unique access to both professions but not permitting a simultaneous exercise¹. B) Preliminary Draft Law regulating the framework for corporate reporting on environmental, social and governance issues (2024). It will transpose Directive (EU) 2022/2464 of the European Parliament and of the Council as regards corporate sustainability reporting. It regulates the role of the independent verifier of information on sustainability, as a different profession to that of the auditor, although it establishes a similar access regulation.

12. In the area of Technical professions, some examples would be: a) Royal Decree 264/2021 of 13 April, approving the technical safety standards for dams and their reservoirs. It attributes a professional reserve in favour of civil engineers; b) Royal Decree 390/2021, of 1 June, approving the basic procedure for the certification of the energy performance of buildings. Until the approval of this regulation, only architects or engineers could issue energy certificates. However, the regulation eliminates this exclusivity in certain cases, but maintains it in others; c) Royal Decree 1010/2023 on modifications to the Royal Decree 1295/2003, of 17 October, approving the regulations governing private driving schools. The regulation sets out the conditions for access to the professions of driving school instructor and driving school director.

In your jurisdiction is there a requirement to review and assess all existing regulations concerning professional services under a competition perspective, e.g. to lower barriers to entry? What was the impact of this requirement and how could it be enhanced?

13. According to the Law 39/2015 on Common Administrative Procedure for Public Administrations, any restriction on economic activity must be justified by an overriding reason of general interest and there is a general obligation that public authorities are subject to the principles of smart regulation, including necessity and proportionality. To enforce this rule, the national legislator has given different functions to public agencies, in special to the national competition authority.

14. According to the Law 3/2013, of 4 June, on the creation of the National Commission for Markets and Competition, the Commission plays a consultative role in all new regulation that may have restrictive effects on competition. Even though it is not a mandatory provision, the CNMC does his best to convince public administrations to make use of this option. Besides, also has the power to challenge before courts any regulation with a lower rank than law that entail a restriction on competition.

¹ It is worth mentioning as well the Royal decree 64/2023 of 8th February, developing some aspects coming from the law 34/2006.

15. Additionally, according to the Law 20/2013 on the Guarantee of Market Unity, the CNMC can have an important role as well, reporting on complaints denounced by operators, normally affecting to economic barriers.

16. Focussing on professional services regulation, according to the national (Royal Decree 472/2021 on proportionality test) and EU provisions, there is an obligation to assess new professional regulations, which are to be adopted (proportionality test).

17. Generally speaking, bigger efforts from public administrations have been appreciated in order to justify the introduction of restrictions concerning professional services. However, in other cases, draft regulations simply mention the proportionality test but there is no real analysis or justification.

Please describe any new regulatory barriers introduced in your jurisdiction. If there was a public consultation or debate in response to these changes, what were the arguments to justify the new restrictions? Were public interest considerations invoked? Were professionals themselves involved in these consultations or debates?

18. These are some of the barriers to competition we have identified:

19. First, as yet there is no global regulation deciding what professions are subject to a mandatory membership in a professional association in order to exercise an economic activity, and having in mind that, meanwhile, there is a suspensive clause that refers to *in-force* regulation on that issue, an incentive has been created for professional associations to make a restrictive approach on that matter, setting mandatory membership under not very sound reasons².

20. Secondly, in some cases, when regulation provides that only certain professionals can do certain activities, some mistakes in the definition of these activities have been detected in terms of excessive aggregation. Unbundling some of them in separate tasks would let other operators with technical capacitation to provide these services in the market³.

21. Thirdly, in some sectorial regulations, as for account auditors, a very high number of legal requirements have been set when, apparently, it could be enough keeping only some of them. For example, despite there is a final test to evaluate the capacity of the candidate, an ex-ante theoretical and practical training period is required⁴.

22. In other cases, as for the activity of energy performance of buildings, some progresses are in course to eliminate restrictions while others remain in place. The draft Royal decree of 2022 amending Royal decree 390/2021, of 1 June, approving the basic procedure for the energy performance of buildings foresees to eliminate the reservation of activity for energy performance of buildings of completed works. However, it maintains a reserve in favour of a reduced number of professions (architects, technical architects,

² For instance, the CNMC considered that it was not appropriate to impose compulsory membership in several reports. See for example the Report on the General Statutes of the Associations of Technical Mining Engineers (IPN/CNMC/025/21)

³ IPN/CNMC/017/23 Royal Decree 264/2021 of 13 April, approving the technical safety standards for dams and their reservoirs.

⁴ IPN/CNMC/007/19 Draft Royal Decree approving regulations for the development of the Law 22/2015 on Auditing of accounts.

engineers and technical engineers) in the case of energy performance of buildings for projects works⁵.

23. Finally, according to the Law 2/1974 of 13th February on professional associations, a relevant role to defend and represent the members of the association is recognized to these entities. Without underestimating the relevance of these functions and its connection with a public reason of general interest (protection of consumers as final beneficiaries of the services), in some cases, a risk of extra limitation has been identified when adopting specific regulatory instruments (for example, through statutory provisions)⁶.

3. Impact of regulation

If there were regulatory reforms in any profession in your jurisdiction, what was their effect on competition? Have there been any ex-post evaluation studies? Please refer to either quantitative or qualitative evidence.

24. In 2022, two external consultants (KPMG and VVA) conducted a study on the degree to which CNMCs' recommendations were followed by public authorities and the impact that these recommendations could have on the economy ([Impact of Competition Advocacy and Market Unity Reforms in Spain](#))⁷.

25. The study found that public administrations followed more than 60% of the CNMC's recommendations during the period from 2013 (creation of the CNMC) to 2019. As a result, efficient economic regulation generates a positive impact of millions of euros in the Spanish economy, favouring job creation and strengthening consumption.

26. Twelve specific cases of actions in different sectors of the Spanish economy were analysed in detail, with the aim of assessing the economic impact that the CNMC's recommendations would have had if they had been accepted by the public authorities. The economic consequences were analysed based on numerous variables, such as prices, waiting times for consumers, savings in public spending, business volumes or jobs, among others⁸.

27. Two of the twelve cases concern professional services: one related to professional reserves affecting technical building inspections and other to driving schools.

⁵ IPN/CNMC/055/22 report on the draft royal decree amending royal decree 390/2021, of 1 June, which approves the basic procedure for the certification of the energy performance of buildings. The regulatory impact assessment report of the draft decree of 2022 expressly refers to the recommendations of the CNMC on the need to limit access to the activity to the possession of the knowledge and skills, rather than linking it only to university degrees.

⁶ The CNMC has been particularly pro active assessing draft statutory provisions. More than 10 reports have been done in last 5 years.

⁷ The project Impact of Competition Advocacy and Market Unity Reforms in Spain was financed by the European Commission through the Technical Support Instrument. It was developed by two external consultants (KPMG and VVA), selected by the EC, under direction of the CNMC. The project received last year an award by the review Concurrences in the category "Best Soft Law" and we plan to continue performing estimations of individual assessments and refining the methodology.

⁸ The study concluded that, for the 12 specific cases of detailed analysis, if the CNMC's recommendations had been followed, a positive impact of between 2 and 2.3 billion euros would have been generated. In addition, 490 jobs could have been created, 54 new operators could have entered the markets, and 67 new service stations could have been opened. The study also estimates 1,575 new VTC licences and 69,400 additional bids in public procurement processes.

28. The first one refers to **professional reserves** in favour of architects and technical architects to carry out the technical building inspections. It comes from a CNMC's report on the Catalonian decree on technical inspection of buildings, in which the CNMC concluded that this professional reserve is a barrier to entry that restricts effective competition by protecting architects from other professionals who are equally qualified to carry out this activity⁹. This was subsequently confirmed by the courts.

29. Since the technical inspection of buildings are mandatory, this barrier to entry would affect all consumers who contracted it between 2015 (when it came into force) and 2018 (when the professional reserve was eliminated after the National High Court judgement).

30. The welfare loss associated to the potential increase in price derived from the introduction of entry barriers was estimated at between €4.06 million and €4.82 million, depending on whether the restriction is assumed to be eliminated in 2018 or in 2020¹⁰.

31. The second case refers to **driving schools**. In 2019 a CNMC's report concluded that some of the measures initially included in the draft royal decree would constitute a barrier to entry in favour of driving schools that restricts effective competition, by protecting them through the establishment of compulsory on-site training against other online alternatives¹¹.

32. Since the measures proposed in the draft regulation were not finally applied thanks to the CNMC's recommendations, reducing the barriers to entry, all the new drivers who contracted driving classes from 2020 (since the report was published at the end of 2019) would have benefit from the CNMC actions. The consumer benefit associated to the potential decrease in price derived from the elimination of entry barriers were estimated at between €6.56 million and €7.98 million, depending on whether the new drivers in 2020 had to take 8 or 12 additional theoretical classes.

4. Competition advocacy

Have you advocated for pro-competitive reform of professional services? Please select those advocacy activities that you consider more relevant and set out the analytical framework you used to assess the regulations and whether they were justified.

33. The CNMC's advocacy toolbox includes a number of *ex ante* and *ex post* instruments that have been consistently used in the fields of competition advocacy, efficient economic regulation and market structural reforms. The toolbox includes consultative, non-enforcement instruments (such as market studies, economic reports and public reports on draft or in force regulation, and administrative acts) and quasi-enforcement mechanisms (such as active legal capacity to challenge regulations and administrative acts before Spanish Courts).

34. The toolbox instruments can be used jointly, in an integrated approach, or in isolation. In general terms, after identifying a competition concern, the most appropriate and potentially effective advocacy tool is selected for use. If the initial advocacy action

⁹ UM/033/2015

¹⁰ Despite this regional regulation was removed and has not been modified since then, the Spanish Supreme Court has recently decided that a reserve in favour of architects and engineers on that point could be justified due to security reasons.

¹¹ IPN/CNMC/032/19 report on the draft Royal Decree amending the general regulations for drivers.

does not yield a positive result, or if the outcome is less positive than anticipated, other advocacy tools are employed to reinforce the effort.

35. In certain situations, a combination of instruments is used from the outset, as a single advocacy tool may not be sufficient to fully address the identified competition concern. In such cases, we employ a variety of instruments to create a comprehensive approach, thereby maximizing the impact of our advocacy actions and recommendations on the markets.

36. The CNMC has repeatedly called for an in-depth reform of the regulation of professional services from the standpoint of the promotion of competition and efficient economic regulation. The adaptation of national regulations has not been carried out for more than a decade and numerous restrictions not covered by the Services EU Directive remain in place.

37. The CNMC has been defending an approach to the professional services regulation on the following grounds:

- Starting from a general principle of free access to services and professions.
- To limit possible restrictions to such access to exceptional cases, duly justified in a rule of legal rank, in accordance with the principles of necessity, proportionality and non-discrimination.
- Reconsider in the light of these principles the reserves of activity, the existing catalogue of qualified professions and the regulation of their curricula.

38. The CNMC has conducted various studies on professional services markets:

- **Study on the professional services sector professional services and professional bodies** ([E-2008-01](#)). The report set out the competition-related problems that have been detected in this professional services field and described developments in the economy and society that affected this sector, in particular, the approval of the Services EU Directive and changes in university degrees. It includes recommendations on the basic principles and guidelines that should be followed, from the standpoint of competition, in designing the new regulatory framework for professional services.
- **Study on professional colleges after the transposition of the Services Directive** ([E-2011-04](#)). The report conducts an in-depth analysis of the regulatory reforms and the state of national and regional laws and regulations on the professional associations known as *Colegios Profesionales* (professional associations) and, after finding that only a small part of these collegial bodies had been expressly adapted to those reforms, goes on to identify the main constraints on effective competition that originate in the Colleges, illustrated by numerous real examples.
- **Study on transport of goods by rail** ([E-2010-02](#)). One of the principal barriers to entering the market highlighted by many operators was access to driving personnel¹² due to multiple reasons: a) costly and long training periods; b) regulations do not encourage mobility of drivers between companies (a rail

¹² Drivers were required to have a licence, accrediting their general expertise, and a permit, which is specific for each section of line and for each type of rolling stock. Obtaining the specific permit means that practical training has to be carried out on that line before grant of the permit. If a company wants to obtain a permit for a train driver for a line on which it does not have an accredited driver, it has to call upon another company to allow one of its accredited drivers to accompany the trainee driver.

company which engages a train driver from another company must therefore obtain a new permit for the driver); c) a traditional lack of alternative training centres to those of public enterprise RENFE-Operadora (successor to the former monopoly holder, RENFE), giving rise to problems for new entrants in accessing drivers.

39. Other report ([PRO/CNMC/003/15](#)) focused on this sector analyzed the individual licenses required for providing train professions related to security issues. Among others recommendations, it was advised to reinforce the role of an independent agency when granting licenses and to improve the professional mobility in other European countries.

Have you considered the impact of technology developments on the market and on the rationale for regulating these services in the first place? Conversely, have you seen any evidence that the existing regulation, such as the restrictions on the organisational structure of professional services businesses, limits the adoption of new technologies?

40. In general, the adoption of new technologies expands the relevant market in a given market and leads to productivity gains. Regulation can slow down the adoption of new technologies in regulated professions and thus deprive consumers of lower prices and higher quality services.

41. We have witnessed a concrete example in driving schools. Spanish regulations prohibit online theory lessons. This has prevented the emergence of driving schools offering this option, so the driving school market remains highly fragmented (students tend to go to a driving school near their place of residence). However, if online classes were allowed, driving schools would be able to compete on price with each other, especially in rural and less densely populated areas, and students would benefit from a wider choice.

Have you conducted any market studies on professional services markets or on any other sectors where the professions are important, such as construction services?

42. A recent report on civil engineering ([IPN/CNMC/017/23](#)) was focused on a draft regulation for dam building. The report confirms that the new regulation, in relation with some special activities reserved for civil engineering does not evaluate correctly the competences needed for providing these services.